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The Others in Europe

EDITED BY SASKIA BONJOUR, ANDREA REA
AND DIRK JACOBS



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Legal and social categorization in context

Edited by
Saskia Bonjour, Andrea Rea, Dirk Jacobs

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EDITIONS@ulb.be
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Introduction

Andrea REA, Saskia BONJOUR and Dirk JACOBS¹

Judging by the results of the Eurobarometer surveys, identification with the European Union remains weak for large parts of the population of the EU member states. Perhaps this should not surprise us, as European citizenship has up till now *a priori* been regarded to be a complement and not a substitute to national citizenship (Martiniello, 1995). Jacobs and Maier (1998) have argued that processes of Europeanization have nevertheless led to the creation of new identity boundaries. The old distinction between nationals and foreigners seems to have transformed itself into a triangular logic distinguishing nationals, EU citizens and third country residents. In the process, the *Other* has increasingly become the “non-European Other” – even if it is still unsettled who the European *We* might exactly be.

This book aims to provide a trans-disciplinary analysis of the construction of migration-related “Otherness” in Europe. It is the result of a midterm conference of the research project entitled *Outsiders in Europe. The Foreigner and the “Other” in the Process of Changing Rules and Identities*, conducted by the center for transdisciplinary research Migration, Asylum and Multiculturalism (MAM) of the *Université Libre de Bruxelles*. We do not pretend to be able to integrate different disciplines (law, sociology, political sciences, social psychology and anthropology) into one unified frame of analysis. Instead, MAM strives to enhance disciplinary dialogue whereby the differences between the disciplinary approaches are not dissolved but exploited so as to be able to do justice to the complexity of social reality. This trans-disciplinary dialogue is realised on both the theoretical and empirical levels to acknowledge the

¹ With the collaboration of Alejandra ALARCON HENRIQUEZ, Assaad AZZI, Emmanuelle BRIBOSIA, Philippe DEBRUYCKER, Nicole GRÉGOIRE, Chloé HUBLET, Yves PASCOUAU, Pierre PETIT, and Isabelle RORIVE.



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diversity of interpretations of social reality. Within the framework of MAM we did this quite literally through monthly meetings in which academics of different disciplinary backgrounds openly discussed theories and methods of their respective disciplines, without fearing to go back to the basics or “ask silly questions”. This has proven to be a productive and enriching enterprise. This book contains contributions by ULB team members – partly reflecting the results of our transdisciplinary meetings – and contributions by non-ULB international scholars, who participated to our midterm conference. They all relate to the issues we have discussed within the framework of the MAM-project “Outsiders in Europe”, and which we will further outline in this introduction. The first six chapters of the book will provide a legal, political and sociological approach of the issue of the Others in Europe. The five remaining chapters offer the perspective of social psychology and anthropology.

Changing migration flows and European identity

Starting as early as the 1960s, the ways in which European immigration policies are implemented – (post) colonial and/or temporary labour migration mostly organized through bilateral agreements, etc. – have converged with relatively little intergovernmental dialogue. Deepening European integration has led to the creation of an institutional framework for a Europeanization of immigration and asylum policy. If regulation of foreigners’ entry, freedom of movement and right to stay in EU territory is the focal point of legal and political debates in European and national institutions, issues regarding the integration of foreigners and especially access to citizenship have traditionally remained within the realm of national sovereignty. Nevertheless, convergences between national policies appear in this area as well, notably in the generalisation of *jus soli* in the 1980s and 1990s. The issue of immigration and integration in Europe is characterised by a paradoxical process: policies in Europe are converging, without losing their national specificities.

The emergence of a European Union immigration and asylum policy since the 1990s has been influenced by at least two new processes. The first one is the development of new migrations with specific characteristics. The processes of globalisation and growing urbanisation that characterise the 21st century are bringing about a new age of migrations (Castles and Miller, 2003). Mobility and freedom of movement are values that are pursued and are essential for social advancement. This contributes to increasingly complex migratory models. Indeed, the simple duality of labour immigration and settlement immigration is no longer operational. The entry of tourists or students feeds these new migration processes as much as labour immigration, asylum or family reunification. In addition, freedom of movement within Europe strengthens movements of migration. In Europe today, national origins and statuses of new migrants are very different from what they once were. Since the fall of the Berlin Wall and the enlargement of the European Union, many immigrants have come from Central and Eastern Europe. The era of dominance of the illiterate male immigrant from a rural area is long gone: the new migrants are more often women, city-dwellers and highly educated.

The second process is the transformation of identities in Europe. The Europeanization underlying the creation of a European citizenship (Martiniello, 1994)

is also at the basis of the reframing of existing identities and the production of new ones. These processes contribute to the creation of new “imagined communities” (Anderson, 1983), as well as an “imagined European community”, pulling together opposite identities and pushing apart closely related identities. This affects nationals as well as foreigners. As a supranational identity is being created at the European level, European states are faced with re-emerging national and regional identities which may occasionally be very strong. In addition, legal tools, institutional practices, social interactions and representations all contribute to the metamorphosis of the image of the foreigner in Europe. Immigration policies used to be largely based on economic considerations, in particular on the demands of the labour market. Today, however, social tensions and political passions produced by immigration are mostly linked to issues of belonging and identity. The representation of the foreigner is no longer solely defined by his or her place on the labour market or in the social hierarchy. European society is increasingly questioning its “cultural and ethnic identity” as a result of its enlargement and immigration flows.

The different processes of European enlargement have brought peoples and identities closer to each other, endlessly renewing European identity. The accompanying rhetoric often insists on the proximity and shared destiny of the old and new Member States and populations of the European Union (cf. the debates over references to Christianity in the European Constitution or over the accession of Turkey). This alleged proximity is however more of a performative speech act than a lived reality. Several Eurobarometer surveys and the European Social Survey indicate that the fear of the Other is fairly strong in Europe. This has been confirmed over the years by the emergence and durable presence of extreme right wing and populist parties that use racism as their favourite electoral argument. This fear of the Other targets not only new immigrants, but also descendants of old migrations, who still see the legitimacy of their presence in European societies called into question. They are often victims of what has been called a European racism (Balibar, 1992; Rea, 1998) or of the racialization of European society (Fassin, 2010). Old migrations, especially those assimilated to colonial migrations not only by former colonial powers but by the whole European continent, and the descendants of immigrants who claim a specific identity linked to Islam are now “re-colonized” (Balibar, 2001) not only within the national boundaries (Rex, 1973) but also within European boundaries.

As a consequence, boundaries between internal identities within States are being redefined. Some non-nationals that have become nationals may remain confined to the status of outsider while other non-nationals, i.e. EU citizens, may be considered culturally similar. Legal and social categorizations are reshaping the image of the foreigner in Europe: this image becomes that of the Other, “the non-European Other”, whose legal and symbolic definition varies and wavers with different social situations. Thus, the European construction goes hand in hand with processes of identity redefinition: them/us, national/non-national, European/third country national, the majority recognised as *homo nationalis*/the minority denied recognition as *homo nationalis*, local/global. We will focus specifically on the European/non-European distinction, which defines majority/minority positions constructed by legal and institutional devices, media messages and discourse, social dynamics, mobilizations

and other processes of representation, which differentiate groups and individuals. Within the European construction, two generic origins seem to crystallize cultural diversity and feed fears in Europe (cultural conflicts, clash of civilizations, terrorism, etc.): “Sub-Saharan Africans” or “Blacks” on the one hand and “Muslims” on the other, two specific figures of Otherness in Europe, of Outsiders in Europe.

The Europeanization of immigration and the *re-categorization* of the Other

Since the Amsterdam Treaty which was signed on the 2nd of October 1997 and came into effect in 1999, immigration and asylum policy has in principle become a European matter. The communitarization of this field corresponds with the end of the intergovernmental method and the transfer of competences over asylum and immigration to the supranational institutions, as well as the selection of a certain number of areas for which a common policy is put forward. The study of different measures in asylum (Dias Urbano de Sousa and De Bruycker, 2004; Guild, 2004) and immigration (De Bruycker, 2003; Guild, 2009) fields tends to show the emergence of a relative convergence of national policies in Europe. This trend towards convergence was brought to light long before the communitarization of public action in this field (Geddes & Favell, 1999 ; Guiraudon, 2000 ; Geddes, 2003). However, States remain primary actors in the definition of immigration policy. For example, each country continues to consider economic migration as a matter of national sovereignty, while regretting the lack of coherence between public policies (quotas in Italy and Spain, green card in Germany, points-based policy in the United Kingdom, etc.).

If the *modus operandi* of immigration policies reveals a limited level of European integration, this is not the case for the legal categories, particularly those of non-national and of European citizens. The European construction has led to a re-categorization of the legal definitions of national legislations, in particular those pertaining to issues of entry and stay of non-nationals. By introducing a principle banning nationality-based discrimination as early as 1957, the European construction has had an impact on traditional legal categories (Bribosia *et al.*, 1999). In fact, the classic distinction between nationals and foreigners has become more complex. Today, there are at least three different categories: the national, the EU Member State national and the third country national. This new categorisation did not erase all distinctions between nationals and nationals of other Member States, also called EU citizens. However, it helped to accentuate the common aspects and bring EU citizens closer to nationals while pushing non-European foreigners out. If some of the new rights obtained by third-country nationals within the European framework stem from the new rights that have been awarded to EU citizens, notably the creation of a European zone of free movement, clear-cut differences in treatment remain between EU and non-EU citizens. The debates concerning these differences have been analysed as the expression of either the passage from national to societal security issues (Waever, 1993), or from a control of territories to a control of populations (Bigo, 1996 ; Huysmans, 2006). This differentiation illustrates the way in which non-European foreigners are considered a threat, entailing the need for Nation-States and national institutions to acquire the means necessary to reduce the perceived risks.

In the first chapter of this book, Kees Groenendijk presents a vigorous analysis of labelling by national and EU law of statutory categories of immigrants. Using a historical approach beginning with the first European Treaty (1957) through to the Stockholm Programme (2009), he demonstrates how new EU migration law creates new categories and new distinctions amongst people. However, he argues that the labelling process of the EU law is not so different from Member States's national law. He points out that the main difference between EU and national law is that the potential for divergence in moving from the legislative process to the application of those laws is greater with EU law. With Union citizenship, EU law creates an opposition between "We", Unions citizens versus "Them", third country nationals. However this categorization does not automatically produce stigmatization. Stigmatization follows from the rules that allow for the selective use of new technology (EU immigration databases) for third country nationals in irregular situation.

The most visible sign of the Europeanization of immigration and integration policies lies clearly in the production of European legal norms, the Long Term Resident and Family Reunification Directives in particular. Political scientists have largely focused on analysis of the institutional framework (Radaelli, 2003) with supranational institutions and multi-level governance as their objects of study; legal scholars have also considered the legal tools produced at the European level and their translation at the national level. There is a recurrent question throughout this type of research: does Europeanization lead to a widening or a reduction of the rights of foreigners? The hypothesis of the alignment towards the lowest standards is most often suggested. According to a widely shared opinion, the legislative suggestions of the Commission were practically emptied of all substance by the Council of Ministers as a result of its obligation to reach unanimous decisions by representatives of all Member States. In this way, the academic image of the legislative process tends to align itself with the long-standing criticism of NGOs defending foreigners' interests who claim that harmonization is bringing about a generalization of the lowest standards among the Member States and is thus unfavourable to the interests of foreigners. If this hypothesis is corroborated, then it would be time to question whether the European framework introduces more obstacles to foreigners obtaining rights than the national framework does. If this proves to be the case, it would seem that Europeanization tends to reinforce the threatening figure of the foreigner.

Many elements encourage a more moderate vision. Relations between European law and national law on immigration matters are much more complex than the hypothesis of a harmonization towards the lowest standards suggests. There are few points on which there has been harmonization and Member States have created numerous ways out of the obligations set by European law (including the introduction of non-constraining measures in directives that are by definition legally binding). Moreover, the fact that the Council, in each Directive, gives the Member States the right to maintain or introduce more favourable national provisions tends precisely to avoid a general harmonization towards the lower minimum standards agreed upon unanimously by Member States.

The story is more complicated when migrant integration policy is concerned. We cannot talk about a genuine European policy making effort aimed at harmonization.

Although the Lisbon Treaty for the first time provides an explicit legal basis to the European Union for activities in the domain of migrant integration, it also explicitly mentions the EU cannot try to harmonise legislations: “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States” (Article 79 (4) TFEU). This, however, does not mean there are not converging trends to be observed in the European Union.

Integration and risk management

Whereas national immigration policies since the 1960s have mostly been blind to the cultural specificities of immigrants, it seems that this will no longer be the case in future. Even though European States refuse to consider themselves immigration countries like the United States or Canada, Europe seeks to implement immigration policies that incorporate demands for cultural conformity. Europe as a political community, intends to use its control over immigration in an utilitarian perspective, in response to needs in population and competencies (Bribosia & Rea, 2002), but also in an identity perspective. When European countries called upon Moroccan, Algerian, Turkish and Pakistani workers they did not worry about the cultural or religious identity of these populations. They were first and foremost a workforce. Today however, cultural and ethnic identity is becoming a preoccupation of policy makers, even if this preoccupation is not directly translating into material political measures. This is proven by the emergence of a European integration policy (Groenendijk, 2004). With the help of the Commission, Member States have thus set up a network of National Contact Points on immigration matters. On November 19th, 2004, the Council of Ministers of Justice and Internal Affairs adopted the Common Basic Principles on integration. The use of such instruments is not set within a legally-binding framework. However, it does participate in the Europeanization process and affects Member States’ policies.

Political and media discourses rely on a rhetoric of peril (Hirshman, 1991), thus broadening classic discursive registers. Immigrants have often been represented as a danger to the stability of welfare systems, on the one hand, and to public peace, on the other. They are suspected of either working in conditions that threaten competition or of unlawfully taking advantage of the benefits of the Welfare State. Moreover, the inextricable link between immigration and delinquency leads to a systematic questioning of immigrants’ irreproachability. Since the 1990s, these two discursive registers have been complemented by the rhetoric of threat to the specificity of the European identity and to the external security. The growth of majority or minority multiple identities feeds the theory of the “clash of civilizations”. Certain cultural or religious specificities, particularly those linked to Islam, are seen to endanger European identity. Numerous disagreements appear in Europe on subjects linked to the management of cultural diversity (the Islamic veil, gendered space-division, dietary laws, religious holidays, etc.). These conflicts or litigations are regulated either socially (negotiation, mediation, etc.) or through the judiciary (court cases).

These new discursive registers lead to the implementation of precautionary risk-management measures aimed at new migrations (Rea, 2009). The perceived risks linked to certain cultural characteristics are becoming an important factor in the choice of new recruitment areas for new migrants. While still fulfilling their duty of protecting refugees as well as foreigners already settled on their territory, Member States increasingly intend to control the cultural identities of new migrants. They are thus adopting the principle that the right to emigration finds its limits in the right for a political community to preserve its specific way of life. The introduction of integration criteria, prior to new migrants entering the territory, in certain Member States indicates that European countries are seeking to control the entrance of immigrants onto European soil on a basis of cultural belonging. The principle of precaution is aimed at ethnic minorities whose practices and cultural and religious claims seem to endanger the compromises negotiated historically to institutionalise Church-State relations in European countries.

After a period of acceptance of diversity in certain European countries such as the Netherlands and Sweden, multiculturalism is now being questioned (Joppke and Morawska, 2003; Jacobs, 2004) everywhere in Europe. New policies are being introduced that focus instead on cultural conformity. There is a tendency to introduce more active integration policies in European countries. They are articulated along two axes: knowledge of the national language and knowledge of the host society and its political system. Contrary to the hypothesis of Joppke (2007) that the proliferation of such integration policies signals the end of “national models” of integration in Europe, it may be argued that the implementation of integration policy is still determined by national models, even if some components of this policy are shared by different countries (Jacobs and Rea, 2007). After all, the aims of these integration policies vary significantly in different European countries: reducing cultural diversity, conditioning access to social or civil rights and learning about the social, institutional and cultural context in which the new migrants are living.

In Chapter II of this book, Yves Pascouau highlights the importance accorded to integration issues in the European Union and the Member States with special attention to mandatory integration provisions. He demonstrates that the issue enjoys political support at the highest level, is implemented in Member States, and is accompanied by operational instruments. Yves Pascouau argues that these integration measures or conditions adopted in the EU seem to act as tools of migration policy. Focusing on Dutch and French implementation of integration policy and more particularly family reunification, Yves Pascouau demonstrates that integration rules function as a criterion to limit migration flows. More precisely, integration requirements are established in order to deter family members from exercising their right to family reunification. Therefore, the extension of pre-departure measures in the framework of external relations is relevant in this regard. In Chapter III of this book, Saskia Bonjour also analyses integration policies. Both France and the Netherlands have recently introduced policies which require migrants to learn about the language and customs of the host country before being granted entry. Dutch civic integration abroad policy however is much more restrictive than the French. Bonjour compares parliamentary decision-making regarding civic integration abroad policies in order

to evaluate whether “national models” are capable of explaining this difference. She argues that while Dutch and French politicians define the “problem” at hand in highly similar ways, their policy responses are shaped by country-specific discursive and institutional structures.

The Europeanization of anti-discrimination policies

In certain areas the action of the European Union has clearly contributed to the extension of the rights of non-national residents. By deepening and complementing the actions of several international organisations such as the United Nations and the Council of Europe working towards the protection of human rights, the European Union has led Member States to develop their legislative protection of the principle of equal treatment and to reinforce their national anti-discrimination policy (Guiraudon, 2006). Anti-discrimination tools are usually constructed through a multi-stage process (Simon, 2004). This process starts when the issue of discrimination is put on the political agenda, sometimes as a result of a mobilization campaign. Then, the usual first type of reaction consists of admitting that the most blatant cases of discrimination (“direct” discriminations) should be brought to justice. The limitations of such a reaction and the lack of substantial improvement to the situation of the discriminated groups lead to recognition that the systematic nature of these discriminations must be taken into account. As a consequence, “indirect” discriminations, that may be unintentional, can be tackled. The fight against discriminations strives to remedy inequalities inscribed in general rules, for instance through the implementation of “reasonable accommodations” that would benefit particular groups.

It is crucial to understand the impact of the European Union on anti-discrimination policies in this context. On the one hand, the elaboration of these European policies proceeds partially through a bottom-up mechanism where national laws and practices inspire and feed into a common norm. On the other hand and conversely, Europeanization also implies the impact of the common norm on the legal orders of the Member States. This latter dimension is present, in particular, in the banning of discriminations based on nationality – indeed in this case the European normative level was the driving force. However, as far as ethnic and religious discriminations are concerned, the European level is grafted onto existing national laws and practices, taking inspiration from as well as completing them. Without creating new categories, the European Union contributes to the reshaping of identities and to the creation of new ones. The fundamental principle of fighting against nationality-based discrimination that has been at the heart of European integration since its beginnings, is now completed by tools used to fight against discriminations based on race and ethnic origin on the one hand, and on religion and beliefs on the other. Today however, this latter policy remains underdeveloped at the European level. The Amsterdam Treaty introduced the legal basis allowing for the adoption – through a unanimous decision of the Council – of European policies against discriminations based on gender, sexual orientation, handicap as well as race, ethnic origin, religion and beliefs. Despite the fact that unanimity was required, the political context (i.e. the increasing electoral power of extreme right-wing parties in Europe) facilitated the rapid adoption of two European directives on this matter: Directive 2000/43/EC implementing the principle

of equal treatment between persons irrespective of racial or ethnic origin (the Race Equality Directive) and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive) (Bell, 2002).

In Chapter IV, Chloé Hublet analyses the application of the principle of non-discrimination on the grounds of nationality to third country nationals in European Union law. Recognising that Article 18 TFEU, prohibiting discrimination on the grounds of nationality, cannot apply to them, as the ECJ confirmed this classic interpretation in its recent *Vatsouras* case, she examines additional means of protection which could be available in EU law. Her conclusion is that a gap exists in the protection of third country nationals against discrimination on the grounds of nationality, a gap which hinders their integration in Europe.

These legal tools also enable us to measure the transformations of the figure of the foreigner. After living in Europe for over forty years, some immigrants, most of whom have become nationals, as well as their descendants, are, in some degree, maintained in an immigrant status which is the cornerstone of their racial and ethnic discrimination. These figures of foreigners whose legitimate presence is still disputed are always suspected of refusing to integrate. Rising racism and increasing racial and/or religious discrimination, also in institutional categories such as “non-western”, confirm the construction of an ethnic European society. This is a mosaic of national identities as well as a budding supranational identity strewn with minority ethnic identities resulting from successive migrations. The figure of the foreigner is growing larger, encompassing even those persons of migration background who are citizens of European countries. One of the consequences is that they increasingly become targets for monitoring and profiling, which, however, are becoming increasingly sophisticated.

On this topic, in Chapter V, Didier Bigo, Julien Jeandesboz, Francesco Ragazzi and Philippe Bonditti offer an important contribution to the debate. They question how the border and the politics of bordering produce the categorisation of Otherness. In this perspective Otherness is the result of techniques for governing populations. Techniques for controlling mobility constitute a way to construct categories of people defined as “undesirable” or “potentially dangerous”, people who should be blocked at the border, while others, defined as “desirable persons”, should see their travel expedited through technology. This approach insists on the fluidity of border. Rather than stopping or blocking, emphasis is on filtering or sorting people and more efficiently banning the undesirable. These practices have been coined in recent years as “smart border technology” and result from the Schengen experiment. The virtualisation of borders contributes to the securitisation of borders, which is a way to govern populations on the move, to trace them and to sort them out “smoothly”, without hurting them. The visibility of coercion at the borders is then often limited and violence is relocated to the bureaucratic procedures of categorising, profiling and tracing people through the selection of computerized data. One might actually wonder to what extent the increasing invisibility and technical sophistication of border control is not only linked to the imperative of free movement of people within

the European Union but is also to be understood in the light of a stronger emphasis on anti-discrimination policy making on the European level.

The introduction of anti-discrimination instruments at the European level is, indeed, not without challenges. One can observe a shift from a logic centred on the nationality criterion to an increased focus on the ethnic criterion, and in a lesser degree to religion. However, the law is less at ease with ethnic or religious categories than with the traditional category of nationality, which is more easily objectively identified. Furthermore, the Race Equality Directive prohibits not only direct and intentional discriminations, but also indirect ones. As a consequence, one can notice a shift from the individual to the group that involves a connection to categories based on ethnicity. The recourse to statistics as a major way to prove indirect discriminations strengthens the need of an ethnical classification in Member States (De Schutter and Ringelheim, 2010). The notion of ethnic category is, however, far from being defined in the same way in various European countries. In addition, categorization based on religion is tricky. Several tools used to fight against discriminations are not easily deployed in the field of religious discriminations, where the separation between Church and State as well as the principle of neutrality of the State are at stake. For instance, some States are reluctant to address the requests of “reasonable accommodation” put forward by some religious groups or individuals (e.g. allocation of a praying area at work, availability of special diets in canteens, etc.) (Woehrling, 1998). Finally, to a certain extent, the impact of these policies could be paradoxical: by protecting individuals identified on an ethnic or religious ground one could contribute to strengthen the categories built on such criteria and increase the process of racialization of society.

In Chapter VI, Emmanuelle Bribosia, Andrea Rea, Julie Ringelheim and Isabelle Rorive consider the relevance of the concept of reasonable accommodation as a device for handling religious plurality in European labour relations. They offer a trans-disciplinary approach of the reasonable accommodation issue, integrating a legal and a sociological analysis. Considering EU law, the ECHR and national laws and policies regarding accommodation of minority religious practices (Belgium), the authors assess that a legal duty to provide accommodation for religious reasons could be derived from antidiscrimination and/or religious freedom norms. After a presentation of the main findings of a study on what sorts of adjustments are *de facto* asked for in the employment sector and how employers cope with such demands, the authors highlight that despite the absence of any clear right to reasonable accommodation, informal practices of negotiated accommodation can be observed in various employment settings. The legalisation of accommodation practices could contribute to the equality of individuals in the treatment of their demands but at the same time it could also cause some inconveniences (employers might avoid hiring Muslim employees, fearing that they might invoke the right to reasonable accommodation).

Denials of recognition and identity mobilization

As mentioned earlier, even though many immigrants and their descendants have become nationals, they are not necessarily perceived as fellow citizens or as European citizens. Some of them remain stigmatized as outsiders, especially Muslims and Black Europeans. Despite their social, economic and political integration, some nationals

are assigned an identity of otherness that may not be of their own choosing. Victims of racial and ethnic discrimination, they continue to suffer from a lack of recognition. In addition to being excluded from national “imagined communities”, immigrant groups are excluded from the emerging European identity, which is increasingly homogenised by political discourses and media imagery. As a consequence, their identity becomes marginalized and stigmatised in both the national and the European contexts.

The theory of the struggle for recognition (Honneth, 1996) and its application to the issues of racism and xenophobia (Sanchez-Mazas, 2004) suggest an analysis of these phenomena in terms of the denial of recognition, which can take various forms such as a denial of rights (citizenship rights, social rights, freedom of movement, etc.), a denial of social esteem such as negative opinions of the culture and/or religion of the Other, or a denial of “voice” which delegitimizes the demands and aspirations of these groups, especially in a public sphere perceived as secular and in need of protection against the influence of religion. Different forms of denial of recognition are likely to occur simultaneously when public discourse conflates two very different types of concerns under the single label of “immigration issues”: on the one hand matters linked to immigration *per se*, such as the number of entries (legal and/or illegal) into a territory, and on the other hand those due to the (often permanent presence) on this territory of immigrant populations or ethnic minorities. The constitution of a European identity and the shifting of the ethnic boundaries of the figure of the Outsider are certainly at the source of the persistence or even reinforcement of the denial of recognition in the social sphere, i.e. the denial of social esteem: access to national citizenship does not give immigrants access to the recognition granted to native European citizens.

However, the assertion of their identity by minorities cannot be understood as a mechanical consequence of the discourses and practices of majority groups: ethnic groups are always stake-holders in the construction of their identity. Belonging to a group comes about through an imputation and a subscription process: it is only to the extent that a person identifies him/herself or is identified by others that ethnicity is manifested by distinctive features (Barth, 1968). Seen from this angle, ethnic identity is a resource that can be used by groups to create and recreate their boundaries. To do so, these groups mobilize the most diverse symbolic marks from the most blatant to the most subtle, sometimes including the emblem of their own racial or ethnic stigmatisation which they then use as the banner of their identity (Eriksen, 1993). The production of “us/them” relations by the surrounding society is mirrored by a symmetric construction, which inverts the order of inferiority. Such a process supposes that the actors consciously perceive this categorization and the attributes that bring it to life. However, this sensitivity is strongest amidst opinion leaders and social entrepreneurs. Their role is absolutely crucial when identities are studied under the angle of mobilization.

In Chapter VII, Didier Fassin explores the development of racialized social boundaries in France over the previous decades. Racialization, he argues, has to be understood as a process as well as a problematization, a specific way of describing the world. The “racial scene” is comprised of processes of ascription and self-identification. The descriptions of intellectuals and politicians, which have a performative effect,

contribute to this construction. Fassin questions the delayed public recognition of the phenomenon by the French, which is due, in his view, to three peculiarities that have long made up a colour-blind country, where the State is idealised as treating all its citizens equally: the Republican imaginary, the assimilationist ideology of the Nation and the sole reference to class in assessing inequalities. Although his reflections are based on the French case, he argues that they can be broadened to contemporary Western Europe. The European scene is also a racialized scene comprised of citizens who are considered and consider themselves as aliens because of their phenotype, origin, culture or religion. This fact must be taken into account rather than denied or occulted.

Applying a social psychological approach, Chapters VIII and IX of this book are dedicated to the effect of categorization imposed by the majority group on ethnic minority group members. Maykel Verkuyten reviews the literature in social psychology on ethnic identification and perceived discrimination. He discusses how ethnic identification can influence discrimination perceptions, but also how perceived discrimination influences ethnic identification with the country of origin and the host society. Coping strategies of individuals facing discrimination are also explored. In Chapter IX, Alejandra Alarcon-Henriquez and Assaad Azzi explore the reactions to ethnic or religious discrimination in a qualitative study. Particular attention is paid to what inhibits or favours the use of legal actions in the struggle against discrimination. Social psychologists have investigated the motivations of disadvantaged group members in their fight against inequalities by focusing mainly on collective action. They analyze whether this literature can also be applied to legal anti-discrimination actions.

Whereas, in the past, associations linked to immigrant communities mostly focused on issues of equal social or civil rights or on the struggle against racism and xenophobia, today new associations are emerging as an answer to the processes of Europeanization or globalization. Similar to what happened in the United States where the struggle of African Americans for civil rights largely gave way to an Afro-centrism that places the debate on the cultural level (Fauvelle-Aymar *et al.*, 2000), associations are appearing in Europe with an agenda that hesitates between political and cultural demands on a national or transnational basis. The social embeddedness of ethnic minorities is increasing, as they constitute transnational networks which facilitate the movement of people and merchandise (Basch *et al.*, 1994). These emerging networks, favoured by new communication technologies can take on different forms, from the reinforcement of ties to the country of origin to the creation of a true archipelago of identities uniting communities present in several EU countries in a single *ethnoscape* (Appadurai, 1996). Transnational identities are thus born on European territory, nationally disembedding themselves and sometimes becoming diasporas such as the Turkish, Moroccan, Pakistani, Albanian, or Congolese communities in Europe.

The construction of ethnic boundaries by minority groups is now taking place within national spheres and at the European level. Whether the issues are religious specificities such as the Islamic veil or the affirmation of “black” culture amongst many youths of African or West Indian origin, the practices of “voice” are spreading to all minority groups in Europe. New forms of discursive assertiveness often come

from younger generations who refuse the denial of cultural difference and in particular its stigmatization or derogation. The identities carried by these new generations are often not in accordance with those of their parents: they are more generic than the old national references. Associations and individual actions with a collective reach, such as strategic litigation in favour of minority ethnic groups (ERRC *et al.*, 2004) are working towards the development of a multicultural citizenship in Europe, without necessarily taking on the classic form of social movements (Martiniello, 1997).

From a more anthropological perspective, Nicole Grégoire and Pierre Petit describe and analyze the recent development and redefinitions of Pan-African ideologies in the African associational milieu of Belgium in Chapter X of this book. Comparing the way Pan-Africanism is utilized to build a Belgian “African community” similar to developments in the US, the authors illustrate that the nature and scope of reactions to the majority’s construction of Otherness must be subjected to careful contextual and historical analysis. In Chapter XI of the book, Bruno Riccio focuses on the associational creativity of youth of immigrant background in an Italian context marked by a “backlash against diversity”. Drawing on case studies of seven second generation associations, he shows how they differ from first generation migrants’ associational involvement. Being more assertive, they challenge Italian common representations of otherness and discrimination by putting forward cosmopolitan identities and claiming equal citizenship and opportunities of social mobility. Their socio-political trajectory, the author argues, shows citizenship as a process that is negotiated, contested and can never be taken for granted.

We hope this introduction to the topics addressed in this book gives a flavour of the added value of analysing the construction of Otherness in Europe from multiple disciplinary perspectives. The completion of this volume would not have been possible without financial contributions from the *Ministère de la Communauté française de Belgique, Direction recherche scientifique* (who also funded the MAM-project as a *Action Recherche Concertée*) and the Faculty of Social and Political Sciences (ULB). For their intellectual input, we wish to thank the participants of the International Symposium organised by the MAM, which took place in Brussels on the 6th March 2009. This Symposium could not have taken place without the energy and commitment of Irina Bussoli. Special thanks go to Marco Martiniello who provided the conclusions to this International Symposium as well as to Virginie Guiraudon for her extensive contribution on this occasion. We also thank Kerri Poore for her priceless efforts in proofreading the manuscript, and Daniel Zamora for his valuable work on the layout.

CHAPTER I

Categorizing human beings in EU migration law

Kees GROENENDIJK

Immigrants, labels and laws

The law always labels and categorizes people. It distinguishes between persons entitled to benefits, rights, protection or land and those who are not or not yet; and between those who have obligations and those who are exempted. This labelling is especially effective when the statutory categories coincide with longstanding social categories. Statutory categories may have dangerous effects if they coincide with ethnic or religious demarcations. New laws may create new distinctions. New distinctions, often accompanied by new terminology, may function as a justification for a new policy.

This process occurs in state law but also in informal law, e.g. in social norms setting the rules for correct behaviour at a workplace, a university institute or a seminar. The main difference is that categorization by state law is supported by force. The power of the state can be applied to enforce the distinctions, if necessary. Moreover, distinctions sanctioned by state law or regularly applied by state officials produce the appearance of objectivity and correctness.

Dutch and German terminology for immigrants

In the early 1990s, the Dutch Central Statistical Office (CBS) introduced a distinction between *autochtone* and *allochtone* residents of the country to its population statistics on immigrants. *Allochtone* became the new designation for persons born abroad and persons with one parent born abroad. The common, neutral term used by demographers (“persons born abroad”¹), indicating persons who had

¹ Interestingly, the size of the population born abroad is quite similar in several developed countries. For France, Sweden, the UK and the US, it varies between 8% and 12% of the total

moved across an international border after their birth, was replaced by the term *allochtone*, an ethnically determined term. It includes not only those born abroad, irrespective of their nationality or ethnic origin, but also the descendents of migrants. Half of the persons concerned were included in this category only on the basis of their descent (Geschiere, 2009, chapter 5). A side effect of the new terminology was that the number of persons designated was two times the number of immigrants previously counted. Suddenly, one fifth of the Dutch population had become *allochtones*.

Since this new category included a large number of persons who were not considered to be problematical by politicians – the Queen and the members of the royal family were all *allochtone* under the new definition – the category of *allochtone* was divided in two, on the basis of political criteria: Western and non-Western *allochtone*. Persons born in or having a parent born in Europe (but not Turkey), Indonesia, Japan, Australia, New-Zealand or North America were defined as “Western”. Persons born in or having a parent born in Turkey, South-America, Africa or Asia were defined as “non-Western”. Turkey is included in this category, even though it is a member of the Council of Europe and NATO, because Turkish immigrants are considered a problem category in the political debate. Persons born in or having a parent born in Indonesia or Japan are defined as “Western” because they are no longer seen as a problem category. In political discourse the word *allochtone* is often used to indicate *non-Western allochtone* which is considered to be the problem category. The category *non-Western allochtone* covers virtually all migrants from Muslim countries and their descendents. Social scientists and lawmakers were quick to adopt these ethnically and politically defined categories. In the 1990s the new labels were used in legislation intended to support the integration of immigrants into the educational system and the labour market and to designate the beneficiaries of positive action programs. After 11 September 2001 and the murder of Pim Fortuyn in 2002, those programs were gradually dismantled and the related legislation abolished. Instead the term *allochtone* that had become accepted in daily and bureaucratic communication in the Netherlands was now used in the opposite direction, i.e. in proposals for new legislation abolishing rights for particular categories of immigrants or imposing obligations on certain categories of immigrants on the basis of being born abroad or having a parent born outside the Netherlands (Groenendijk, 2007). As a result of EU free movement rules, EU nationals were exempted from these new laws and proposals. This only enhanced the message that these measures targeted non-European immigrants. The distinction between Western and non-Western has been a core element of the “integration” policy of four successive Dutch governments since 2002.

In 2005 the German Federal Statistical Agency introduced similar terminology. Germany’s population was divided into persons with or without a migration background (*Migrationshintergrund*). Children of migrants are included in the former category².

population. In the Netherlands it was 10% in 2009 (in the official terminology “first generation *allochtone*”).

² The official definition is: “*alle nach 1949 auf das heutige Gebiet der Bundesrepublik Deutschland Zugewanderten, sowie alle in Deutschland geborenen Ausländer und alle in Deutschland als Deutsche Geborenen mit zumindest einem nach 1949 zugewanderten oder als Ausländer in Deutschland geborenen Elternteil*”.

This new terminology sounds similar but is more neutral than the Dutch-Greek terms *autochtone* and *allochtone*. The German term focuses on migration whilst the focus of Dutch terminology is on foreign or indigenous origin. There are two other important differences with the official terminology in the Netherlands. The German government does not legitimize a distinction between Western and non-Western residents. Moreover, official statistics on persons with and without a migration background are published together with data on the nationality of both groups. This made it clear from the very beginning that the majority of persons with a migration background are German nationals and a considerable portion of those without a migration background are non-nationals³. The authorities made it clear that nationality, migration background and ethnicity do not coincide. Thus far, in the Netherlands, no such data have been published. The fact that the majority of the persons officially defined as “non-Western allochtone” are in fact Dutch citizens often is not mentioned by those using the term in the political debate or in the press.

In this article I intend to deal with three questions. Which categories are used in EU migration law and have those categories influenced the labelling process in Member States and, if so, how? My supposition with respect to this categorizing or labelling process is that EU law is not so different from the national law of Member States. The main difference between national and EU law is that the potential for divergence and inconsistency in moving from the legislative process to the actual application of those laws is greater with EU law than with national law. Moreover, EU law is formulated in 21 different languages. This enhances the possibility that certain terms used in EU law may have different connotations and effects in the various Member States. Ideally, EU law is implemented through national law. Often it must compete with pre-existing national law on the same issue. Hence, it may take years before the persons entrusted with the implementation of EU law (state and local officials, lawyers, judges, immigrants and their organizations) learn about the EU law and start taking it seriously in their work. It took approximately 10-20 years for the Community rules on freedom of workers to be fully taken into account by practitioners (Groenendijk, 2007). It took more than 15 years before the detailed rules on the legal status of Turkish workers and their family members based on the EEC-Turkey Association were taken seriously in the main EU Member States concerned⁴.

Which categories are used in EU migration law?

The answer depends on which rules you look at. The EU’s Charter of Fundamental Rights, which became binding EU Treaty law upon the entry into force of the

³ In January 2008, according to the Federal Statistical Office, 15.6 million residents (19% of the total population of Germany) had a migration background. The majority, 8.3 million, were German nationals, see *Migration und Bevölkerung*, February 2010, p. 2 and www.destatis.de. The share of the population with a migration background in Germany was almost the same as the share of those designated as allochtone in the Netherlands: 19.5% in 2008.

⁴ The first official instructions by EU Member States taking the EEC-Turkey Association Council Decisions 2/76 and 1/80 seriously were issued by the competent ministries in the Netherlands in 1994 and in Germany in 1998.

Lisbon Treaty on 1 December 2009⁵, stipulates rights for “everyone” in most of its provisions. Some articles of the Charter grant rights to more restricted categories, such as workers, children or residents⁶. In the Charter a few rights are granted only to Union citizens⁷ or to lawfully resident nationals of third countries⁸. Both categories are based solely on the nationality or the residence status of the persons concerned. The category of third country nationals, used in the Charter, is a universalistic and neutral term. It refers to the nationality of an individual from a state outside the EU and not to the ethnic origin or culture of the persons concerned. The term is relatively new and does not have a normative connotation (yet). It was introduced to the Treaty on European Union (TEU) by the Treaty of Maastricht in 1992⁹. The term is used in almost all measures on migration and asylum that have been adopted under Article 62 and 63 of the Treaty establishing the European Community (ECT) inserted by the Treaty of Amsterdam. With the implementation of these new migration and asylum directives and regulations, the term “third country national” found its way into the national legislation of the Member States as well.

Categorization within the EU Visa Regulation¹⁰ differs considerably from the categories in the Charter. Third country nationals are divided in two categories on the basis of their nationality in two annexes to this Regulation. Third country nationals on the positive list do not need a visa for visits up to three months, while those on the far longer negative list require a visa even for a short visit as a tourist or for commercial or family purposes. Most of the third countries on the positive list happen to be rich countries or countries in Europe or the Americas with predominantly white populations. With a few exceptions, African and Asian countries are on the negative list. All countries with a predominantly Muslim population are on the negative list except for Malaysia and Brunei. The decision to place a country on the positive list is not based on the religion of the population but on criteria such as actual or potential security risks, illegal immigration and economic relations. The result, however, is that almost all countries with a predominantly Christian population are on the positive list and almost all Muslim countries are on the negative one. These two legal documents, the Charter and the Visa Regulation, clearly create varying categories and legitimize different behaviours of authorities towards the persons in the categories used or

⁵ Article 6 Treaty on the European Union. For the text of the (revised) Charter see OJ 2010 C 83/389.

⁶ The right to petition the European Parliament or the European Ombudsman and the right of access to documents of the institutions and bodies is granted to any natural person, irrespective of the nationality or the lawfulness of his or her residence, in Articles 42-44.

⁷ Political rights (Article 12 (2), Article 39 and Article 40), access to employment (Article 15 (2)), freedom of movement (Article 45) and diplomatic protection (Article 46) are granted to Union citizens.

⁸ Article 15 (3) (equal working conditions) and Article 45 (2) (freedom of movement and residence *may* be granted).

⁹ Article K.1 (3) TEU.

¹⁰ Regulation 539/2001 of 15 March 2001, OJ 2001 L 81/1. The two lists were amended in December 2009 to transfer Macedonia, Montenegro and Serbia from the negative to the positive list, see OJ 2009 L 336/1.

created within those instruments. Both documents send different and contradictory messages both to migrants and to the majority population of the Member States. One stresses equal treatment while the other justifies differences in treatment. Which of those contradictory messages is observed and taken more seriously by migrants and by the rest of the population?

Historical development of the terminology

The number of categories used in EC migration law (or, since 1 December 2009, EU migration law) has expanded considerably over the last fifty years. Over the last five decades and since the signing of the EEC Treaty in 1957, four periods in the development of migration law can be distinguished.

From workers to Union citizens (1957-1992)

During this period, the freedom of workers and other Member State nationals was gradually developed and applied in practice. Article 48 of the original EEC Treaty spoke about “workers of the Member States”. However, this neutral category was restricted to Member State nationals from the beginning in the secondary legislation. Nationality as opposed to worker status became the defining characteristic. From the perspective of having one common labour market, it was rather odd to exclude a segment of the workers, lawfully employed in the Member States, solely on the basis of their nationality. That restriction is less surprising if one remembers that four of the six original Member States were strongly opposed to the inclusion of the free movement of workers in the EEC Treaty. Only Italy fought for the free movement of workers in order to create an opportunity for the large numbers of its unemployed to find employment abroad. It successfully negotiated the inclusion of this fourth freedom. Italy was only supported in the negotiations by the Belgian government which expected free movement to have a downward effect on its relatively high wages (Goeding, 2005, p. 117 ff).

For 35 years EC law explicitly provided for privileged treatment of workers of other Member States. During that time, the scope of free movement was gradually extended to other nationals of Member States, such as the self-employed, service providers and tourists (Condinanzi *et al.*, 2008; Guild, 2001; Groenendijk, 2009). The effect was that EC law created three categories in each Member State: (1) nationals of the Member State, (2) nationals of other Member States, and (3) workers or other migrants from states outside the EC. Those in the third category were the real foreigners, *aliens*, *Ausländer*, *étrangers* or *vreemdelingen* in national legal terminology. This terminology was still in use in the early nineties at the European level. The 1990 Schengen Implementing Agreement still used the term “alien”. According to the definition in Article 1, an “alien” is “a person not being a national of one of the Member States of the European Communities”.

In these 35 years, there was one category that blurred the line between the second and the third category: third country family members of EU migrants¹¹. Ever since

¹¹ Other “borderline” categories are: EU nationals with dual nationality, EU nationals who have not used their free movement rights, Union citizens subject to transitional measures during

the first Regulation on free movement of workers, adopted in 1961, this category had almost the same privileged status as their spouse, parent, son or daughter who were Member State nationals working in another Member State¹². For decades, this privileged status was often disregarded in the daily practice of immigration or consular officers and other authorities in all Member States. Family members received the same treatment as all other third country nationals (members of the third category). Their nationality was considered to be the primary basis for that treatment notwithstanding their status as beneficiaries of EU free movement law. Forty-five years after this first regulation was adopted, several Member States seized the opportunity offered by the implementation of the new Directive 2004/38 on free movement of Union citizens and their family members to make the admission of those family members subject to national law on family reunification again, justifying their decision with reference to the *Akrich* judgment¹³. This clearly indicated the persistent rejection of and opposition to the transition of this (relatively small) group of third-country nationals to the privileged second category. In the *Metock* judgment of June 2008, the Court of Justice explicitly departed from its position in *Akrich* and reminded Member States that they had to comply with the basic free movement rules and the Directive they had adopted in 2004¹⁴. The noisy opposition to this judgment in some Member States (Denmark, Ireland and the UK) calmed down relatively quickly. Within weeks or months all Member States openly disregarding the privileged status of third country family members complied with the Court's ruling and adjusted their national law or practice or both.

With the accession of new Member States in 1971 (Denmark, UK and Ireland), 1981 (Greece) and 1986 (Portugal and Spain), large numbers of settled immigrants who had previously been designated as foreign workers (*Gästarbeiter*) became members of the privileged second category (nationals of a Member State) overnight. This new status facilitated the return to the country of origin for some. For the large majority remaining in the Member States, however, this contributed to their integration in the host country.

Between Maastricht and Amsterdam, the third country national is born (1992-1999)

The Treaty of Maastricht instituted Union citizenship¹⁵. This new status made the EU migrant less of a migrant and more of a co-citizen in the host Member State. At first this was mostly a symbolic change of labels. But, during the second half of

the first years after accession of their country to the EU and EU nationals with a migration background.

¹² Article 11-15 of Regulation No. 15 of 12 June 1961, OJ of 26 August 1961.

¹³ ECJ, Case C-109/01, *Secretary of State for the Home Department v. Hacene Akrich*, 23 September 2003, (2003) ECR I-9607. The Court held that the free movement of third country family members could be made conditional on their previous admission in another Member State.

¹⁴ ECJ, Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, 25 July 2008, (2008) ECR I-6241.

¹⁵ Articles 8-8a ECT introduced in 1992.

the nineties, the European Court of Justice (ECJ) had the opportunity to take that new status seriously and use it to extend the scope of equal treatment (Condinanzi *et al.*, 2008). The differences between the second and first category mentioned above – nationals of the Member State and nationals of other Member States – were reduced once again. Both became *species* of the *genus* Union citizen. But Union citizens still have a few more rights inside their own Member States than in another Member State. The most relevant remaining differences between these two categories are that EU nationals in another Member State have political rights only at municipal level, no full protection against expulsion and only partial access to public assistance during the first years of residence. The Maastricht Treaty also introduced the possibility for Member States to make common rules on admission and residence of third country nationals (TCNs) within the new Third Pillar of the EU, hence outside the scope of the ECT. The Treaty introduced two new pivotal terms for new policy development: Union citizen and third country national (TCN)¹⁶. Both are “neutral” terms indicating that nationality is the main criterion for making and justifying difference in treatment.

The Third period: between Amsterdam and the Hague (1999-2004)

The intergovernmental cooperation provided for in Maastricht produced little binding law on migration or asylum. It yielded mostly non-binding resolutions and decisions. But those documents may have paved the way for the intense legislative activity in the period after 1999. The sole binding instrument in this field, the Dublin Convention, was adopted in 1990, hence before Maastricht, and it took six years before that convention entered into force. Common binding rules on migration and asylum after 1990 were produced by a smaller number of Member States in the intergovernmental cooperation within the Schengen group. In 1999 the Schengen *acquis* was transformed into Community law (EU law since the Lisbon Treaty). Since then, most Schengen rules have gradually been replaced by regular instruments of EU law.

Two fears in 1992: “We” Union citizens versus “them” third-country nationals

When Union citizenship was introduced in the Treaty of Maastricht in 1992, I had two fears regarding this new term. Firstly, I was afraid that the term would prove to be an empty shell. Spain and other southern Member States had proposed Union citizenship with the aim of providing better protection for their citizens living and working in northern Member States, which in turn did their best during the negotiations on the treaties to deprive the relevant provision on the free movement of Union citizens (today Article 21(1) TFEU) of most of its content. My second fear was that Union citizenship would become a “symbol for exclusion”, that it would stimulate and justify differences in treatment between EU nationals and third country nationals resident in the EU (Groenendijk, 1995; 2000, p. 226)¹⁷. This fear was reinforced in 1996 when the Court in Strasbourg used the “establishment of its own citizenship”

¹⁶ The term third country national had been used in one clause in Article 59 ECT on provision of services. But it became a central term in the new K. (1)(3) TEU in 1992.

¹⁷ This paragraph is an updated summary of an earlier acknowledgement of my mistakes in Groenendijk, 2006.

by the EU as extra grounds for the justification of different treatment of EU nationals and TCNs in the case *C v. Belgium*¹⁸. Has the introduction of the concept of Union citizenship actually added to the tendency to distinguish between “us” Europeans and “them” strangers from outside Europe?

In hindsight, developments in EU migration law in the almost two decades since Maastricht have proved me wrong on both accounts. I underestimated both the role of the European Court of Justice as an institution that takes the rights of migrants seriously and the readiness of Member States to agree on binding rules on the admission and the rights of third country nationals lawfully resident in their country.

Union citizenship: no empty shell

My first fear was mistaken because, in a series of judgments starting with *Martinez Sala* in 1998, the European Court of Justice turned Union citizenship into an instrument of dynamic change, extending the rights of EU migrants within the EU¹⁹. Moreover, in 2001, four large Member States took a step of great symbolic importance: EU nationals would no longer need to apply for a residence permit with the aliens police. In a common declaration at the Justice and Home Affairs Council in Marseille, France, Germany, Italy and Spain first voiced their intention to take this step²⁰. The change was actually realized in Spain and France in 2003²¹ and in Germany in 2004. The 2004 German Act on the freedom of movement of EU citizens provides that these migrants can simply register with the municipality, just as any German citizen who changes his residence. The population registration office would inform immigration authorities which, on their own initiative, would issue the document certifying residence status²². This simple measure of administrative efficiency sent an important message. Nationals of other Member States are no longer “real aliens”; they are almost one of us. In 2004 important elements of recent case law of the Court on the rights of Union citizens were codified in Directive 2004/38 on the free movement of Union citizens and their family members. Member States unanimously agreed to codify judgments that they had severely criticized when they were handed down by the Court only a few years earlier²³. In 2008 the Court held in the *Huber* judgment that Germany could not register Union nationals in the central

¹⁸ Eur. Ct. H.R., *C. v. Belgium*, 7 August 1996.

¹⁹ ECJ, Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, 12 May 1998, (1998) ECR I-2691.

²⁰ *Déclaration Commune de la France, de l'Allemagne, de l'Espagne et de l'Italie pour le Conseil Informel J.A.I. des 28-29 Juillet 2000* and Council document 15380/01 of 18 December 2001, p. 2. The UK never really pressed EU nationals to apply for residence documents. It was more the other way round. EU nationals applied for these documents because it entailed proof of their rights under EC law and could result in a more secure status under UK law.

²¹ In the *Loi Sarkozy* of November 2003. Today, the relevant provision is Article L 121-1 of the *Code de l'Entrée et du Séjour des Etrangers et du Droit d'Asile*. In Spain the amendment of the immigration legislation occurred by a Royal Decree of 2003.

²² Article 5 of the *Freizügigkeitsgesetz EU* of 2004, *Bundesgesetzblatt* 2004 I, p. 1950.

²³ ECJ, Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 20 September 2001, (2001) ECR I-6193 and ECJ, Case C-148/02, *Garcia Avello*, 2 October 2003, (2003) ECR I/11613.

alien registration (*Ausländerzentralregister*) nor use that data for police and criminal justice purposes, since German nationals are only registered in municipal registers and not in one central data base²⁴.

Union citizenship: a symbol for exclusion of other immigrants?

My second fear proved to be wrong, mainly because over the last two decades, and especially after 1999, a whole range of intermediate statuses within Community migration law were developed. These new statuses actually bridge and diminish the differences in the treatment of nationals and non-nationals rather than sharpening and justifying that distinction as was my fear in 1992. The traditional sharp divide between nationals and non-nationals (citizens and aliens) has been blurred by the introduction of a range of new intermediate statuses in EU migration law. The four most relevant intermediate statuses in declining level of rights and protection are Union citizenship; the status of Turkish workers and their family members under Association Council Decision 1/80; the status of long term resident third country nationals under Directive 2003/109; and, the status of categories of TCNs on the basis of the new Directives on legal migration and asylum, such as admitted family members, students, refugees, other protected persons and asylum seekers²⁵.

How is the gap between “us” and “them” bridged?

This gradual blurring of the distinction between nationals and non-nationals is the result of four developments. First, the position of Union citizens (nationals of other Member States) has steadily come closer to that of nationals. The most important remaining exceptions are expulsion in exceptional cases, certain restrictions on access to public assistance and no full political rights. EC legislation (Directive 2004/38) and the ECJ's case law continue to restrict the scope of those exceptions.

Successive EU enlargements, especially those in 2004 and 2007, constitute the second major development. The accession of new Member States had three effects. First, paradigmatic “aliens” in some Member States (Poles in the Netherlands, Rumanians in Italy and Roma in many Member States) became Union citizens in law overnight. Old prejudices continued to influence the behaviour of authorities and part of the population but the room for action on the basis of those prejudices was severely restricted by EU law. Secondly, the accessions of 2004 and 2007 gave birth to a new intermediate status: Union citizens with partial movement rights only. Their status is somewhere in between those of full Union citizens and the Turkish workers under the Association Agreement. Thirdly, these accessions gave rise to considerable migration. In 2008, 1.7 million Rumanian nationals were registered residents of another Member

²⁴ ECJ, Case C-524/06, *Heinz Huber v. Bundesrepublik Deutschland*, 16 December 2008, (2008) ECR I-09705.

²⁵ There are other intermediate status than the four presented in the text: e.g. in between Union citizens and Turkish nationals, there are the third country national family members of Union citizens and the citizens of new Member States who, under the transitional measures, have restricted free movement rights. The status of holders of the Blue Card on the basis of Directive 2009/50 is somewhere in between the status of Turkish nationals under Council Decision 1/80 status and the long term residents.

State and 1.2 million Polish nationals were living elsewhere in the EU. Rumanian migrants outnumbered Italian migrants in the EU (1.3 million); Polish migrants outnumbered the Portuguese (almost 1 million) and the British residing in another Member State (0.9 million)²⁶. In some Member States these large new immigrant groups held the new intermediate status provided for in the Accession Treaties during the transitional period (up to seven years), as Union citizens but without full free movement rights.

The third major development has been the jurisprudence of the European Court of Justice on the Association Agreement between the EEC and Turkey. In more than 45 judgments over the last 20 years the Court has gradually built a status for Turkish workers and their family members that includes a secure right to residency, substantial and procedural protection against expulsion²⁷, equal treatment in electoral rights for workers and educational grants. Second generation individuals born in the country of residence are also protected by this status as a result of the *Cetinkaya* judgment²⁸. This development started with *Demirel* (1987) and *Sevince* (1990). By 1999 the Court had already given 13 judgments on EEC-Turkey Association rules. In the early 1990s, Advocate General Darmon described the status of Turkish workers under the Association Agreement as halfway between that of EU workers and the workers from other third countries (“*une situation intermédiaire*”)²⁹. Today their status approaches that of EU migrants. The 2010 judgment *Commission/Netherlands* will considerably reinforce that process³⁰.

The fourth major development bridging the gap between nationals and non-nationals has been the adoption of a series of directives and regulations on the admission and status of third country nationals on the basis of the Treaty of Amsterdam. The adoption of Directive 2003/109 on the status of long term resident third country nationals³¹ was of major importance because the directive entitles immigrants with five years lawful residence in a Member State to the EC long term resident status including reinforced protection against expulsion and a set of rights not equal, but “as near as possible” to the rights of EU migrants or nationals. Moreover, the directive grants persons with the new status a conditional right of entry into other Member States. If Member States refrain from blocking access to that status by introducing integration conditions, almost half of all third country nationals lawfully living in the Union could qualify for this new status. In addition, a right to admission and a set of rights after

²⁶ Eurostat, Statistics in focus 94/2009 (K. Vasileva), p. 4.

²⁷ ECJ, Case C-136/03, *Dörr and Unal*, 2 June 2005, (2005) ECR I-4759.

²⁸ ECJ, Case C-467-02, *Inan Cetinkaya v. Land Baden-Württemberg*, 11 November 2004, (2004) ECR I-10845.

²⁹ In point 62 of his conclusion in the *Kus* case: ECJ, Case C-237/91, 16 December 1992, (1992) ECR I-06781 and in points 23 and 25 of his conclusion in case *Eroglu*: ECJ, Case C-355/93, 5 October 1994, (1994) ECR I-5113.

³⁰ In ECJ, Case C-92/07, *European Commission v. Kingdom of the Netherlands*, 29 April 2010, not yet reported, the Court held that the standstill clause in Article 13 of Association Council Decision 1/80 applies to the first admission of Turkish workers and their family members.

³¹ Adopted on 22 September 2003, OJ 2003 L 251/12.

admission in a Member State have been granted to large categories of third country nationals, especially in Directive 2003/86 on the right to family reunification³², in Directive 2004/83 on refugees and other beneficiaries of international protection³³, in the Students Directive 2004/114³⁴ and in Directive 2009/50 on highly qualified workers, the so-called “Blue Card Directive”³⁵. The effect of those five directives is that large groups of lawfully resident third country nationals today have rights under EU law that can be directly enforced within the Member States, if necessary with the assistance of the national courts under the guidance of the European Court of Justice. It may take several years before the national immigration authorities recognize and respect the new rights under EU migration law, just as happened with the right of EU workers and Turkish workers under Community law. But they will no longer be dependent on the discretion of national immigration authorities or at the mercy of national immigration law which is always influenced by the politics of the day. They are no longer only guests or foreigners, but persons with rights, even residence rights under EU law.

In 2008 almost 31 million non-nationals were living in EU Member State territory, i.e. 6% of the total EU population; 11.3 million (37%) were nationals of another Member State and 19.5 million (63%) were third country nationals. Turkish nationals (2.4 million) counted for 8% of all non-national residents or 12% of all resident third country nationals³⁶. The majority of all non-nationals, including the large majority of the third country nationals living in one of the 27 Member States, have one of the four EU residence statuses mentioned above. Union citizens living in another Member State count for 37% of all non-nationals in the EU; Turkish nationals are 8% of the non-nationals; in 2009 40% of all registered third country nationals in Austria had an EC long term resident status (BMI, 2009); probably half of the registered third country nationals are living for five years or longer in the Member States³⁷ and around half of the third country nationals are admitted for family reunification or born in a Member State.

The Fourth period: between The Hague and Stockholm (2005-2010)

During the period between the five year Justice and Home Affairs policy programme adopted by the European Council in The Hague in December 2004³⁸ and the programme adopted in Stockholm in December 2009³⁹, the process of legal categorization and labelling was influenced by developments in EU migration law in two opposing directions. On the one hand, the post Amsterdam migration and

³² Adopted on 25 November 2003, OJ 2004 L 16/44.

³³ Adopted on 29 April 2004, OJ 2004 L 304/12.

³⁴ Adopted on 13 December 2004, OJ 2004 L 375/12.

³⁵ Adopted on 25 May 2009, OJ 2009 L 155/17.

³⁶ Eurostat, Statistics in focus 94/2009 (K. Vasileva).

³⁷ In 2008 almost three quarters of the 6.7 million non-nationals registered in the Central German Aliens Register were living in Germany for eight years or more. Half of the total non-national population was living in Germany longer than 15 years (Federal Statistical Office).

³⁸ Council Document 16054/04 of 13 December 2004.

³⁹ Council Document 17024/09 of 2 December 2009.

asylum directives were gradually implemented in Member States' national legislation (Groenendijk *et al.*, 2007). The term "third country national" was gradually introduced to Member States' immigration law. Lawyers, judges and immigration authorities became adjusted to the idea that third country nationals may have residence rights under EU law and may be entitled to equal treatment with Union citizens in certain areas. This prompts the following question. To what extent would the status of EU migrants function as a model for the interpretation of these new EU directives whose explicit aim is to grant rights comparable or equivalent to the rights of Union citizens to categories of third country nationals? Will the Court also use a similar interpretation to the rights of third country nationals under the new directives on legal migration as that applied to the rules on Turkish workers and their family members? The judgment in *Chakroun*, whereby the Court held that the excessive income requirement for family reunification in Dutch law violates the Family Reunification Directive, could well provide the first indication of the Court's position on this issue⁴⁰. Such a development may send the message of a reduction in the differences in treatment between "us" Union citizens and "them" third country nationals. At the very least, these directives will require Member States authorities to justify some of the differences in treatment under EU law⁴¹.

On the other hand, two developments during the five years following 2004 may work in the opposite direction. The first development is the adoption of three important instruments that may well enhance the differences in treatment: the 2006 Schengen Border Code⁴², the 2008 Return Directive⁴³ and the 2009 Visa Code⁴⁴. The Border Code makes an explicit distinction between Union nationals and third country nationals with regard to their treatment by border guards at the external borders of the Schengen area⁴⁵. Then again, the code also provides the basis for a legal challenge of decisions of border guards refusing the entry of third country nationals and it contains

⁴⁰ ECJ, Case C-578/08, *Chakroun*, 4 March 2009, not yet reported in ECR. In that judgment on the Directive on family reunification of third country nationals, the Court twice refers by way of analogy to recent judgments on the rights of family members of EU nationals, see points 46 and 65 referring to the judgments in *Eind* and *Metock*. The infringement procedure of the Commission against the Netherlands on the levy of high fees for EU long-term resident status might be a second example. In that case, the Commission uses the same reasoning as the Court in the *Sahin* judgment: ECJ, Case C-242/06, 17 September 2009, (2009) ECR I-08465.

⁴¹ Article 21(2) of the EU Charter of Fundamental Rights or the general non-discrimination principle may play an important role since it requires Member States to justify existing or new differences in treatment on the grounds of nationality.

⁴² Regulation 526/2006 of the European Parliament and the Council of 15 March 2006, OJ 2006 L 105/1.

⁴³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98. For a critical discussion of this directive see Baldaccini (2009) and Acosta (2009).

⁴⁴ Regulation 810/2009 of the European Parliament and the Council of 13 July 2009, OJ 2009 L 243/1.

⁴⁵ Article 5 and Article 7(2) of the Schengen Border Code.

an explicit prohibition of racial discrimination at the border⁴⁶. The latter provision may turn out to be the basis for external control on an essential field of decision making by state officials that largely escaped such controls until now. The Return Directive and the Visa Code both apply primarily to third country nationals. The Return Directive regulates the expulsion of third country nationals, their detention pending expulsion and the re-entry ban. This directive introduces the category “illegally staying third country nationals” in EU migration law. The Visa Code provides detailed rules for handling applications for the common visa for a short stay in the Schengen area. Only nationals of third countries on the negative list of the EU Visa Regulation need such visa. But the process of application for such a visa often also involves a sponsor who is resident in the EU and may be a Union citizen of immigrant origin or a third country national. This brings us to the second development: the establishment of large immigration databases and the use of the data in those databases for police, criminal justice and intelligence purposes.

In the Hague Programme of November 2004, Member States, in reaction to the terrorist attacks and bombs in New York, Washington (September 2001) and Madrid (March 2004), adopted the so-called “principle of accessibility” and the “principle of interoperability”⁴⁷. In plain language those new terms justified a policy that all digital information available to Member States should be linked and used in the fight against terrorism, other serious crimes and illegal immigration. The list of what are considered to be serious crimes is long and includes some strange bedfellows. It includes such diverse crimes as trafficking in stolen vehicles, corruption and forgery of means of payment⁴⁸. These two new “principles” are the opposite of the principle of purpose limitation, one of the centre pieces of European and national data protection law over the last decades. According to the Hague Programme, information in databases built for immigration and asylum purposes should be available for police, criminal prosecution and intelligence purposes as well. In this case, I fear that the establishment of the new large immigration databases and the wider use of existing immigration databases will result, in practice, in the stigmatisation of lawfully resident third country nationals and of EU nationals of immigrant origin. Moreover, the use of these databases may actually hamper or take away rights granted to third country nationals under the new post Amsterdam migration and asylum directives.

At the beginning of 2010, two large EU immigration databases were operational: the Schengen Information System (SIS) and EURODAC. In 2008 the EU Council decided to build a third Visa Information System (VIS)⁴⁹. A new version of SIS, called

⁴⁶ Article 6 and Article 13 of the Schengen Border Code.

⁴⁷ See note 44.

⁴⁸ Reference is made to the list in Article 2(2) of the 2002 Framework Decision of 13 June 2002 on the European Arrest Warrant, OJ 2002 L 190/1.

⁴⁹ In addition, in 2009 the Council decided to develop an electronic data system recording all entries and exits across external borders, the outline of which is not yet clear. See on SIS and the other two databases: Brouwer (2008), with data on the actual application of SIS-I in France, Germany and the Netherlands and chapter 5 on EURODAC and VIS.

SIS-II, is under development⁵⁰. The new central SIS-II database will be linked to “over half a million terminals located within the security services of the Member States”⁵¹. New search techniques interlinking various types of data will allow data mining or data profiling and the data in SIS should be linked to data in other European databases⁵². The strict separation between immigration data and data for criminal law purposes in the current SIS-I will be abolished in SIS-II. EURODAC and SIS contain impressive amounts of information about asylum seekers, irregular migrants and third country nationals who should be refused entry. At the end of 2008, fingerprints and data on more than 1.3 million third country nationals had been stored in the Eurodac Central Unit in Luxembourg, 85% of these are the fingerprints of asylum seekers⁵³. At the beginning of 2009, SIS contained data on approximately 930,000 persons, four-fifths of those are third country nationals registered with a view to refusal of entry in the 28 states of the Schengen group⁵⁴. VIS will contain data on all foreigners who request a short term visa, as well as on their sponsors – among whom residents of migrant origin are likely to be over-represented. In 2008, approximately 11.6 million applications for short-stay visas were made with the consular authorities of the Schengen states⁵⁵. Since most data will be stored in VIS for at least five years, eventually data on 60 to 90 million third-country nationals (applicants and sponsors) and on millions of EU nationals (sponsors) will be stored in VIS. SIS contains indirect ethnic data, i.e. the place of birth, while VIS registers not only the place of birth but even the nationality of birth. In recent years, the number and type of authorities who have access to this data has expanded significantly and steps have been taken to use these immigration databases for criminal investigation purposes.

I find these developments extremely worrisome, first because the quality of the information is poor, particularly in SIS. Second, there is not a single clause either in SIS-II or in VIS protecting the residence rights of third country nationals under community law against unlawful or incorrect decision of immigration authorities on the basis of the system. My third and main concern is that, because data on immigrants in all three databases will be used for the purpose of criminal investigation and prosecution, third country nationals will be far more likely to face criminal investigation and charges than EU nationals.

Immigration data concern all asylum seekers, all visa applicants and all visa sponsors indiscriminately. Third country nationals can only avoid being registered

⁵⁰ Regulation (EC) No. 1987/2006 of 20 December 2006, OJ 2006 L 381/4; see also Council Decision of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System, OJ 2007 L 205/63.

⁵¹ Council document 13305/09 of 15 September 2009, p. 3.

⁵² Steve Peers, *Schengen Information (SIS) I*, Statewatch Summary, June 2006, <http://www.statewatch.org>.

⁵³ Report from the Commission to the European Parliament and the Council – Annual Report to the Council and the European Parliament on the activities of the EURODAC Central Unit in 2008, COM(2009) 494 final, p. 10.

⁵⁴ SIS Database Statistics at 1 January 2009, Council document 5764/09 of 28 January 2009.

⁵⁵ Council document 12493/09 of 31 July 2009, p. 95.

in VIS or EURODAC by not applying for asylum or for a visa or not sponsoring a family member who intends to come for a visit. The multi-purpose use of the immigration data, the interlinking of data within one system and the interlinking of data between the different databases, will increase the chances that third country nationals will be investigated, suspected and convicted for crimes far more often than the EU-nationals (Baldaccini, 2008). The photographs, fingerprints or other personal data of EU nationals are only in exceptional cases, not systematically, stored in these data bases. These are exactly the effects that the German Constitutional Court held to be unconstitutional in its 2006 judgment on data profiling (*Rasterfahndung*) of Moroccan youth: the higher risk for the persons concerned to become the target of criminal investigation and the possibility of stigmatisation of a group of persons in public life⁵⁶. None of the “safeguards” that the drafters have introduced in the rules on these new immigration databases effectively addresses the risk of stigmatization. The Grand Chamber of the European Court of Human Rights made it clear that precisely the kind of statistical data that some Member States and the Commission use to support their case for the use of EURODAC for criminal law purposes, is insufficient to justify extended registration of fingerprints of persons who have not been convicted for a crime⁵⁷.

Conclusion

This stigmatization is not a direct effect of EU rules and terminology. Stigmatization follows from the rules that allow for the selective use of new technology thereby creating extra risks mainly or exclusively for third country nationals irrespective of the lawfulness of their residence. In the *Huber* case, the European Court of Justice protected EU migrants and their family members against increased risk of being the subject of police or criminal justice activities caused by their being registered in the special central registration of non-nationals. There are good reasons why Germany (and most other EU Member States) does not have one central database with personal data of all nationals or all residents of the country for use by police authorities. The building of large immigration databases and their use for purposes other than immigration control will create that same risk at the European level that the Court held to be a violation of the non-discrimination principle at the national level.

Until 2004, the new categories introduced in EU migration law (Union citizen, Turkish worker, third country family member, third country national) generally did not send an exclusive message. The new terms were neutral. EU migration law in the 1980s and 1990s tended instead to include ever larger groups of migrants within the protection provided by EU law. This process has been reinforced by the adoption of the directives on legal migration and the accessions of 2004 and 2007. Since the Hague Programme (2004), developments have become more ambiguous. The outcome will depend critically on whether the European Court of Justice and Member

⁵⁶ BVerfG 4 April 2006, 1 BvR 518/02, www.bundesverfassungsgericht.de.

⁵⁷ Eur. Ct. H.R. (Grand Chamber), *S. and Marper v. UK*, 4 December 2008, application 30562 and 30566/04. For limited data on “hit rates” presented by the Commission as evidence of the usefulness of linking these data, see SEC(2009) 936, p. 8. The Court in *Marper* observed that hit rates do not tell what results the “hits” actually produced.

States will use Union citizenship as a model when interpreting and applying the two main directives on legal migration and whether the risk of stigmatization by the multi-purpose use of the new large information systems with personal data on millions of third country nationals will materialize.

CHAPTER II

Mandatory integration provisions in EC and EU Member States law ¹

Yves PASCOUAU

The question of third country nationals integration (TCNs) in European Member States has been debated within European institutions since the mid 1970s and throughout the 1980s even though the EC did not yet possess the competences to adopt rules related to migration issues. During this period, security of stay and residence, acquisition of rights, acknowledgement of obligations to be fulfilled by TCNs and acquisition of language skills were emphasized as relevant elements in the integration process (Carrera, 2009). The Treaty of Maastricht (1992) introduced migration issues as questions of “common interest” into the EU’s third pillar. Integration issues were dealt with in a 1994 Commission Communication recalling the principles outlined in previous years (European Commission, 1994, p. 32). The Treaty of Amsterdam (1999) awarded competence to the EC over the adoption of rules for immigration. However, neither the Treaty, nor the Member States expressed the will to give legislative competence over integration to the EC. On the one hand, the Treaty’s provisions were drafted in such a way as to make it difficult to identify clear competence. On the other hand, Member States considered this issue a national one, falling under the principle of subsidiarity. As a consequence, political orientations defined in the Tampere Summit (1999) or in the Hague Program (2005) highlighted “the need for greater coordination of national integration policies” (European Council, 2005, p. 4). The Lisbon Treaty follows this path and ends the debate regarding the legislative competence of the EU:

“The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country

¹ This chapter was finalised 1 March 2010.

nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States” (Article 79 (4)).

In other words, the EU may help and coordinate integration national policies but may not harmonise them.

Notwithstanding this narrow reading of EC/EU competence over integration, the EC has the power to enact immigration rules which have a direct impact on integration. This is the case in two domains: family reunification of TCNs under Article 63 (3) (a) of the Treaty establishing the European Community (hereafter ECT) and the creation of long term resident status under Article 63 (4) ECT. The first domain allows TCNs to be joined by family members and ensures their integration into the host country. The second domain provides TCNs with stronger rights and improved status upon completion of a certain period of legal residence. The acquisition of a secured status provides a certain degree of integration into the host society. While initial proposals of the European Commission reflected the goal of improving TCN integration into Member States, negotiations within the Council have modified this purpose. Member States have introduced integration criteria into these Directives which must be fulfilled in order to benefit from the rights enshrined in EC law. Thus, as integration becomes part of EC migration policy, it raises the question as to whether integration might be used as a tool to regulate migration flows rather than to enhance TCNs status within Member States. This article examines the status and goals of integration provisions, and more particularly mandatory integration provisions, in EU and Member States’ legislation and policy. The first section evaluates the impact of EC law on Member States when the directives are transposed. The second section focuses on recent political documents and statements which demonstrate that the introduction of integration requirements into national migration laws will probably concern a larger number of Member States in the months or years to come.

Integration provisions in EC and national law with regard to family reunification and long term residents

This section assesses the extent to which Member States have taken the opportunity offered by the transposition of the Family Reunification and Long Term Resident Directives to introduce integration provisions in their legislation.

The Family Reunification Directive

Two types of integration provisions can be distinguished in the Family Reunification Directive (Directive 2003/86/EC): integration conditions and integration measures. Integration conditions allow Member States to condition the right to family reunification on the fulfilment of integration requirements. In contrast, integration measures cannot constitute an obstacle to the right to family reunification but may be introduced to assess the integration capacity of TCNs².

² For a definition of the difference between integration measures and conditions, see Council document 7393/1/03 of 14 March 2003, p. 5.

Integration conditions

Integration conditions are outlined mostly³ in Article 4 (1), second indent of the Directive. This Article states:

“by way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorizing entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive”.

This provision, introduced through the initiative of Austria and Germany (Carrera, 2009), “is intended to reflect the children’s capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school” (recital 12 of the Directive). This provision was challenged before the European Court of Justice (ECJ) by the European Parliament. Though the ECJ considered that this provision does not run “counter to the right to respect for family life” as interpreted by the European Court of Human Rights, it nevertheless delineated the margins of manoeuvre of the Member States. The ECJ stated that:

“Member States which wish to make use of the derogation cannot employ an unspecified concept of integration, but must apply the condition for integration provided for by their legislation existing on the date of implementation of the Directive in order to examine the specific situation of a child over 12 years of age arriving independently from the rest of his or her family”⁴.

The ECJ also added “the final subparagraph of Article 4 (1) of the Directive cannot be interpreted as authorizing the Member States, expressly or impliedly, to adopt implementing provisions that would be contrary to the right to respect for family life”⁵.

Available reports on the implementation of the Family Reunification Directive (Odysseus Network, 2007; Groenendijk *et al.*, 2007; European Commission, 2008) indicate that three Member States rely on such an integration requirement. In Germany this integration condition has been applied since 1990. Minors over the age of 16 and who arrive independently from the rest of the family must demonstrate either that they have command of the German language or that they will be able to integrate into the German way of life. The fulfilment of this integration requirement is assessed by diplomatic missions or by competent authorities if the child is already on German territory. The language requirement is considered to be met once the

³ This article does not focus on Article 4 (5) of the Directive which allows Member States to determine an age criterion justified by integration purposes. Article 4 (5) states “in order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her”.

⁴ ECJ, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, (2006) ECR I-05769, point 70.

⁵ ECJ, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, (2006) ECR I-5769, point 71.

applicant illustrates language skills which correspond to level C1 of the CEFR⁶, whereas ability to integrate is assessed on the basis of the child's education and way of life. In the Netherlands, minors aged 16 and 17 who do not have to go to school, must pass an integration test prior to admission into the Netherlands. The test consists of a language test (level A1 CEFR) and questions regarding Dutch society. The purpose of this provision remains unclear as arrival independent from the rest of the family is not specifically required. This leads to the conclusion that this condition falls within the scope of integration measures set up by Article 7 (2) of the Directive. This is probably why the Commission did not think the Netherlands had violated the standstill clause⁷ inserted into Article 4 (1). Finally, Cyprus introduced an integration condition for minors over the age of 15. But, as outlined by the Commission, this requirement was introduced after the date of implementation of the Directive and constitutes a breach of the standstill clause (European Commission, 2008).

In sum, the integration condition of Article 4 (1), second indent, of the Directive only applies in Germany and awaits clarification in the Netherlands. It is worth noting that even Austria, which lobbied for the integration of such a condition in the Directive, did not transpose it into its own legislation and is now forbidden to do so as a result of the standstill clause. Thus, by "uploading" its national legislation into the Directive, Germany has unintentionally settled the question of minors arriving independently from the rest of their family as such requirements cannot be introduced anymore in national laws.

Integration measures

Article 7 (2) of the Directive indicates that "Member States may require third country nationals to comply with integration measures, in accordance with national law". The second indent of the provision adds "with regard to the refugees and/or family members of refugees referred to in Article 12 the integration measures referred to in the first subparagraph may only be applied once the persons concerned have been granted family reunification". This provision has raised several comments surrounding three major points. First, as mentioned above, there is a difference between integration "measures" and "conditions". Whereas the latter allows Member States to impose conditions before a TCN can benefit from a right, the former only allows Member States to impose measures on TCNs which cannot condition a right awarded by Community law. In this sense, when transposing Article 7 (2) of the Directive, Member States cannot condition the right to family reunification. Second, this provision introduces the possibility of integration measures which can be applied to TCNs in the country of origin. Finally, this provision is not accompanied with a

⁶ Common European Framework of Reference. Adopted by the Council of Europe, this document provides a basis for the mutual recognition of language qualifications.

⁷ A standstill clause means that Member States are not allowed to introduce specific rules into their national law after the entry into force of a directive. For instance, the possibility to transpose Article 4 (1) second indent of the Directive was possible until its entry into force. Afterwards, Member States are not allowed anymore to introduce such rules in their national legislation.

standstill clause. Hence, nothing prevents Member States from joining those which have implemented Article 7 (2) of the Directive.

Eight Member States⁸ have transposed Article 7 (2) of the Directive into their national rules (Odysseus Network, 2007; Groenendijk *et al.*, 2007; European Commission, 2008). Once again, differences exist among them. A distinction may be drawn between Member States which have organised integration measures after entry into the territory and those which have instituted integration measures in the country of origin. Regarding the former, Latvia and Greece must be set aside as their integration measures are more broadly required to obtain a permanent or long term residence permit. Austria and Cyprus have established integration measures which must be fulfilled after admission into the host Member State. In Austria, all family members accepted for family reunification must sign an “integration agreement”⁹. This agreement stipulates that TCNs must take two modules. The first module includes literacy courses and must be completed within twelve months from entry into the country. The second module entails learning German and includes elements of political education. This module must be completed within five years and ends with a written examination. Denmark, a Member State not bound by the Directive, has also established an integration test called an “immigration test” (Ersbøll, 2010). In practice, an applicant for family reunification must receive recognition of his application for family reunification in advance. He will then be granted a temporary visa in order to take an integration test in Denmark. The test includes a language test (level A1 minus CEFR) and a test on Danish society. The purpose of the test is to allow the family member to prepare for his/her integration in Denmark. If the applicant fails the test, it may be taken again upon payment. In the end, family reunification may also be refused if the applicant does not pass the test requirements.

The latter group concerns the three Member States which require the fulfilment of integration measures by family members in their country of origin. Surprisingly, Denmark is not amongst these countries although Denmark proposed integration abroad during the Directive’s negotiations. This proposal was immediately supported by Germany and the Netherlands (Carrera, 2009). And, though France did not initially support this provision, it implemented it a few years later as a result of changes in the government. Once again national rules present broad differences. The Netherlands was the first to implement such integration measures (Human Rights Watch, 2008). Dutch legislation requires adults and children of 16 and 17 years who are no longer required to attend school¹⁰ to pass an integration test as a requirement for family reunification prior to admission into the Netherlands. The test, taken at a Dutch embassy or general consulate, includes a language test (level A1 CEFR) and questions

⁸ Austria, Cyprus, France, Germany, Greece, Latvia, the Netherlands and Denmark.

⁹ At the moment of entry into Austria, children under the age of 9 as well as elderly or sick people are exempt from such requirements.

¹⁰ Those exempted from this requirement include: children under the age of 16, family members who have reached the age of 65, persons who are permanently unable to pass an integration exam on the grounds of a proven physical or mental handicap and persons from the EU, Surinam, Australia, Canada, Japan, US, Monaco, South Korea, Switzerland, New Zealand, the Vatican, or Iceland.

regarding Dutch society. The candidate answers questions by telephone. A computer based in the United States assesses whether the applicant has passed the exam. If a candidate fails the test, the visa required to enter the Member State is not issued and the test will have to be taken again which means that the applicant must pay the 350 Euro exam fee again. The decision cannot be challenged. Obviously this rule violates the Directive as the procedure places conditions on the right to family reunification. In this sense, Dutch law institutes integration conditions where the Directive only allows the creation of integration measures. After admission into the Netherlands, migrants must pass another, more difficult, integration test on language and society within five years.

In Germany, before 2007 and as a general rule¹¹, spouses were granted a residence permit if they were able to make themselves understood in German at a basic level (level A1 CEFR). A law adopted in 2007 extended this mechanism to the issuance of the visa. Hence, a foreigner seeking family reunification must possess the above-mentioned language skills before entering the country. Along with the visa application, the applicant must submit a certificate from the Goethe Institute for the A1 language examination “Start Deutsch 1”. In countries where the “Start Deutsch 1” examination is not available, embassies or general consulates determine whether the spouse has basic knowledge of the German language during the visa application procedure. If, during the personal interview it becomes evident that the applicant has the required language knowledge, no separate proof is required. In exceptional cases, other language certificates are accepted as proof as long as they are of equal value to the “Start Deutsch 1” language test. Though this system may seem flexible, its compliance with Article 7 (2) of the Directive is questionable. First of all, it seems a visa will not be issued until an applicant proves his/her sufficient skills in German language. Even if German law does not institute a test *per se* and enables the applicant to prove his/her knowledge in different ways, the effect of such a requirement leads *in fine* to a condition rather than a measure. Secondly, and consequently, the implementation of this rule should be monitored carefully in the future. In some countries, the “Start Deutsch 1” certificate may, in practice, become the main, if not the only, accepted evidence of language skills. Therefore the issuance of a certificate delivered following an exam may in fact require spouses to pass a test and thus constitutes a condition for family reunification. If German jurisprudence allows for other evidence¹², the potentially contradictory practice of staff at German embassies and consulates should be assessed. Thirdly, national authorities benefit from wide margins for manoeuvre when they assess language skills. This leaves the question of uniform implementation of German law worldwide open as it creates uncertainty for the applicants. Finally, it is not clear that the goal of integration requirements pursues integration purposes

¹¹ This rule does not apply to recognized refugees, spouses who are not able to prove basic knowledge due to physical, mental or psychic illness or disability, spouses who, as a result of their nationality, do not need a visa to enter (like citizens of Australia, Israel, Japan, Canada, The Republic of Korea, New Zealand and the United States of America) and spouses of short term residents.

¹² High Administrative Court of Berlin Brandenburg (judgment of 16 January 2008, case 2 M 1.08)

in conformity with the Commission's interpretation of Article 7 (2) of the Directive (European Commission, 2008).

Aside from the Government's objective of tackling forced weddings, some commentators have underlined that the German rule, as well as the Dutch one, were established to select skilled migrants (Michalowski, 2010). In fact only migrants who can demonstrate the skill and motivation to learn the language will be selected. This position is reinforced by the fact that neither Germany nor the Netherlands offer language classes in the country of origin.

In France, a law adopted in November 2007 introduced new measures on family reunification. Since then, and in principle¹³, persons benefiting from the right to family reunification are subject to an evaluation of their degree of knowledge of French language and the values of the Republic (Pascouau, 2010). If the level required (level A1 minus CEFR) is not met, the person may be asked to attend language and civic lessons in the country of origin. The visa is issued on the basis of a certificate attesting that the person has attended the courses. The law specifies that these courses may not last more than two months. They are immediately followed by a second evaluation in the country of origin in order to assess the content and length of the course family members must attend once in France as part of the "integration contract". Compared to the Dutch and German system, French rules comply with the Directive as they do not impose a "test" but rather participation in courses. In this regard, these rules may be regarded as measures as they do not prevent the applicant from being admitted to France.

In conclusion, integration measures are applied by less than one third of the Member States and in very diverse ways. However, it should be kept in mind that Article 7 (2) of the Directive does not contain a standstill clause. This means that the trend to introduce integration measures regarding family reunification could be extended to other Member States as we will see in the second part of this article. As regards the diversity of schemes, a harmonised process may nevertheless emerge. Cooperation and benchmarking among Member States may give rise to a common approach on integration measures. Further, the Court of Justice may be asked to interpret Article 7 (2) of the Directive and therefore set the framework and the scope of integration measures.

The Family Reunification Directive contains provisions related to TCN integration. It illustrates that integration concerns are a part of EU migration policy and might be used either to condition the right to family reunification of certain categories of TCNs or to assess the integration capacities of TCNs in the Member States. In this context, integration has played as a criterion to limit or to frame family reunification. Such a criterion has also been part of the Directive concerning the status of TCNs who are long term residents.

¹³ Those exempted from this requirement include: people aged under 16 or over 65 years old, foreigners who have studied for at least 3 years at a French secondary school or at a francophone school abroad, foreigners who have studied for at least one year at a higher education establishment in France.

The Long Term Resident Directive

Directive 2003/109/EC created an EC long term resident status for TCNs legally residing in Member States for a certain period of time. As explained in the introduction, long term resident status provides stronger rights and enhanced status to TCNs after a period of legal residence. In order to benefit from the provisions of the Directive, Member States are allowed to either institute integration conditions for the acquisition of the status or establish integration measures for the status holder who wishes to reside in another Member State.

Integration conditions for the acquisition of long term resident status in the first Member State

Article 5 (2) of the Directive allows Member States to require TCNs to comply with integration conditions when applying for the long-term resident status. Our analysis indicates that 13 Member States impose an integration condition¹⁴. Each one requires TCNs to have language skills. But the similarities stop there. For example, proof of language skills concerns either only oral capacity or both oral and written capacity. Further, the level of required language ability varies significantly, ranging from a minimum level to a level of knowledge whereby the applicant exhibits fluent basic language. Aside from language requirements, six Member States¹⁵ require applicants to prove sociological and political knowledge of the host society. Some Member States require knowledge of democratic values or institutions, others of history or society. Other divergences exist regarding integration facilities. Certain Member States do not provide such facilities. Where such facilities are provided, they may be free, partially reimbursed by the State or charged entirely to the applicant. Thus, we observe significant differences among Member States on this matter.

Integration measures for residence in a second Member State

Directive 2003/109/EC grants the holder of a long term EC residence permit the right to reside in another Member State for a period exceeding three months¹⁶. Among the conditions defined for this right to be exercised, Article 15 (3) of the Directive allows Member States to require the long term resident to comply with integration measures. However, if TCNs have had to comply with integration conditions in order to obtain EC long term resident status in the first Member State, no integration measures may be imposed aside from language courses.

Our analysis demonstrates that rules in the Member States are still very different. Some Member States impose integration measures even if the applicant has already complied with such requirements in the State where he/she was granted EC long term resident status and are thereby violating the Directive. Furthermore, in Member States where integration requirements are implemented, differences still exist concerning the

¹⁴ Austria, the Czech Republic, Estonia, France, Germany, Greece, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania and the United Kingdom. In Slovakia, the obligation to fulfil integration condition is up to the discretion of national authorities.

¹⁵ Austria, France, Germany, Greece, Lithuania and the Netherlands.

¹⁶ Article 14 of Directive 2003/109/EC.

consequences for not fulfilling integration measures which may include revoking the residency permit, denial of its renewal or lost or reduced social benefits.

The Directive also allows EC long term residents exercising their right to reside in a second Member State to be accompanied or joined by their family. However, two scenarios must be distinguished. The first scenario concerns the reunification of family members who already reside in the first Member State. In this case, the second Member State is not allowed to ask family members to fulfil any integration requirement. This is not the case, however, in the second scenario whereby family members join the long term resident for the first time in the EU. In this context, the integration requirement set up by Article 7 (2) of the Family Reunification Directive may apply to family members. Several Member States require family members to comply with the integration requirement without taking this distinction into consideration. If these measures do not constitute a condition for family reunification, failure to comply with the requirements may have consequences on residence rights such as non renewal of the residence permit, reduction of social benefits, non-issuance of a permanent residence permit and administrative sanctions.

Integration requirements in EC Law are quite complex. The wording of the Directives is of primary importance. The difference between integration conditions and measures is significant. Measures cannot condition the granting of rights whereas conditions may. Secondly, an overview of national rules demonstrates that there is no common approach among Member States. National schemes are sometimes so different that it is hard to find points of convergence. Finally, the objective of such measures remains questionable. Do integration requirements aim at integration in the sense of fostering the status of TCNs? Or, do integration requirements constitute a tool relied on to limit migration and/or select certain categories of migrants i.e. those who are able to integrate easily into Member States? While this question remains open, the trend to introduce integration measures or conditions in the Member States is gaining importance.

Towards the extension of mandatory integration provisions

The Common Basic Principles for integration, adopted in November 2004 by the Justice and Home Affairs Council, establish the framework for EU policy in the field of integration. This political document considers basic knowledge of the host society's language, history and institutions an important element of TCN integration into Member States. In this regard, the document awards great significance to existing introductory programmes as they "will allow immigrants to quickly find a place in the key domains of work, housing, education, and health, and help start the longer-term process of normative adaptation to the new society". Acquisition of such knowledge constitutes the background for many political and operational instruments. This illustrates the will to extend integration requirements in Member States where they are not currently set up.

Political statements

Political statements have emphasized the importance of knowledge of the host society in the integration process within EU Member States. First, heads of state and

government adopted the European Pact on Immigration and Asylum in October 2008 (European Council, 2008). Soon after, European Ministers met in Vichy, under the French Presidency, for a Ministerial Conference on Integration. On this occasion, the concept of the process of TCN integration was further clarified and developed.

European Pact on Migration and Asylum

The European Pact was adopted to “give a new impetus to the definition of a common immigration and asylum policy”. Among the objectives pursued, the first is to “organise legal immigration to take account of the priorities, needs and reception capacities determined by each Member State, and to encourage integration”. Hence, the European Pact dedicates several paragraphs to the question of TCN integration. The Pact outlines “the importance of adopting a policy that enables fair treatment of migrants and their harmonious integration into the societies of their host countries”. Within this scope, the European Pact takes two aspects of integration into account: family reunification and integration for TCNs who are likely to settle permanently.

Regarding family reunification, Member States agree:

“(d) to regulate family migration more effectively by inviting each Member State, (...), to take into consideration in its national legislation, except for certain specific categories, its own reception capacities and families’ capacity to integrate, as evaluated by their resources and accommodation in the country of destination and, for example, their knowledge of that country’s language”.

This objective is significant. Material conditions, such as income and housing capacities, and language skills are not considered as criteria to enhance integration of TCNs into the host society but constitute criteria used in order “to regulate family migration more effectively”. This sheds light on a recent trend in some Member States whereby they rely on integration criteria in order, explicitly or implicitly, to limit family reunification. Thus, the European Pact modifies the content of the Family Reunification Directive without modifying it through legal procedure. More precisely, the Directive contains optional clauses that allow Member States to choose conditions they wish to impose upon the right to family reunification. By inviting Member States to take resources, accommodation conditions and integration capacities, such as language skills, into consideration, heads of state and government have agreed to convert an optional provision, namely Article 7 of the Directive, into a mandatory one. In other words, Member States are strongly invited to introduce requirements regarding resources, accommodation and integration into their legislation. As the Directive does not contain any standstill clause in this matter such a modification is permitted.

Regarding TCNs who are likely to settle permanently, the European Council agrees:

“(g) to invite Member States, in line with the common principles approved by the Council in 2004, to establish ambitious policies, in a manner and with resources that they deem appropriate, to promote the harmonious integration in their host countries of immigrants who are likely to settle permanently; those policies, the implementation of which will call for a genuine effort on the part of the host countries, should be based on a balance between migrants’ rights (in particular to education, work, security, and

public and social services) and duties (compliance with the host country's laws). They will include specific measures to promote language-learning and access to employment, essential factors for integration; they will stress respect for the identities of the Member States and the European Union and for their fundamental values, such as human rights, freedom of opinion, democracy, tolerance, equality between men and women, and the compulsory schooling of children. (...)"

This paragraph covers the period of time prior to the issuance of the long term/permanent residence permit. This is significant since the Long Term Resident Directive just awarded Member States the possibility to require TCNs to comply with integration conditions without specifying of the content of those conditions. Here, the Pact fills in the gap as it puts forward two elements including the promotion of language-learning as it is implemented in several Member States. This trend should be improved in Member States as indicated by the wording "will include". Secondly, the Pact emphasizes respect for Member State and EU identities and fundamental values. This also relates to the development of trainings and exams on issues related to values of the host society in some Member States. These two elements are becoming the basis of integration policies that should be developed in the Member States. The adoption of the Pact by the European Council constitutes a strong incentive and creates the potential for these policies to become more prolific within Member States.

Ministerial meeting on integration

Just one month after the adoption of the European Pact, Ministers of Integration of the Member States met in Vichy. Since national integration policies differ from one state to another, the ministerial conference's aim was to improve the convergence of the concepts and practices of Member States in the continuation of the work already started at European level. The Ministers considered it:

"necessary to promote and explore the common basic principles in greater depth, around the following themes, among other important integration issues: promotion of the fundamental values of the European Union, the integration process, access to employment and the promotion of diversity in employment, the integration of women and the education of children, intercultural dialogue and principles of integration policy governance".

Of major interest here is the paragraph dedicated to the integration process:

"The introductory phase is a key step in the integration process from the moment of immigrants' arrival and even, in certain cases, before their departure from their country of origin. Priority measures that can be organized in this introductory phase primarily involve learning the language, history and institutions of the host society".

The Vichy declaration gives a European dimension to the national practices developed in some Member States and, in this context, gives precedence to the introductory phase. It is striking to note that this phase should start before the departure from the country of origin. The "Europeanization" of the concept of "integration abroad" developed by three Member States is endorsed by all representatives of the Member States. This reveals the ever increasing phenomena to insert integration issues within the management of migration flows particularly in the case of family

reunification and encourages Member States to establish such schemes. Even if the issue of integration measures abroad is rarely discussed at the European level, the trend to institute integration processes after admission to the host Member State constitutes another strong incentive advanced by the ministerial declaration. In this context, these processes should primarily deal with learning the language, history and institutions of the host Member States. At first glance, this perspective does not provoke particular commentary as this framework constitutes the general scheme accepted by some Member States. Nevertheless, it should be recalled that currently many Member States only require TCNs to improve their language skills. Therefore, the declaration proposes to widen the scope of integration processes to include institutional and historical matters. Finally, the modalities of the integration process remain imprecise. The declaration states that “Member States may introduce appropriate arrangements”. In this framework, Member States are granted wide margins of discretion in deciding whether to establish an integration agreement, the content and length of such processes and finally their nature, voluntary or mandatory. However, the option to create integration agreements such as in Austria or France may be one path to be explored.

A movement is taking place at the highest European level to place integration issues at the top of the political agenda. Thus far, integration policies would rather serve migration policies than social and employment policies, as integration abroad measures illustrate. While political statements give a better understanding of the movement occurring in the field, operational instruments also demonstrate this movement.

Operational instruments

Two different operational instruments demonstrate the tendency to invite Member States and even third countries to develop integration schemes: the creation of a European Integration Fund and the establishment of mobility partnerships.

European Integration Fund

Adopted in June 2007, the Decision to establish the European Integration Fund (Council Decision 2007/435/EC) reinforced the trends outlined above. Article 2 (1), of the Decision states:

“the general objective of the Fund is to support the efforts made by the Member States in enabling third country nationals of different economic, social, cultural, religious, linguistic and ethnic backgrounds to fulfil the conditions of residence and to facilitate their integration into the European societies”.

Contrary to the objectives put forward in the preamble¹⁷, the Fund does not focus only on newly-arrived migrants. Actions developed by the Member States regarding admission procedures are also eligible for funding. According to Article 3 (a) and (b)

¹⁷ Point 3 of the preamble: “The integration of third country nationals in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty. However, having regard to the Treaty, the European Fund for the Integration of third country nationals (...) should be primarily targeted at newly-arrived

of the Decision dealing with specific objectives, the Fund shall first of all contribute to “facilitation of the development and implementation of admission procedures relevant to and supportive of the integration process of third-country nationals” and then contribute to “development and implementation of integration process of newly-arrived third-country nationals in the Member States”. As a consequence, Article 4 of the Decision determining eligible actions focuses on admission procedures in the first paragraph and on programmes and activities aimed at introducing newly-arrived TCNs in the second paragraph. Therefore, it is not surprising to discover that the Fund will support actions which:

“prepare third-country nationals for their integration into host society in a better way by supporting pre-travel measures which enable them to acquire knowledge and skills necessary for their integration, such as vocational training, information packages, comprehensive civic orientation courses and language tuition in the country of origin” (Article 4 (c)).

It is important to note that the trend among Member States to set up pre-arrival measures, such as “integration abroad” schemes, is supported financially by the EU.

Several press releases on support from the European Fund demonstrate that at least 13 Member States¹⁸ will receive European financial support for projects related to the integration process of newly-arrived immigrants. Most of these projects are oriented towards acquisition of language and/or historical knowledge of the host society for newly-arrived TCNs¹⁹. This funding might stimulate the development or the improvement of introductory programmes.

The support of the European Fund is significant as it highlights, from an operational standpoint, which projects will primarily be financed. It appears then that pre-departure measures and introductory programmes are considered priorities to be supported by the EU.

Mobility partnership

The new concept of mobility partnership also covers the question of integration. The joint declarations on mobility partnership between the EU and Moldova and Cape Verde do not concentrate much attention on integration. Apart from a subtitle mentioning integration issues, very little is dedicated to this issue in either the Moldovan²⁰ or Cape Verde mobility partnership. The latter stresses a few points related to integration but does not mention language or civic knowledge to be acquired

third country nationals, as far as the co-financing of concrete actions supporting the integration process in Member States is concerned”.

¹⁸ Bulgaria, Estonia, France, Italy, Lithuania, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia, Sweden, United Kingdom. As for Portugal it is currently unclear to what extent the funding relates to integration measures such as language and historical knowledge.

¹⁹ At least in 8 Member States: Bulgaria, France, Malta, Poland, Romania, Slovakia, Slovenia, United Kingdom.

²⁰ “Integration facilitation – Proposal by the Hellenic Republic and Italy to offer pre-departure training for Moldovans planning to migrate. Proposal by Italy to elaborate and disseminate a handbook on entry procedures and integration policies”, (Council of Ministers, 2008, p. 11).

in the country of origin. However, this approach changed in the beginning of 2009. A document from the Council of Ministers (2009), entitled “Building Migration Partnerships” and issued to prepare for a ministerial conference to be held in Prague in April 2009, announced:

“This partnership (...) will address the issue of migration partnership by pursuing the following objectives: to prevent and fight illegal migration, to promote readmission, sustainable return and reintegration, to better manage labour migration, to further promote the integration of migrants in their host societies, and to make migration and mobility positive forces for development”.

Among the issues to be addressed for the promotion of the integration of legally residing TCNs, the document foresees the possibility “to promote “pre-departure” integration training in countries of origin, such as language training, orientation courses, knowledge of the fundamental values in the country of destination, and training on migrants’ rights and obligations” (Council of Ministers, 2009, p. 8). In other words, the issue of integration abroad should be considered as an integral element of the partnerships to be concluded by the EU with third countries. This again demonstrates the pervasive effect of integration measures which are now part of external relations in the field of migration.

Conclusion

This article highlights the importance accorded to integration issues in the European Union and the Member States. It has demonstrated that the issue enjoys political support at the highest level, is implemented in EU and national instruments, and is accompanied by operational instruments. Nevertheless, a core question remains. What are the purposes pursued by integration measures or conditions adopted at the EU and the national level? If political statements claim that those measures or conditions are established to ensure better integration of TCNs in the Member States, it seems that the real objective lies elsewhere. In reality, integration measures and conditions seem to act as tools of migration policy. Here, integration rules function as a criterion to limit migration flows into the Member States and more particularly family reunification. More precisely, integration requirements are established in order to deter family members from exercising their right to family reunification. Therefore, the extension of pre-departure measures in the framework of external relations is relevant in this regard. In practice, integration conditions introduced in Dutch law have led to a significant decrease in family reunification applications. The introduction of integration measures in French law has had a similar effect. It is important to recall that the introduction of integration requirements regarding family reunification in French law was preceded by political speeches stating that migration for family purposes is too significant as compared to labour migration and that the balance between the two should be improved. In fact integration requirements are considered by Member States as instruments limiting migration of TCNs rather than enhancing their integration into the territories. Therefore, extension of the issue of pre-departure measures in the framework of external relations is also relevant.

CHAPTER III

Problematical Otherness: Defining and dealing with the Other in French and Dutch civic integration abroad policies

Saskia BONJOUR

Introduction

Until recently, no country in Europe or elsewhere had imposed integration requirements on family migration, that is on the admission of foreigners who join a partner, parent or child. In 2005, the Dutch centre-right Balkenende government was the first to introduce such a requirement (Groenendijk, 2005, p.12). The French right-wing Fillon government followed suit in 2007.

The civic integration abroad programs introduced by the Dutch Law on Civic Integration Abroad and the French Law on Migration Control, Integration and Asylum¹ are broadly similar. They both require family migrants to familiarise themselves with the language and customs of the host society before being granted entry. In France as in the Netherlands, the introduction of civic integration abroad was a response to growing concern for the societal consequences of past and present migration flows. French and Dutch politicians perceived the process of migrant incorporation to be failing, to the extent that the cohesion of society as a whole was endangered and state intervention was necessary to restore the minimum conditions for society to function harmoniously. These conditions were apparently considered to include a certain degree of homogeneity in cultural values and skills among the population. Difference, or “Otherness”, was perceived as a problem that required a policy solution.

In this paper, I seek to identify and account for differences and similarities in the framing of “Otherness” in the making of French and Dutch civic integration abroad policies. Relying on a constructivist approach to the study of policy-making (Schön & Rein, 1994; Hall, 1993; Hajer, 1989), my aim is to determine how problematic

¹ *Loi No 2007-1631 du 20 novembre 2007 relative à la maîtrise de l'immigration, à l'intégration et à l'asile.*

Otherness is defined, i.e. what differences are believed to pose problems; which migrants or groups of migrants are perceived as problematically different; and finally, how this Otherness is dealt with through the modalities of French and Dutch civic integration abroad policies. To answer these questions, I have analysed parliamentary debates pertaining to civic integration abroad that took place in the Netherlands between June 2004 and April 2005 and in France between July and October 2007.

In academic literature, a well established approach to explain differences between countries' migrant policies refers to "national models", i.e. country-specific institutional and discursive traditions in the policy field of migration and integration (Brubaker, 1992; Castles, 1995; Favell, 1998; Entzinger, 2005; Koopmans *et al.*, 2005). In these works, the Netherlands is often represented as a typical example of a pluralist country where ethnic, cultural and religious differences are acknowledged and protected by the state, whereas France is considered the archetype of a universalist country where such differences are barred from the public and political realm. In other words, France and the Netherlands are ascribed with opposing ways of dealing with Otherness. The analytical validity and usefulness of "national models" have recently been subject to debate (Joppke, 2007; Jacobs & Rea, 2007). Throughout this chapter, I shall assess how and to what extent "national models" may be of value in understanding the differences between the constructions of the Other in Dutch and French civic integration abroad policies.

The legal definition of the target group

Overall, the target group of civic integration abroad is very similar in the Netherlands and France. In both countries, civic integration abroad applies to non-EU nationals between sixteen and sixty-five years old who request entry for the purpose of uniting with a partner, parent or child. It extends not only to those who come to join a resident foreigner, but also to family members of nationals. In France, as in the Netherlands, the age criterion of sixteen years was chosen because compulsory education ends at sixteen². Younger children are expected to learn the language and customs of their new country in school³. In the Netherlands, religious ministers, in addition to family migrants, are also obliged to learn about Dutch language and society before being granted entry due to the "exceptional societal function" they fulfil⁴.

Both countries have accorded exemptions to nationals from some of their former colonies. Thus, Algerian family migrants who request entry into France are not subjected to the civic integration abroad requirement. Their conditions of entry and stay are not determined by regular French immigration law, but by a bilateral agreement between Algeria and France. However, the French government has expressed its intention to renegotiate this agreement at a later date⁵. In the Netherlands, Surinamese nationals

² In the Netherlands, 16 year old foreigners who must attend school part-time are exempt from civic integration abroad.

³ Assemblée Nationale (further: AN), *Rapport No 160*, 12 September 2007; Tweede Kamer (further: TK) 29700 (3): 7, 21 July 2004.

⁴ TK 29543 (2): 10, 24 April 2004; cf. TK 29700 (6): 34, 6 December 2004.

⁵ Sénat, plenary, 3 October 2007.

who can prove completion of at least primary school in Surinam – where Dutch is the official language – or in the Netherlands are exempted from civic integration abroad⁶.

Finally, but not insignificantly, the Dutch integration requirement at entry applies only to those family migrants who require a provisional residence permit⁷ to enter the Netherlands. Nationals from Australia, Canada, Japan, New Zealand, the United States and – since 1 June 2007 – South Korea may enter without such a permit, therefore without fulfilling the integration requirement. The government argued that it would endanger Dutch “foreign and economic relations” with these countries to introduce obstacles to the entry of their citizens. Besides, the countries concerned “are comparable to European countries in cultural, socio-economic and societal respect” and their nationals “in general possess a certain insight into the societal relations we have in the Netherlands and into Dutch norms and values”⁸.

Naming the problem and the problematic Other

In the classic “national models” approach, the Netherlands is represented as a pluralist country and France as a universalist country. Thus the Dutch perceive their nation as composed of minorities and the country’s public and political sphere as pluralistic. This pluralist tradition is relied on to explain why, in dealing with migrants, the Dutch state adopted a collective approach, identifying groups or communities mostly on the basis of national or ethnic origin as target groups of policy and recognising or protecting collective cultural and political rights (cf. Entzinger, 2003, p. 62-65; Koopmans *et al.*, 2005, p. 71). France, in contrast, defines itself as “one and indivisible”, a nation composed of individual citizens whose relation to the French state is not to be mediated by communities or organisations. The Republic is colour-blind. The ethnic, cultural or religious background of its citizens is irrelevant in its public sphere. This conception of equality among citizens of the Republic is seen to explain French aversion to state recognition of migrants’ collective identities or claims (cf. Viet, 1998, p. 419; Bertossi & Duyvendak, 2009, p. 31). To what extent have these “national models” shaped the content and outcome of French and Dutch parliamentary debates about civic integration abroad?

Politicians’ perceptions of the overall problem for which civic integration abroad is intended to solve are very similar in France and the Netherlands. They fear that, as a result of past and present immigration flows and failing immigrant integration, their societies are disintegrating into distinct, isolated, and even hostile groups. A French UMP deputy raised the spectre of “different cultures and ethnicities living together on the same territory while preserving their specificities, thus resulting in the formation of ghettos, the juxtaposition of antagonist blocs”⁹. In the Netherlands, the first Balkenende government stated that “differences in ethnic origin (...) trigger centrifugal forces in society and lead to the physical, social and mental separation of population groups”¹⁰. Ethnic and cultural diversity are seen to present a threat

⁶ TK 29700 (27), 25 March 2005.

⁷ “*machtiging tot voorlopig verblijf*”, commonly referred to as “*mvv*”.

⁸ TK 27083 (45): 8-9, 24 June 2004; TK 29700 (6): 32, 6 December 2004.

⁹ AN, *Amendement No 59*, 14 September 2007.

¹⁰ TK 28375 (5): 15-16, 3 July 2002.

to the very cohesion of society. Migrants are considered both actors in and victims of the problem. On the one hand, they are the ones who are “pulling back into their community”¹¹ and “turning away from society and reverting to archaic norms and values”¹². On the other hand, they are the ones to suffer from “marginalisation” and “isolation”¹³, as well as from being “locked up in communitarist schemes”¹⁴. Both socio-economic and socio-cultural aspects play a role in this problem perception. Indeed, the cause for concern is precisely the idea that socio-economic disadvantage in the labour market and in education and housing overlaps with ethnic and cultural difference, i.e. that socio-economic gaps and cultural cleavages are mutually reinforcing each other. When specifying the differences in values and customs they find problematic, politicians in France and the Netherlands refer first to matters related to gender, family and sexuality, including forced marriages, domestic violence, child rearing, polygamy and, in the Netherlands, homosexuality and second to issues regarding religion and church-state relations. It is in these respects that groups of migrant origin – and more particularly, though rarely explicitly mentioned, of Muslim faith – are deemed most worryingly different from the host society.

However, French and Dutch politicians offer very different accounts when defining why family migration in particular presents a problem that requires policy intervention. The French government has only referred to the size of family migration flows – almost twice the size of student inflow and more than six times that of labour immigration – to illustrate why this particular type of migration should be subjected to an integration requirement¹⁵. French politicians presented the problem of family migration as purely quantitative in nature, not qualitative. The Dutch government on the other hand has elaborated at length on the problematic nature of family migration, not only in terms of size but also in terms of the type of migration. It stated that “the large scale immigration of the last ten years has seriously disrupted the integration of migrants at the group level. We must break out of the process of (family) migration which time and again causes integration to fall behind”. “Normally”, the government stated, each new generation with a migrant background would grow up to be better integrated than their parents. This progressive process however was obstructed “by the fact that a large number of second generation migrants opts for a marital partner from the country of origin”, thus continuously importing new first generation migrants¹⁶.

The Dutch government proceeded to explain which family migrants in particular were cause for concern and why. It argued that “an important part of these [family migrants] has characteristics that are adverse to a good integration into Dutch society. Most prominent among these – also in scale – is the group of marriage migrants from Turkey and Morocco”. More than half of second generation migrants of Turkish and Moroccan background married a partner from their parents’ country of origin. Of these Turkish and Moroccan marriage partners, only 60% and 41% respectively had

¹¹ AN, plenary, 10 February 2004.

¹² TK 29700 (6): 47, 6 December 2004.

¹³ TK 27083 (44): 6 & 9, 21 June 2004; TK 28198 (5): 6, 4 October 2002.

¹⁴ AN, plenary, 19 September 2007.

¹⁵ AN, *Projet de loi No 57*, 4 July 2007.

¹⁶ TK 29700 (3): 2-4, 21 July 2004; TK 29700 (6): 3, 6 December 2004.

completed more than primary education. Unemployment of this population was three times higher than the native population. In addition, the government indicated that these migrants had few contacts with Dutch people, were strongly oriented towards their own group, identity and culture, and held “traditional opinions regarding [women’s] emancipation”. Given these research findings, these family migrants were deemed unlikely to integrate successfully into Dutch society both in socio-economic and socio-cultural terms. Although the refugees’ situation and that of their family members was somewhat less well documented, the government stated that the available data indicated that “follow-up migration” among refugees in the Netherlands was a cause for equal concern¹⁷.

Both the facts that such detailed information about the socio-economic position and socio-cultural attitudes of particular ethnic groups was available and that the government did not hesitate to present this data to support its policy proposal, are in line with the “national models” representation of the Netherlands as pluralist. In Dutch policies and research since the 1980s, it has been common practice to examine and address the needs of different migrant groups separately and explicitly (Scholten, 2007, p. 80-82). This contrasts with French practice, where reluctance to recognize particular group identities has led politicians to shy away from labelling immigrants as groups, both in discourse and in policy, and researchers from applying ethnic criteria in their studies (Amiriaux & Simon, 2006). This “universalist” approach is clearly reflected in the debates about civic integration abroad. French government officials and parliamentarians speak about “immigrants” or “foreigners”. References to specific nationalities or regions of origin are rare and data about particular immigrant groups are absent.

Thus, the pluralist and universalist “models” are clearly identifiable in the ways in which Dutch and French politicians present family migration as a policy problem. Whereas the Dutch explicitly and extensively argue why they consider the inflow of particular groups of family migrants highly problematic, the French discourse remains much more abstract and general, referring only to the size of inflows, not to characteristics or categories of family migrants.

However, one episode in the French parliamentary debate reveals that the French government’s perception of “problematic” family migrants was very similar to the Dutch government’s perception. In the Senate, the submission of foreign spouses of French nationals to the integration abroad requirement was cause for lengthy debates. The Commission which prepared the plenary debates unanimously adopted an amendment eliminating this requirement. It argued that spouses of French citizens should benefit from a “presumption of integration” and that they would learn the language much more effectively in France with their French partner¹⁸. In the Commission meeting, Socialist as well as UMP Senators declared that reunification with a foreign resident and reunification with a French spouse were distinct cases which should be subjected to different regulations¹⁹. Thus pressured to defend his

¹⁷ TK 29700 (3): 4, 21 July 2004; TK 29700 (6): 3, 5, 14-16, 6 December 2004.

¹⁸ Sénat, *Rapport No 470*, 26 September 2007.

¹⁹ Sénat, *Commission des lois*, 26 September 2007.

proposal, Minister Hortefeux reverted to an extremely rare explicit reference to the regions of origin of family migrants. He emphasised that, while the Senators seemed to have spouses from Australia or Canada in mind, in fact 43,000 out of a total 60,000 spouses of French citizens came from Africa, 12,000 of which from Sub-Saharan Africa. Hence, Hortefeux declared that application of civic integration abroad to these marriage migrants “indeed seems necessary to us”²⁰. The government proposal was saved by an amendment put forward by UMP Senator Del Picchia, exempting the foreign spouse of a French citizen residing abroad and wishing to return to France for professional reasons, from fulfilling the integration requirement. The Senator gave the example of a “young French executive sent abroad, who marries a local national” and who “wishes to return to France for professional reasons shortly after his marriage”. In such a case, the spouse should be “entirely exempted from the formalities of the test and course abroad”. This amendment solved the problem for the right-wing majority in the Senate and the integration abroad criterion for foreign spouses of French nationals was reintroduced. Arguments from the Socialists that “the marriage to a French citizen is, in itself, a sign of a will to integrate with regard both to language and to the Republican values” were of no avail²¹.

Thus, it seems that the French government and right-wing Senators had two distinct cases in mind: that of a French expatriate, probably well-educated and professionally successful, meeting a partner abroad on the one hand, and that of a French citizen, probably of African background, marrying a partner from his country of origin on the other hand. It was the latter type of family migration which was considered problematic, not the first. The Socialist Senators were quick to point out that “the target of this bill is (...) the marriage of a young French man or woman whose family is of foreign origin with a foreigner from his or her parents’ country of origin”²². The French supporters of civic integration abroad then, like the Dutch government, considered chain migration through marriage with French residents of migrant background as the problem that the integration requirement was intended to alleviate.

Thus, it appears from our analysis thus far that “national models” have influenced the form of the debates in France and the Netherlands much more than its underlying purport and outcome. Explicit reference by the Dutch to the ethnic groups that civic integration abroad aimed to target and French reticence to do the same certainly reflect deeply rooted discursive and institutional structures which are country-specific. “National models” decisively shaped the limits of what politicians deemed proper to express and the lines of argument that they chose to use. Underlying these very different ways of naming the problem however was a highly similar definition of the group that politicians aimed to target, that is of the group that was considered to pose a problem.

²⁰ Sénat, plenary, 2 October 2007.

²¹ Sénat, plenary, 3 October 2007.

²² Sénat, plenary, 3 October 2007.

Dealing with Otherness²³

French and Dutch modalities of civic integration abroad programs are crucially different even though their perception of the societal “problem” that civic integration abroad was designed to alleviate was very similar as were the legal definition of the target group and the underlying perception of which family migrants posed problem.

In France, family migrants are obliged to participate in an evaluation of their knowledge of the French language and Republican values. Should this knowledge prove insufficient, they must attend a course before being granted entry into France. The courses are organised free of charge by a governmental agency. Admission is conditional on satisfactory participation in the evaluation and course not on achieving a certain result. In contrast, the Netherlands requires family migrants to prove basic knowledge of Dutch language and society by passing a test before granting them admission. The Dutch government does not provide the courses or learning material. However, it has compiled a practice pack available for 63.90€ including a film, a picture booklet about Dutch society, an exhaustive list of questions that may arise during the knowledge of society test, and a set of mock language tests. Applicants are charged 350€ each time they take the exam. In other words, the Dutch civic integration abroad policy is much more stringent than the French.

This difference is related to civic integration abroad objectives. In both countries, the government has indicated that the primary purpose was to improve the overall integration process of family migrants by ensuring that they entered the country well-prepared. From there however, the objectives diverged significantly. In the eyes of the Dutch government, civic integration abroad was to ensure at the earliest possible stage, that both the migrant and his or her family member in the Netherlands were aware of their responsibility for the integration of the newcomer into Dutch society and of the active efforts that were expected of them²⁴. Moreover, the government explicitly presented its civic integration abroad criterion as a “selection mechanism”. The criterion would select migrants based not on education, income or origin as this would infringe on the right to family life guaranteed by the European Convention on Human Rights, but based on “motivation and perseverance”. Since the government would not assist applicants in preparing for the exam, a substantial investment of time and resources would be required of them. This was deemed not only acceptable but even recommendable since appealing to the “personal responsibility” of the persons concerned would “yield the best results”²⁵. Moreover, “the foreigner might also face difficulties in the integration process after arrival in the Netherlands which it will be up to him to overcome”²⁶. Those unable to attain the required level of knowledge through their own means while abroad were expected to “experience serious problems integrating once in the Netherlands” and would therefore “not be granted permission to settle in the Netherlands”. Although reduction of immigration was “not a primary

²³ This section is partly based on an article that I am writing in collaboration with Doutje Lettinga to whom I am indebted for fruitful exchange and inspiring ideas.

²⁴ TK 29700 (3): 5-6, 21 July 2004; TK 29700 plenary: 4002, 22 March 2005.

²⁵ TK 27083 (44): 24, 21 June 2004.

²⁶ TK 29700 (3): 13-14, 21 July 2004.

goal”²⁷, an expected “side-effect” of the new integration requirement was a decrease in family migration flows by an estimated 25%²⁸. The government welcomed this prospect. “A reduction of the inflow of migrants whose integration into Dutch society can be expected to lag behind will alleviate the problem of integration”²⁹.

The French government on the other hand emphatically presented the evaluation and courses abroad as a service offered to family migrants by the state for their benefit as an “additional means given to strangers who wish to settle in France to prepare their integration”³⁰. The UMP rapporteur explicitly stated that “our objective is not to limit family reunification”³¹. The fact that there would be an obligation of effort, not of result, and that the courses would be offered for free, underpinned this presentation of civic integration as an integration provision rather than as a measure to control immigration.

Thus, we observe that while problematic Otherness was defined in very similar terms in France and in the Netherlands, the French and the Dutch opted for very different ways of dealing with this Otherness through civic integration abroad. A first explanation for this difference lies in the judicial constraints that weigh upon family migration policies in these two countries. In France, the “right to a normal family life” is considered a “*principe général du droit*”, the equivalent of a constitutional right, protected as such by the Constitutional Council (GISTI, 2002). This constitutional protection played a significant role in the parliamentary debates. In particular, members of the governmental majority in the *Assemblée Nationale* presented amendments that would have made the French civic integration abroad policy much more similar to the Dutch. Two UMP deputies proposed that admission be made conditional on passing the test rather than on mere participation in the evaluation and the course³². Two other amendments were submitted by the UMP to the effect of charging applicants for the costs of the evaluation and course, possibly to be refunded after satisfactory participation³³. The government however advised against the adoption of these amendments, with regret, as “the Constitutional Council would most certainly censor a provision that would thus infringe upon the right to family reunification”. All four amendments were withdrawn³⁴.

In the Netherlands, no such constitutional protection exists. The Dutch courts, in family reunification cases, refer to Article 8 of the European Convention on Human Rights, which guarantees the right to family life. Article 8, as interpreted by the European Court of Human Rights in Strasbourg, does not grant a right to family reunification. However, it does oblige states to strike a fair balance between the interest

²⁷ TK 29700 (6): 43, 6 December 2004.

²⁸ TK 29700 (3): 14-15, 21 July 2004.

²⁹ TK 29700 (3): 6, 21 July 2004.

³⁰ Sénat, plenary, 3 October 2007; cf. AN, plenary, 18 September 2007.

³¹ AN, plenary, 19 September 2007.

³² AN, *Amendement No 64*, 14 September 2007; AN, *Amendement No 84*, 17 September 2007.

³³ AN, *Amendement No 70*, 17 September 2007; AN, *Amendement No 83*, 17 September 2007.

³⁴ AN, plenary, 19 September 2007.

of individuals in living with their family and the general interest of the host society. Thus far, the Court has granted states quite some leeway in defining and protecting this general interest (Van Walsum, 2004). The French Constitutional Council has a stricter interpretation of the obligations imposed on the state by the right to family life. Thus, the right to family reunification, although by no means absolute, enjoys a higher standard of protection under the jurisprudence of the French Constitutional Council than under the Court in Strasbourg (Labayle, 2007, p. 105-106, 111, 114). Therefore, the possibilities for the French government to impose obstacles to family migration were more limited than the Dutch.

Beyond these distinct judicial constraints however, I discern patterns in the ways of speaking about civic integration abroad and its intended purposes, as well as in the policy choices that have been made which appear to have been shaped by “national models” of migrant integration. This may seem surprising at first sight. Indeed, the classic “national models” approach appears wholly inadequate to explain the fact that “multicultural” Netherlands has implemented a civic integration abroad policy that exerts more pressure on family migrants to adapt to Dutch language and customs than “assimilationist” France. To Joppke (2007, p. 2), current Dutch civic integration policy provides significant ammunition to his argument that “the notion of national models no longer makes sense, if it ever did”. While acknowledging that the notions of “multiculturalism” and “assimilationism” as defined by Castles (1995) yield little insight into the difference between Dutch and French civic integration abroad programs, I hold that country-specific discursive and institutional structures have in fact informed the decision-making process and shaped its outcomes.

In France, the government considered the French language “an essential component of national identity and a vector of adhesion” and knowledge of Republican values “in itself a guarantee of integration”³⁵. This reveals a belief in the universal attraction exercised by French culture and values, a belief wholly shared by parliamentarians from the Left to the Right which Brubaker (1992, p. 11) labelled “messianic universalism” and traced back to the Revolution and Napoleonic expansion. This explains in part why the French opted for an obligation of effort through their requirement to participate in a course rather than an obligation of result requiring successful completion of an exam. It was thought sufficient to put immigrants in contact with French language and values in order to arouse their adhesion. Furthermore, the active role adopted by the French state in organising and financing the courses reflects the strong social engineering role accorded to the state and its institutions in disseminating the values of French citizenship, of which the “internal *mission civilisatrice* carried out by the Third Republic’s army of school teachers” (Brubaker, 1992, p. 11) is a classic historical example. Finally, the reticence of French politicians to refer to specific ethnic or national groups of family migrants completes the picture of a country which is confident that any foreigner, regardless of her background, can be educated by Republican institutions to be a French citizen. In this “model” of dealing with Otherness, where citizenship is a state of mind or

³⁵ AN, *Projet de loi No 57*, 4 July 2007.

practice based on shared universal values which can be acquired, it makes sense to design civic integration abroad as a tool to improve integration, not to bar entry.

In contrast, in the Netherlands, politicians make constant explicit reference to particular ethnic groups of family migrants, providing detailed statistics about their socio-economic and socio-cultural integration. This reflects an approach which Rath (1991) has called “minorisation”: a process in which migrants are constructed as “problem groups” by politicians and researchers. Minorisation revolves around “non-conformity”. Migrants are “represented as people with a way of life and mentality which deviates from the Dutch norm”. This non-conformity is considered to be problematic because it is associated with a weak socio-economic position (p. 112). Rath argues that “minorisation is a characteristic of Dutch social history” (p. 131). It goes back at least to the second half of the 19th century when so-called “asocials” were subjected to intensive state care and re-education. Like the migrants in later times, these members of the Dutch lower class were “problematized because of their socio-cultural “deviations”, in so far as these might affect their participation in society” (p. 132-143). Ghorashi (2006, p. 8-17) builds on Rath’s analysis by identifying “categorical thinking” as a crucial characteristic of the Dutch approach to migrant integration from the 1960s until today. This “categorical thinking” entails an essentialist conception of culture – where culture is considered an immutable characteristic of people instead of an ever-changing social construct. Gorashi traces this back to pillarisation when most realms of Dutch society were strictly divided into a catholic, protestant, socialist and liberal pillar. Pillarisation has left the Netherlands with a legacy of thinking in terms of immutable dichotomy between “Us” and “Them” which makes it “seem almost impossible to detach the individual migrant from his/her cultural and/or ethnic category”. Like Rath, Ghorashi argues that cultural difference has been considered problematic because it has been associated with – and in her view even seen to cause – a disadvantaged position in the labour market and the education and housing sectors. Thus, the Netherlands has a tradition of approaching migrants as “groups”, even “problem groups”, where the socio-cultural properties of the members of an immigrant group are thought to be essential and unchangeable and are thought to determine their chances for improving their socio-economic position in society. This conception of belonging sheds light on the decision to use Dutch civic integration abroad policies as a “selection mechanism”. While in France citizenship is seen as a property that can be acquired, in the Netherlands the properties of individuals tend to be seen as determined by their membership of a specific group. Since the Dutch do not share the French confidence in the capacity of state institutions to “create” citizens, they are inclined to regard group differences as lasting and irremediable. If difference is thus considered “sticky”, it makes sense to strive to keep out those believed to be problematically different. This would explain why the Dutch civic integration abroad program is designed to deny entry to those unable or unwilling to adapt to the Dutch ways.

Conclusion

In recent years, both the Netherlands and France have implemented highly innovative policy reform. They have introduced integration requirements at entry

for family migrants. French and Dutch civic integration abroad programs have been designed to solve a problem defined in very similar terms: the disintegration of society into antagonistic groups due to past and present migration flows and failing migrant incorporation. Frequent references during parliamentary debates on issues related to gender, sexuality and family as well as church-state relations, reveal that the Muslim population is found to be the most problematically different.

The legal definition of the target group of civic integration abroad is very similar in France and the Netherlands. Family migrants between 16 and 65 years old are subject to the integration requirement. However, the rationale of these two governments for targeting family migration, i.e. the construction of the family migrant as the problematic Other, is very different, at least in form. While the French government points only to the size of family migration flows and avoids reference to characteristics of family migrants or their region of origin, the Dutch government emphatically presents family migration as problematic both in quantitative and qualitative terms, painting a bleak picture of chain migration which causes marginalisation to be reproduced from one generation to the other, especially in the case of marriage migrants from Turkey and Morocco. This fits with the tendency, well documented in the “national models” literature, of the French to disregard the cultural, ethnic or religious background of migrants as irrelevant, and of the Dutch to acknowledge ethnic and cultural belongings and to define policy target groups along such criteria. However, beyond the form, i.e. beyond the terms and arguments employed in political debates, this analysis has shown that “problematic” family migration was in fact defined quite similarly in France and in the Netherlands. The “problem” is migration resulting from second or third generation migrants marrying partners from their (grand)parents’ country of origin, especially when they originate from Turkey, the Maghreb, Sub-Saharan Africa, or similar parts of the world.

Thus, “national models” appear to have had little influence on the way in which the Other was defined in the debates about civic integration abroad. However, they have partially shaped the distinct ways in which France and the Netherlands have dealt with this Otherness through civic integration abroad. While the French program was presented as a service provided to immigrants to improve their integration, the Dutch program was designed to work as a “selection mechanism”. This difference should be partly considered the result of different judicial constraints, i.e. the protection of the right to family reunification by the French Constitutional Council, a constitutional protection which is absent in the Netherlands. In addition, I argue that historically rooted conceptions of citizenship and belonging have played a role. In France, “Otherness” is thought of as remediable. There is faith in the capacity of the Republic to transform a foreigner into a citizen. Hence the obligation to participate in the evaluation and course and not to pass a test, i.e. shaping civic integration abroad as an integration provision, not a tool of migration control. In contrast, migrants in the Netherlands are considered members of a group, permanently endowed with the characteristics of that group. Since Otherness is almost irremediable, those who are problematically Other should be kept out. Hence the obligation of result and the use of civic integration abroad as a selective migration tool.

“National models” in their classic definition offered by Castles (1995), i.e. multiculturalism in the Netherlands and assimilationism in France, yield little insight in the differences between the French and Dutch civic integration abroad programs. However, Joppke (2007) seems to throw away the baby with the bath water when he states that “national models” have lost their value as analytical tools. Incorporating country specific discursive and institutional structures in our analysis remains essential if we are to understand why different countries deal with Otherness in different ways.

CHAPTER IV

Some foreigners more equal than others under EU law

Chloé HUBLET

Introduction

European Union (EU) competence for the construction of a European immigration policy¹ raises some questions regarding the application of the principle of non-discrimination on the grounds of nationality to third country nationals (TCNs)² for at least two reasons.

First, the European Council's political objectives allow for a comparison of the situation of TCNs and EU citizens and, eventually, an assessment of the proportionality of the remaining differences in treatment. Indeed, during the Tampere Council of October 1999, the European Council affirmed its will to approximate "the legal status of third country nationals to that of Member States' nationals" (European Council, 1999, § 21) granting TCNs legally residing in the EU for a certain period of time "a set of uniform rights which are as near as possible to those enjoyed by EU citizens" (European Council, 1999, § 21). The European Council repeated this intention during its meeting on 30 November and 1 December 2009 through the adoption of the Stockholm Programme. In fact, the Council affirmed that the EU "must ensure fair treatment of third country nationals legally residing in the territory of its Member states" and that TCNs should be granted "rights and obligations comparable to those of EU citizens" (European Council, 2009, § 6.1.4).

Secondly and in the opinion of many authors (Cholewinski, 2002, p. 40-41; Groenendijk 2006, p. 84; Bell 2001, p. 54), the material extension of the scope of application of EU law resulting from the Amsterdam Treaty to an area concerning TCNs (EU immigration and asylum policy, i.e. former Title IV of the Treaty on the

¹ Already introduced by the Maastricht Treaty (1992).

² Nationals of non-member countries of the EU.

European Community (ECT)) raises the question of the application of Article 18 of the Treaty on the Functioning of the European Union (TFEU) (former Article 12 ECT) to TCNs. This article prohibits discrimination on the grounds of nationality. Within the scope of application of EU law, could Article 18 TFEU be invoked to challenge differences in treatment among TCNs? For example, on the basis of Article 7 (2) of the Family Reunification Directive (Directive 2003/86)³, Germany and the Netherlands have both conditioned the granting of a family reunification visa on the successful completion of an integration examination, testing host society language, history and culture. Certain nationalities are, however, exempt from this obligation. The result is a difference in treatment of TCNs on the basis of their nationality. Could that difference in treatment be challenged under Article 18 TFEU? Could Article 18 TFEU even be invoked to challenge differences in treatment between TCNs and European citizens within the scope of application of the Treaty? For example, as regards the right to family life, conditions for family reunification are very different if the sponsor is a European citizen or a TCN (Bribosia, 2003). Could the legitimacy of these differences in treatment be assessed in light of the principle of non-discrimination on the basis of nationality enshrined in Article 18 TFEU?

Article 18 TFEU was originally included in the 1957 Treaty of Rome to improve market integration⁴. It was not included as a means to address human rights considerations. Most likely as a result of its economic *rationale*, and even after the EU was granted competence in immigration policy, Article 18 TFEU has classically been interpreted as applying only to differences in treatment amongst European citizens⁵.

This chapter will first discuss the legal arguments that could be advanced to challenge such a classic interpretation. The chapter will also discuss the recent unambiguous confirmation by European Court of Justice (ECJ) of this interpretation of Article 18 TFEU. The final section will analyze the consequences of this interpretation for the protection of TCNs against discrimination on the grounds of their nationality and will discuss other potential means of protection under EU law. Particular attention will be given to the European Charter of Fundamental Rights, the European Convention on Human Rights which according to the European Court of Justice should be considered general principles of EU law, and to the general principle of equal treatment. This chapter will also address the prohibition of indirect racial, ethnic or religious discrimination as an alternative way of protecting TCNs against nationality-based discrimination. As illustrated later in the chapter, none of these potential means of protection are an effective remedy for TCNs fighting discrimination on the basis of nationality.

³ Taken on the basis of Article 79 (2) (a) TFEU (former Article 63 (3) (a) EC)).

⁴ Prohibition of nationality discrimination is required in order for individuals to exercise freedom of movement.

⁵ Nationals of EU Member States.

The personal scope of Article 18 TFEU: an evolution at last⁶?

Article 18 TFEU reads as follows:

“Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. (...)”.

While the ECJ has been very generous in its interpretation of this provision in order to give full weight to the fundamental EU right of freedom of movement (Dony, 1999; O’Leary, 1997, p. 105-136), it has done so only for the benefit of European citizens. According to Bell, this limited personal scope of application of Article 18 TFEU could be explained by its association with the personal scope of freedom of movement (2002, p. 37-38) which has always been granted to European citizens only. This is exactly the reason why the ECJ has been unable, until now, to criticise cases of reverse discrimination (cases in which nationals of a Member State, having never made use of their free movement right, are disadvantaged by their own national State as compared to the situation of European citizens), given that prohibition of discrimination on grounds of nationality does not apply to purely internal situations (Dautricourt & Thomas, 2009), the “free movement element” being absent. Instead of providing some protection at the EU level, the ECJ has always relegated the solution of such discrimination to the national legal system.

In a sense, this association could be perceived as logical since the need to be protected against discrimination on the basis of nationality can only arise when there is movement of an individual to a country other than his or her own, exposing him or her to potential discrimination on the basis of nationality. Nevertheless, arguments can be made against the association of the personal scope of application of Article 18 TFEU with the personal scope of freedom of movement and, thus, against the resulting inapplicability of Article 18 TFEU to TCNs.

As regards the right to freedom of movement, it is incorrect to assert that movement from one Member State to another is required in order for the principle of non-discrimination on grounds of nationality to be relevant. Rather, an element of “foreignness” is required but, as the case of reverse discrimination demonstrates, a national could be discriminated on the basis of nationality within his or her own country. As for TCNs, they have moved from their country of origin to the EU and, therefore, could potentially be exposed to discrimination on the basis of nationality without actually moving from one Member State to another within the EU.

Moreover, the scope of the right to freedom of movement is not cast in stone. Initially accorded only to European citizens who moved for work in another Member State, under certain conditions it has been extended to economically inactive citizens (Carlier, 2007, p. 58). Its scope has even been expanded to include TCNs. In addition to “privileged foreigners” (family members of European citizens, TCNs working

⁶ This part is a summary of a previous publication: Hublet, C., 2009. The scope of Article 12 of the Treaty of the European Communities vis-à-vis third-country nationals: evolution at last? *European Law Journal*, 15 (6), p. 757-774.

for a European company providing services in another Member State, and those coming from a country which has signed a cooperation agreement with the EU), long term resident TCNs benefit, under very strict conditions, from a limited “freedom of movement” (Carlier 2007, p. 77) or more accurately, from a right to reside in another Member State (see Chapter III of the Long Term Resident Directive). One can reasonably expect that the personal scope of application of the right to freedom of movement will continue to evolve since it has already done so. An important indication that the scope of this right may eventually include TCNs is the fact that, while former Article 63 (4) EC referred to the right of TCNs who are legally resident in a Member State to reside in another Member State, Article 79 (2) (b) TFEU now refers to “the rights of third country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States”.

Furthermore, the association of the scope of the prohibition of nationality-based discrimination with that of the right to freedom of movement is not convincing. Indeed, Article 18 TFEU applies “within the scope of application of the Treaties” and this scope is not limited to the freedom of movement as the EU’s competences have broadened since 1957. In fact, the scope of application of EU law was extended by the Treaty of Amsterdam (Articles 77-79 TFEU, i.e. former Title IV ECT) to immigration and asylum policies. Since these “new” EU policies apply principally to TCNs, the material extension of the scope of application of the Treaties creates an extension of the personal scope. There is a need for a link with the Treaties in order to fall “within the scope of application of the Treaties”. Without a doubt, a new EU competence constitutes such a link to EU law. Therefore, there is no legal reason to limit the personal scope of Article 18 TFEU to the personal scope of the right to freedom of movement. The extension of the material and personal scope of EU law, and the fact that Article 18 TFEU should not be limited to the scope of the right to free movement, strongly suggest the need for a reinterpretation of Article 18 TFEU such that it could apply to TCNs the moment they find themselves in a situation governed by EU law, for example within the scope of application of Articles 77-79 TFEU.

If legal arguments plead for an application of Article 18 TFEU to TCNs, then the question of its range arises. Indeed, could it be applied to the differences in treatment between TCNs and European citizens, or, only to the differences in treatment among TCNs? Some authors suggest that, since Article 18 TFEU applies “without prejudice to any special provisions contained [in the treaties]”, it could not, in any way, be applied to the differences in treatment between European citizens and TCNs (De Bruycker, 2003, p. 46; Cholewinski, 2002, p. 41). Indeed, in this opinion, former Title IV ECT (Articles 77-79 TFEU) on immigration policy would have to be understood as such a special provision because it is based on the very distinction between TCNs and European citizens. However, if immigration policy is indeed based on the distinction between the national and the foreigner, it must be stressed that it is not based on their discrimination. Distinction or difference in treatment as such do not constitute discrimination. Discrimination is an unjustified difference in treatment (not having a legitimate aim or using disproportionate means). In reality, as the ECJ has

explicitly stated in *Cowan*⁷, the special provisions referred to in Article 18 TFEU are implementations of the principle of non-discrimination on grounds of nationality in a particular area⁸. In fact, several provisions of the Treaty put the general principle of Article 18 TFEU into practice in a particular area, for example with regard to the freedom of movement of workers. Once a Treaty article implements the principle in a particular area, and in a particular way, that article will be applicable. The identification of the applicable provision has consequences on the justifications that can be offered for the differences in treatment based on nationality. Thus, for example, Article 45 (2) TFEU prohibits discrimination on the basis of nationality within the area of free movement of workers. Article 45 (3) TFEU limits the justifications that can be invoked in order to justify a difference in treatment among workers of the Member States. In cases where the right to free movement of workers applies, only reasons relative to public order, public security or public health can be invoked to justify a difference in treatment (Schergers, 2004, p. 98-99). Could it be claimed that application of Article 18 TFEU “without prejudice to any special provisions of the Treaties” means that the principle of Article 18 TFEU does not apply the moment the Treaties create discrimination on the basis of nationality? Martin (1995, p. 22) rightly states that it should not. Indeed, the contrary would deprive the principle of much of its useful effect, as it would apply only as far as the authors of the Treaty wanted it to apply, i.e. most likely not in sensitive situations, including the migration field. What would be the value of a principle that could be so simply eluded? Besides, given the general character of the principle of equality in EU law (see *infra*), it seems reasonable to stipulate, at the very least, that the exception to the principle of non-discrimination on the basis of nationality must be explicit (Constantinesco *et al.*, 1992, p. 67-68). Articles 77-79 TFEU do not include the possibility for discrimination against TCNs, only the possibility for differences in treatment, which is not the same.

Until recently, the ECJ did not explicitly contradict the potential application of Article 18 TFEU to TCNs. Its position was rather vague. In fact, many cases dealing with Article 18 TFEU concerned European citizens. If the Court did not extend the principle to TCNs, it was simply because they were not involved in these cases. Moreover, various cases referred to in the literature as illustrations of the classic interpretation of Article 18 TFEU did not, in reality, deal with Article 18 TFEU but with one of the special provisions or regulations of EU law implementing the principle contained in Article 18 TFEU and applying explicitly to European citizens only. For example, Denis Martin (1995, p. 24) relies on the *Buhari Haji* case⁹ to justify the classic interpretation of Article 18 TFEU as only applying to European nationals. But, in reality, this case dealt with the application of Regulation 1408/71, which stated, in Article 2 §1, that it applied only to persons who were citizens of a Member State. It can therefore be argued that this restricted personal scope of application is not *ipso*

⁷ ECJ, Case 186-87, *Ian William Cowan v. Trésor public*, (1989) ECR 195, § 14.

⁸ See, for example, Articles 45 TFEU (free movement of workers), 49 TFEU (freedom of establishment), and 56 TFEU (freedom to provide services).

⁹ ECJ, Case C-105/89, *Ibrahim Buhari Haji v. Institut national d'assurances sociales pour travailleurs indépendants*, (1990) ECR I-4211.

facto destined to define the personal scope of application of Article 18 TFEU in other fields of application of the Treaty.

The ECJ's position in *Vatsouras and Koupatantze*

In June 2009, in its case *Vatsouras*, the ECJ affirmed very clearly that Article 18 TFEU was not meant to be applied to TCNs¹⁰. The case concerned two Greek nationals who had come to Germany for work. Mr Vatsouras had worked for almost a year before being unemployed for five months after which he found another job. The wage earned during his first job was, however, not enough to assure him a minimum standard of living resulting in a successful request for a supplement from German social security. This supplement was, however, withdrawn upon his dismissal. Mr Koupatantze, on the other hand, had been working for a much shorter period before being unemployed for reasons independent of him. He then requested an unemployment allowance which was also granted. Four months later, however, this allowance was withdrawn retroactively. Six months after his dismissal Mr Koupatantze found another job.

In both cases the withdrawal of social benefits were justified on the basis of section 7, paragraph 1, second sentence of Book II of the German Code of Social Law regarding benefits for job-seekers (*Sozialgesetzbuch II*), which states that “foreign nationals whose right of residence arises solely out of the search for employment, their family members and those entitled to benefits under Paragraph 1 of the *Asylbewerberleistungsgesetz* (Law on the benefits to be granted to asylum-seekers)” are excluded from those benefits. Both Vatsouras and Koupatantze challenged the withdrawal of benefits before the national social court. Section 7, paragraph 1, second sentence of the *Sozialgesetzbuch II* had been amended when transposing the Union Citizens Directive (Directive 2004/38). Citing Article 24 (2) of the Directive, allowing Member States to make exceptions to the principle of equality in matters of social security for persons other than workers (Minderhoud 2009, p. 225-227), the *Sozialgesetzbuch II* introduced that exclusion. The national judges identified a question of conformity with EU law and referred a preliminary ruling to the ECJ including three questions. The questions sought to confront the validity of Article 24 (2) of the Union Citizens Directive with the principle of equal treatment.

This chapter will not focus on the first two questions (see Fahey, 2009 on this matter) but only on the third one which is of particular interest. Indeed, the third question asked whether the principle of non-discrimination on the basis of nationality enshrined in Article 18 TFEU precludes national rules which exclude nationals of Member States of the EU even from the receipt of the social assistance benefits which are granted to irregular immigrants.

It did not receive much attention from either the Advocate General or the Court, each of whom dedicated only a few paragraphs to their response.

Indeed, the answer to the question was not necessary for the solution of the case. In my opinion, it was meant not so much as a question but rather as an additional argument for the national judge pleading for the non-conformity of Article 24 (2) of

¹⁰ ECJ, Joined cases C-22/08 and C-23/08, *Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900*, (2009) ECR I-04585, § 52.

Directive 2004/38 with primary EU law. Most likely, he wanted to highlight the fact that social assistance could be denied to European citizens while “even” irregular migrants were afforded some assistance.

Nonetheless, the question was answered by both the Advocate General and the Court. It is interesting to note that this question poses the issue from the opposite angle than the one referred to in the introduction of this paper. Here, in the eyes of the German judge, European citizens are placed in a more disadvantageous position than TCNs. However, there is no reason to think that the Court’s response would have been different had the disadvantageous position been occupied by a TCN. Indeed, the Court formulated its response in a very general way making it difficult to argue from then on, that, when appropriate, Article 18 TFEU could be applied to TCNs. The Court reformulated the question in § 50 of its judgment in a more general way by asking “whether [Article 18 TFEU] precludes national rules which exclude nationals of Member States from receipt of social assistance benefits in cases where those benefits are granted to nationals of non-member countries”. Following the conclusions of its Advocate General, the Court replied that Article 18 TFEU does not prohibit excluding European citizens from the benefits of social allowance afforded to TCNs (§ 53) because:

“[Article 18 TFEU] concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries” (§ 52).

The classic interpretation of Article 18 TFEU was thus confirmed. It can only be applied to European citizens and can therefore only be invoked by them.

After such an unambiguous and general statement, it is hardly arguable that Article 18 TFEU could still potentially be applied to TCNs. This ECJ statement is welcomed for its clarity, as, to my knowledge, it is the first time the Court looks at the application of Article 18 TFEU to TCNs without a more specific provision of the Treaty being invoked at the same time. This statement raises further questions however.

It is striking that no explanation of the Court’s interpretation is given in the reasoning of either the Court or the Advocate General. It seems that the original economic rationale of Article 18 TFEU, namely assuring market integration, still remains powerful enough to justify the fact that only European citizens can rely on the principle of non-discrimination on the basis of nationality, even at a time when the EU is trying to strengthen its legitimacy by developing a political integration process respectful of human rights.

It can also be asked whether the Court’s ruling can be explained by the fact that the social benefit at stake, the one afforded to TCNs, was not within the material scope of application of the Treaty. The Advocate General’s brief reasoning concerning the third question could be utilized to plead in such a direction. Indeed, in § 66 of his opinion, he states that “Community law does not provide rules for resolving issues of difference in treatment between Community citizens and citizens of non-member countries who are subject to the law of the host Member State”. However, it is indisputable that TCNs are not always governed by national law. They are sometimes subject to EU

law as, for example, within the scope of application of the European asylum and immigration policies (Articles 78 and 79 TFEU). It can therefore be argued that in the situation at hand, *Vatsouras* and *Koupatantze* were not within the scope of application of European law but were governed by German social assistance law. If this is the case, the Court's affirmation could be different in a situation concerning TCNs falling within the scope of application of EU law. However, the general character of the affirmations by the Advocate General and the Court makes it difficult to support such a view. If the reason for the non-application of Article 18 TFEU to TCNs was that the issue was outside the material scope of application of the treaty, the Court would have said so. On the contrary, it intentionally answered the third question with a general statement that Article 18 TFEU is "not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries". General statements are meant to be applied in any situation, even when a difference in treatment arises in a situation whereby both the European citizen and the TCN are within the material scope of the treaty.

Finally, the Court's statement does not make it clear if Article 18 TFEU could be applied to differences in treatment among TCNs. While it is certain that differences in treatment between European citizens and TCNs cannot be challenged on the basis of Article 18 TFEU, the potential to challenge differences in treatment amongst TCNs is not definitively exhausted. Indeed, while asserting that Article 18 TFEU concerns situations in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State, it concludes by affirming that it is not intended to apply to differences in treatment between European citizens and TCNs. This conclusion leaves the door open for the possibility of applying Article 18 TFEU to differences in treatment among TCNs.

As this case illustrates, there is a huge reluctance to apply the principle of non-discrimination on grounds of nationality to TCNs. The fact that Article 18 TFEU has been interpreted so widely and generously to the benefit of European citizens helps to explain this reluctance. In addition, the fact of its eventual application to the domain of immigration and asylum policy (Articles 77-79 TFEU in which TCNs are indisputably within the scope of application of European law) seems to frighten not only policy-makers but also the Court. There is however no reason to be frightened of the application of the principle of non-discrimination on the basis of nationality to TCNs. The "only" consequence of such an application is to provide a manner to assess differences in treatment in order to abolish discrimination, not the justified differences which could remain in place (Boeles, 2005, p. 502).

The consequences of *Vatsouras* on the protection of TCNs against discrimination on grounds of nationality

As ECJ case law is fixed for now until such time as it is overturned, TCNs cannot rely on Article 18 TFEU to challenge differences in treatment based on nationality, at least not in any case between them and European citizens. One can ask whether TCNs are therefore deprived of any protection under EU law. If so, they would have to appeal to national and international legal orders in order to be protected against discrimination on the basis of nationality. In my opinion, the application of Article 18

TFEU to TCNs could have increased their protection from discrimination because it has “direct effect” (it does not need to be implemented in national legislation before it can be invoked before national judges) and can be seen as a direct way to access legal control over the differences in treatment they face. But other means can be mobilised at the EU level to protect TCNs. These means should be elicited from human rights law, in particular from the European Charter of Fundamental Rights, the European Convention on Human Rights, the general principle of equality, and the prohibition of discrimination on the basis of race, ethnic origin and religion.

The European Charter of Fundamental Rights, now mandatory as a result of the TFEU, includes an article prohibiting discrimination on grounds of nationality. Article 21 (2) stipulates that “within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited”. It is a repetition of Article 18 TFEU and the Explanations relating to the Charter of Fundamental Rights explicitly mention that it “must be applied in compliance with that Article”. Although those explanations do not have the status of law, they are meant to be the authoritative interpretation of the Charter. As a result, the Charter’s Article 21 (2) must be interpreted as applying under the same conditions as Article 18 TFEU, with the same classic limited personal scope. This is quite disappointing considering the Charter is clearly aligned with the objectives of fundamental rights for all human beings. One could have expected the principle of non-discrimination on grounds of nationality to have a broader personal scope than that of Article 18 TFEU, which is more clearly aligned with economic objectives. The Charter might be considered as an added argument in favour of detaching Article 18 TFEU from its economic rationale in order to give the human rights dimension of the protection from discrimination its full range. Meanwhile, it remains that Article 21 (2) of the Charter will only be applicable to TCNs if Article 18 TFEU is also applicable to them. As discussed above, this is not the path that the ECJ chose to take. Thus, the Charter will most likely not be of fundamental interest to the protection of TCNs against nationality-based discrimination.

The European Convention on Human Rights (ECHR) is another possible means by which TCNs can be protected against discrimination on the basis of their nationality as it prohibits discrimination in Article 14. As the ECHR is part of EU law¹¹, protection afforded by the ECHR can be seen as protection under EU law. Concerning the differences in treatment on grounds of nationality, the European Court of Human Rights requires “very weighty reasons” in order for differences in treatment to be justified¹². Therefore, any differences in treatment undergo strict scrutiny, making them *a priori* unjustified. Nevertheless, the Court has been very keen in accepting all the differences in treatment resulting from the construction of the EU as justified by the existence, between Member States, of a “special legal order”¹³, “which has,

¹¹ Even if the EU has not yet ratified the ECHR, the ECJ considers that its content, being common to the constitutional traditions of the Member States, can be regarded as general principles of EU law, i.e. unwritten rules of law.

¹² Eur. Ct. H.R., *Gaygusuz v. Austria*, 31 August 1996, § 42; Eur. Ct. H.R., *Andrejeva v. Leetonia*, 18 February 2009, § 87.

¹³ Eur. Ct. H.R., *Moustaquim v. Belgium*, 18 February 1991, § 49.

in addition, established its own citizenship”¹⁴ (for a critique of this case law see Van Drooghenbroek, 1997, p. 8-12; Bribosia, 2004, p. 13.4/5-7). Since the Court did not explain why this special legal order could justify the particular differences in treatment at stake in those cases, it can be said that it does not operate any effective control over the differences in treatment between European citizens and TCNs, abdicating before the EU legal order. Therefore, TCNs will not find any solution from the European Court of Human Rights.

The ECJ has recognised the existence of a general principle of equality, which “requires that similar situations shall not be treated differently unless differentiation is objectively justified”¹⁵. General principles in EU law are unwritten rules of law compulsory for European institutions and for Member States implementing EU law, established by the ECJ. This general principle of equality could be argued to imply a general principle of non-discrimination on grounds of nationality under EU law, which could have a broader personal scope of application than the principle enshrined in Article 18 TFEU. However, the Court has as yet not recognised a general principle of non-discrimination, and still less, a general principle of non-discrimination on the basis of nationality. In reality, today there is no certainty of the existence of a general principle of non-discrimination, its precise difference with the general principle of equality, or the criteria that would be covered by such a principle (Martin, 2008, p. 425, 427). In 1976, the ECJ recognised the existence of a general principle prohibiting discrimination on the basis of gender (Bribosia 2008, p. 38) by affirming in *Defrenne II* that the “principle of equal pay forms part of the foundations of the Community”¹⁶. However, the Court refused to recognise such a general principle on grounds of sexual orientation¹⁷ while it acknowledged it on the basis of age in *Mangold*¹⁸ before denying it again in *Bartsch*¹⁹ (Martin, 2008). It nevertheless recently reaffirmed *Mangold* case law, affirming the existence of a general principle of non-discrimination on grounds of age²⁰. As Martin highlights, Advocate Generals are taking *pro* and *contra* positions on the existence of such a principle (2008, p. 426-427). Recently, Advocate General Sharpston affirmed the existence of a general principle of “equal treatment or non-discrimination” in EU law²¹ according to which the Dutch distinction of the resource requirement for family reunification based on whether the family relationship arose

¹⁴ Eur. Ct. H.R., *C. v. Belgium*, 7 August 1996, § 38.

¹⁵ ECJ, Joined cases 117-76 and 16-77, *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen*; *Diamalt AG v. Hauptzollamt Itzehoe*, (1977) ECR 1753, § 7.

¹⁶ ECJ, Case 43-75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, (1976) ECR 455, § 12.

¹⁷ ECJ, Case C-249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd*, (1998) ECR I-00621, § 48.

¹⁸ ECJ, Case C-144/04, *Werner Mangold v. Rüdiger Helm*, (2005) ECR I-09981, § 75.

¹⁹ ECJ, Case C-427/06, *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, (2008) ECR I-07245.

²⁰ ECJ, Case C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG*, 19 January 2010, § 21 and 50.

²¹ ECJ, Advocate General’s Opinion, Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 10 December 2009, § 40.

before the sponsor's entry into the Netherlands or later was not justified²². In its judgment of 4 March 2010, the Court followed its Advocate General in its conclusions but did not refer to any general principle of non-discrimination²³.

By analogy to the Court's reasoning in *Defrenne II*, some arguments plead for the existence of a general principle of non-discrimination on grounds of nationality, namely, the long and well established principle of non-discrimination on grounds of nationality in EU law (but for the benefit of European citizens only) and the direct effect of Article 18 TFEU. If such a general principle were to be recognised by the ECJ, its scope of application should be determined. It could be useful only if it had a broader material and personal scope of application than Article 18 TFEU. If so, it could be applied to TCNs. But why would the ECJ recognise such a general principle of non-discrimination on grounds of nationality applicable to TCNs when it has affirmed that Article 18 TFEU does not apply to them? The Court has not yet explicitly recognised the existence of a general principle of non-discrimination on the grounds of nationality applicable to TCNs and there is little hope that it will do so in the future given the *Vatsouras* case law. Once again, nationality-based discrimination faced by TCNs could hardly be challenged on this basis.

Finally, it can be argued that there is no "waterproof" frontier between the criteria of race, ethnic origin, and religion on the one hand and the criterion of nationality on the other hand (De Schutter, 2009, p. 20-23). As a consequence, a difference in treatment on grounds of nationality could be challenged, when appropriate, as an indirect difference in treatment on the grounds of race, ethnic origin or religion. This could be the case, for example, when the migrant population of one country is constituted, primarily, of one particular ethnic group. Thus, measures targeting "foreigners" could intentionally or unintentionally have a particular disadvantage for this ethnic group and could constitute indirect discrimination if there is no reasonable justification. However, it should be stressed that Directives 2000/43 and 2000/78, prohibiting discrimination on the grounds of race, ethnic origin and religion in various areas²⁴ and adopted on the basis of Article 19 TFEU²⁵ (former Article 13 ECT), explicitly mention in their common Article 3 (2) that discrimination on grounds of nationality is excluded from their scope of application. This common Article 3 (2) goes even further when it excludes conditions related to the entry of TCNs into the EU and the residence of TCNs within the EU from the directives' scope of application. More generally, this article also excludes any treatment arising from the legal status of TCNs²⁶. This

²² *Ibid.*, § 42-43.

²³ ECJ, Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, § 64.

²⁴ Only with regard to employment for the criterion of religion.

²⁵ Provision giving some capacity to act to the EU with regard to discrimination on the grounds of, *inter alia*, race, ethnic origin, and religion.

²⁶ Common Article 3 (2): "This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned".

exclusion has not yet been interpreted by the ECJ but it should be narrowly interpreted in order to give effective effect to Article 19 TFEU and to the directives' objectives. As one of the directives' objectives is to prohibit indirect discrimination, the exclusion should be construed as not covering discrimination on grounds of nationality when it can be demonstrated that this discrimination constitutes an indirect discrimination on the grounds of race, ethnic origin or religion (Hublet, 2009, p. 764-767). At the very least, the exclusion cannot be used to hide racial discrimination behind the criterion of nationality, which is supposedly "neutral" since it is not targeted by the directives. If TCNs can hope to be protected from nationality-based discrimination through the prohibition of racial, ethnic and religious discrimination, once again, there is some uncertainty as to the range of the exclusion of the criterion of nationality from the directives' scope of application, and thus as to the concrete protection they can expect.

Apparently, TCNs are in fact not properly protected against discrimination on the basis of their nationality under EU law. They will have to turn to the national legal order (De Schutter, 2009, p. 55-75) and to the international human rights legal order. Indeed, Member States must respect their obligations undertaken with respect to human rights. In international human rights law, as well as in the ECHR, the criterion of nationality is becoming more and more a suspect criterion (De Schutter, 2009, p. 43, 49, 52). This means that judges are applying a strong level of scrutiny when evaluating the justification afforded for differences in treatment based on nationality. However, it has been illustrated that the European Court of Human Rights has not applied any effective appreciation of the differences resulting from EU integration. For its part, the Human Rights Committee²⁷ qualified this position in its case *Karakurt v. Austria* in 2002 stating that:

"Although the Committee had found in one case (N° 658/1995, *Van Oord v. The Netherlands*) that an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable ground for differentiation, no general rule can be drawn from there to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant. Rather, it is necessary to judge every case on its own facts" (HRC, *Karakurt v. Austria*, 2002, § 8.4).

This seems a much more correct way of assessing the differences between European citizens and TCNs, looking at each specific case to see if the difference at stake pursues a legitimate aim and uses proportionate means to achieve it.

Conclusion

The "new" EU competence regarding immigration policy could have led the ECJ to a new construction of Article 18 TFEU, which prohibits discrimination on grounds of nationality, so that it would apply to TCNs. Indeed, as far as it applies "within the scope of application of the Treaties", it should apply to TCNs when they are in a situation governed by EU law, for example inside EU immigration policy.

²⁷ The body in charge with the monitoring of the International Covenant on Civil and Political Rights.

However, the ECJ took an opposing position in the *Vatsouras* case. With no further explanation, it confirmed the classic interpretation of Article 18 TFEU stipulating that it is “not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries”. The question remains whether it could be applied to differences in treatment among TCNs.

Other possible means of protection for TCNs against nationality-based discrimination in EU law exist though they are not as straightforward as the application of Article 18 TFEU could have been. Article 21 (2) of the European Charter of Fundamental Rights prohibits discrimination on grounds of nationality but must be applied under the same conditions as Article 18 TFEU, i.e. with the same limited personal scope of application. Therefore, it will not be of any assistance to TCNs. The same can be said for protection under the ECHR, which is not efficient since the European Court of Human Rights does not operate any real control *in concreto* of the differences in treatment resulting from EU integration. Furthermore, a general principle of non-discrimination on grounds of nationality has thus far not been recognised by the ECJ. And, given the ECJ’s position on the application of Article 18 TFEU to TCNs, there is little hope that the ECJ will recognise such a principle. The prohibition of racial, ethnic and religious discrimination and the porous frontier between these criteria and the one of nationality seems a more efficient way for TCNs to challenge differences in treatment on grounds of nationality. This approach is quite weak however. Indeed, the criterion of nationality is explicitly excluded from the scope of application of Directives 2000/43 and 2000/78 prohibiting racial, ethnic and religious discrimination in various areas, with the consequence that nationality-based discrimination cannot be challenged on the basis of the prohibition of racial, ethnic and religious discrimination, or, in the best case, only the nationality-based discrimination constituting indirect racial, ethnic or religious discrimination.

As it stands, there is a gap in the protection of TCNs from discrimination on the basis of their nationality. Legally speaking, the gap could have been filled by EU law, as there is room for a new construction of the personal scope of application of Article 18 TFEU. Unfortunately, the ECJ moved in another direction with the *Vatsouras* case. This gap could be filled at the ECHR level but that would require the European Court of Human Rights to turn around its *Moustaquim* and *Chorfi* cases. Hopefully, the gap will be covered at national and international levels. It remains that the message sent to TCNs by the ECJ’s *Vatsouras* decision is exclusive of TCNs rather than moving in the positive direction of comprehensive integration of TCNs into European society.

CHAPTER V

Borders and security: the different logics of surveillance in Europe

Didier BIGO, Julien JEANDESBOZ, Francesco RAGAZZI and Philippe BONDITTI

Border and security: decolonising the understanding of border from a security approach

The concept of border, even when limited to a geographical sense, is subject to many discussions that are related, first to the relevance or not to have a different conception of the border, irreducible to the territory and to political order, and secondly, to the relationship between the techniques of control of mobility and the location where the verification of identity takes place and where the right to visit or stay in a given state is established.

The definition or more precisely the categorisation of “Otherness”, in this perspective is not the result of philosophical discussions about values and their possibility of convergences, it is the result of these techniques of governing populations – techniques that abnormalise some while normalising others as different but compatible, and thus constitute a way to construct the former as “undesirable”, by reframing logics of passage and borders as location of exchange into borders as filters, as locks blocking some undesirable or unwanted persons while staying opened for other “desirable” persons.

This approach, which is different from seeing borders as a way to stop and to block, insists to the contrary on the fluidity of border, and takes its references in constructivist and postmodern discourses. Rather than stopping or blocking, the emphasis is on filtering, on sorting out people and banning the undesirable more efficiently. These practices have been coined in recent years as “smart border technology”. They are presented as a way to speed up travels and to facilitate freedom of circulation. But, even if this perspective is different from traditional military security, this way of thinking re-colonises borders as security institutions or as surveillance institutions (Vicki Squire, 2010).

From this distinction between different security modalities, emerges the unease towards many contemporary debates. In our view, the way borders are used to securitise and to filter people is often very far from the noise and complaints around borders as barriers, as military walls, as lines of defense, as fortresses, that the professionals of politics (and some academics) put at the forefront of their debates – either to favour such a discourse of closure in the name of a better integration of the people already present, or to criticise this discourse by creating an analogy with a war against migrants, and a neo fascist type of exclusionary practices grounded into racism.

Certainly, the “homeland security strategy” of 2002 devised in the immediate aftermath of the 2001 bombings and prior to the invasion of Iraq, is by no means a new form of associating borders and security, but a return to a very old-fashioned approach of borders as a ring of (electronic) steel which has been favoured by the military. This approach, however, has been blocked as early as 2003 as non practicable and replaced by an understanding of borders coming more from Europe (and its Schengen experiment) and from neo liberal economists understandings of borders where borders are considered as fluid and dispersed. The paradox of many critiques has been to misunderstand this double move and to continue to describe the policy of the different governments as fortress America or fortress Europe – and to call for more fluidity, a demand which coincided exactly with what the governments were doing by setting up a system where surveillance is not located at the physical borders of the state, but at any point of travel of each individual who can be traced by obliging him to pass through different procedures, depending on the level of “trust” he has acquired.

So, contemporary practices of exclusion come from a more modern vision of borders as “smart” instrument, as “fluid”, as “locus of information and communication”. And far from a classic military thinking, they adjust to a virtualisation of the borders, through which a securitisation of borders is a way to govern populations on the move, to trace them, to sort them out “smoothly”, without hurting them (too much or too visibly). The visibility of coercion at the borders is then often limited, and the violence is relocated into bureaucratic procedures of categorising, profiling and tracing people. As the critics are still often looking to the old borders locations and the detention camps nearby the borders, they fail to understand borders are not where they are supposed to be, i.e., at the territorial edges of the state. They are at the fault lines of circulation of power between elite and bureaucratic groups defining and re-categorising what borders and territory mean in Europe and in a world of globalisation through what they call “security imperatives”. They are disseminated into an archipelago of places which vary along the different travel routes¹. They are often integrated into databases and their categorisations appear more neutral and technical than before. Discrimination is based on statistics, profiles and prediction built by software and human specialists (including criminologists and sociologists) who insist that they are against criminals, terrorists, but not ethnic minorities.

The coercion is then relocated through the selection of computerized data, through the elaboration of profiling softwares claimed to have predictive capacities concerning

¹ See the map designed by MIGREUROP: www.migreurop.org/IMG/pdf/carte-en.pdf [Visited 15/10/2010].

human behaviour, through the systematic nature of biometrics identifiers and their retention in electronic format for a long period in order to refine the profiles of the next wave of suspects, and through the distribution of places where such devices can manifest their power in action (consulates for those who needs visa, travel agencies and air line companies for those travelling far, camps far away from the physical demarcation of interstate relations and their border guards, boat or foot travels afar for the authorised check points, places to get social benefits and so on).

Technology and EU bordering : not stopping people ; enhancer of freedom of circulation or surveillance mechanism speeding up their travel?

Technology plays a growing role in the contemporary transformations of bordering processes. A widening number of studies have sought to highlight how the use of technological systems such as biometrics, databases and information exchange systems, are progressively changing the ways in which borders are controlled and experienced (Amoore 2006; Bonditti 2004; Salter 2004; Muller, 2008) (For the EU context, see Broeders, 2007; Engbersen 2001; Jeandesboz, 2008).

In the EU, furthermore, one might argue that it is through the question of borders and mobility (in the context of Schengen) that a transnational system of surveillance supported by ICT has actually come into being (Mathiesen, 2001). Louise Amoore (2006) surveys the recourse to biometric technology in the context of the reshuffling of US border management organisation (particularly the VISIT programme of the US Department of Homeland Security²), and highlights that the use of such technical systems result in the inscription of the border (or rather, of multiple boundaries, including socio-biological ones) in the very body of the individual on the move. Bordering processes sustained by ICT further operate on the traces left by persons in movement: traces that they leave in the course of their bodily travel, but also traces of their transactions (e.g. credit card references when buying airplane tickets online), which in some cases, should these transactions fit into a risk “profile”, can lead to the banishment of individuals from the circuits of mobility before they have actually started their journey.

In this perspective, the notion of a “borderless world”, as advocated by some commentators, is contradicted by a consistent accumulation of findings that all point to the persistence of bordering processes. This becomes all the more evident when one actually reconsiders the way in which borders are studied, and seeks alternatives to the classical, state-focused understanding of bordering processes. This, however, does not preclude the fact that bordering processes have undergone significant transformations, at the very least since the end of the bipolar period. This has to do in part with the re-evaluation of mobility as one of the fundamental stakes and values of the contemporary period.

Borders, in the experience of individuals as well as in the way they are rationalised in governmental processes, have been dislocated and displaced, generating differentiated patterns of mobility: for some, borders materialised by checkpoints and border guard officials have all but become invisible; others might actually not

² See <http://www.dhs.gov/files/programs/usv.shtm> [Visited 15/10/2010].

even reach such checkpoints, for lack of visas and/or adequate economic, social and symbolic resources. Individuals can be moved in between borders, in the interstitial spaces of waiting zones and airport transit areas, without actually entering anywhere (Makaremi, 2008). New modalities for sorting out individuals and separating “legitimate” forms of mobility from “illegitimate” ones thus emerge, functioning not so much according to the formal geographical partition of political communities, but operating through mobility itself. In the process, state sovereignty is challenged: while even in the EU, border management is still formally a domain of national competence, the displacement of border surveillance and border security, through the increasingly transnational articulation of the practices of professionals of security narrows down the room for manoeuvre of national agencies and services.

Thirdly, in this perspective, the processes of European construction might actually stand as a key crucible for such transformations on an international scale. While many commentators, including in the media and among professionals of politics, are currently pointing at the problematic evolution of US border control practices (e.g. MEPs on the issue of exchanges of Passenger Name Record (PNR) information), the EU, through the Schengen/ Area of Freedom Security and Justice (AFSJ) process, the creation of databases such as EURODAC or SIS, the “externalisation” of border management, migration, refugee or visa policies, seems in many respects to be leading the way, rather than resisting the trend (Basaran, 2010) .

Mobility and its government : speed instead of freedom

What is the relationship between mobility, security and government? Whereas this question was rather marginal in the social sciences until a few decades ago, the growing mobility of populations (or the perception of an increase), and in particular migration flows, as well as expressed concerns for the effects of “globalization” have pushed scholars in disciplines as diverse as anthropology, sociology, political science or international relations to take a stance. This very large literature, split between various subfields including migration studies, diaspora studies, security and surveillance studies, can be roughly distributed between three, conflicting threads of argument.

For some, processes of globalization, the increase of migrant flows, the generalization of cheap air travel and fast telecommunications have brought about the possibility of an alternate form of social existence: transnational communities and diasporas (Anteby-Yemini, Berthomière *et al.*, 2005; Cohen, 1997; Cohen and Vertovec, 1999; Dufoix, 2003; Portes, 1999; Sheffer, 2003). These groups, conceptualized as distinct social forms, are said to bring with them the promise of a more cosmopolitan world. They are conceived as alternatives to the modern nation-state (Cohen, 1996; Schnapper, 2001), as locales of hybridization and métissage (Gilroy, 1993, 1994; Hall, 1990), bearing in their very nature the impossibility of the exclusionary politics of the modern, Westphalian nation-state (Clifford, 1994). In this optic, mobility is understood as the possibility of escaping the practices of control and surveillance of the states of origin and populate a new, ungoverned transnational space (Tölöyan, 1996). These studies, usually published shortly after the end of the bipolar period, are consistent with the most enthusiastic narratives about the advantages and

new opportunities created by the neoliberal globalization. They are also the corollary to one-sided European narratives on the newly acquired freedom of movement, the possibilities of a post-national European citizenship (Jacobson, 1996; Soysal, 1994, 1996) and cosmopolitanism in Europe (Beck, 2006; Beck *et al.*, 2007). This literature covers, of course, much more than issues of mobility and security. Questions of migration, transnational identity formation, integration and long-distance mobilization are at the center of most of the debates. Yet it relies on sometimes acknowledged, often untold common assumptions about the relation between security, mobility and the practices of government. The common feature of most of this literature is to consider mobility as the equivalent of freedom, and the absence of mobility as the condition of subjection to surveillance and practices of security.

Unsurprisingly, the most optimistic of these authors have been largely criticized for their naivety and for painting a partial picture of the actual processes at stake. Broadly speaking, scholars have gathered around two alternate stances taking a much more sceptical look at the relation between mobility and security. The first of these alternate positions has been to admit the novelty of post-Cold War mobility of populations and transnational social formations, while considering this phenomenon not as emancipation from security practices, but rather as a source of insecurity in itself. Here we find the most common move of (in)securitization of mobility as a possible threat and/or risk. While this position has been a common tendency for some EU institutions and EU governments over the past 15 years, a substantial body of literature has concentrated on explaining the possible interconnections between mobility and insecurity from an academic standpoint: be it the dangerousness of the newcomers in terms of criminality, economy, national identity (Rudolph, 2003), for their role as foreign policy lobbies (Huntington 1997, 2005; Smith, 2000) or for the roles they could play in fueling conflicts in their country “of origins” (Loescher, 1993; Posen, 1996; Weiner, 1993; Zolberg, 1993).

A third body of literature has also developed in reaction to the optimistic transnationalists. It broadly shared their starting point of a hope for an increased freedom of movement, but it takes a more pessimistic stance on what is taking place. Scholars in this thread of reflection have pointed out how optimistic transnationalists have failed to see the immense restrictions on migration and movement that have taken place in the contemporary period, and to account for the emergence of new borders and frontiers in parallel to the abolishment of the old ones. The view that far from the promises of globalization, but also far from the alleged dangers of migration, the current situation can be summarized as a proper “war on migrants” comes mostly from the pro-immigration NGO sector (Blanchard *et al.*, 2007) and has been taken over by some scholars (Palidda, 2003, 2005; Perrouy, 2004). For this brand of literature – which often draws on the work of Agamben (1998, 2005) and the Foucault of *Surveiller et Punir* (1975), what we are witnessing is a process of exceptionalisation of migration, namely a situation in which the detention camps across Europe are the ultimate symbol of the will to reduce the unwanted to a fixed, confined, bare life. The main point here has therefore been to refute the argument that anything has substantially changed since the end of the bipolar period, and to argue that what has happened is only the redeployment and the reinforcement of established structures of control. In

this sense, these scholars have taken the optimist transnationalist argument and turned it upside down: arguing that security practices were in fact still largely controlling and limiting the current push for mobility. Here, the equivalence of mobility as freedom, opposed to non-mobility as security has been maintained. The outlook has just been more pessimistic in terms of the possibility of mobility to prevail as an emancipatory movement away from security and governmental control.

We therefore see three positions emerging, that we could define the “transnationalist optimistic”, the “traditional securitarian”, and the “pessimistic libertarian”. These three points of view broadly take for granted the equivalence of mobility and freedom, opposed to non-mobility and security. Freedom of movement and security are put in a balance, as two point of the spectrum in a zero-sum game. The position we intend to develop here is sensibly different, and aims at breaking commonsensical assumptions about the balance of liberty and security in the context of mobility.

Against the transnational-cosmopolitan argument, drawing on the responses that have already been formulated in the literature at the time (Basch, Glick Schiller, *et al.*, 1994; Glick-Schiller, Basch *et al.*, 1992; Glick-Schiller and Fouron, 1999; Kastoryano, 2003, 2006), we argue that the “transnational” is not a separate, unruled, social space, but a new social territory of contention in which traditional logics of inclusion and exclusion are at play. Transnational communities and diasporas are as much – if not more, since they are contended by several governments – the object of government as national populations are. In this sense, transnational social formations are often caught up in a web, or a matrix of sovereignties (Huysmans, 2003). The idea of the transnational as a “third” space, or an “interstitial space” located in between territorial states is a conceptualization that blatantly overlooks the necessarily territorialized condition of transnational communities and diasporas (Koopmans and Statham, 1999, 2001).

The second “securitarian” position will not be excessively discussed as it has been intensively debated in the 1990s through discussions about the social construction of immigration as a threat and the dangers for governments and scholars to engage in such practices (Bigo 1998, 2002, 2005; Huysmans 1995, 2000; Waever, 1993, 1995, 1998; Waever and Buzan, 1993). More interestingly perhaps, in response to the “pessimistic-libertarian” position, we agree on the dim look on the “abnormalisation” of the mobility of certain unwanted groups, yet we differentiate ourselves on the following fundamental points.

In our analysis of contemporary practices of security in Europe, surveillance and control are not opposed to freedom and mobility. Contemporary modalities of government are in fact exactly the opposite of this vision: they operate through freedom and circulation. Following in this the analysis of Michel Foucault (Foucault, 2004) on the question of governmentality we intend to argue that the modern practice of government is not mainly operating through law or through discipline – as it could have been in the past – but through what the late Foucault defined as regimes of security, or governmentality. In this late configuration of relations of power, linked to the material conditions of possibility of acceleration of the mobility of financial, commercial but also human flows, power essentially operates this very mobility and circulation. As Foucault showed, modern liberal regimes do not govern against, but

through regimes of liberties, freedom and hence, circulation (Bigo, 2008, p. 107; Basatan, 2010). The art of government is not anymore the art of enforcing what is allowed and what is forbidden, nor is it to mould bodies into workers, soldiers or reformed prisoners. It is to work through the apparent or imagined natural specificities of population characteristics, rendered visible through statistical tools, and separate a majority from the margins. Contemporary forms of security are destined at guaranteeing the highest possible security and freedom to majority and segregate it from an “abnormal” minority to be controlled and watched. But the principle of circulation and movement is never sacrificed to these practices of control.

In this sense, contemporary practices of security in Europe should not be analyzed as a *dispositif* of disciplining bodies and forbidding movement – as the “pessimistic libertarian” stance in the literature, often stuck in the imaginary of the Benthamian panoptic model described by Foucault, would argue – but as a specific modality of government (Huysmans, 2006) which operates through different forms of demarcations. Foucault is here the victim of the popularity of certain books over others. In his 1977-78 and 1978-79 lectures at the *Collège de France* he had in fact moved from the disciplinary, panoptic moment whose end he locates in the end of the 19th century towards the emergence of the new form of government we are describing. In this sense, as it has already been pointed out (Bigo, 2008, p. 107), Zygmunt Bauman’s criticism of Foucault in his 1998 essay *Liquid Modernity* largely ignores the fact that Foucault himself had already moved to a position very similar to Bauman’s (Bauman, 1998, p. 22). As many in the “surveillance studies” literature have pointed out, the current practices of surveillance in the European Union are not about a territorializing, spatially fixing dystopia of generalized control – as it could have been potentially in the discipline rationality of government, pushed to its extreme in the totalitarian regimes of the 20th century– it is about governing through freedom and circulation, in a way in which the management of the unwanted never hinders the principle of movement. The analysis of contemporary practices of security in Europe is therefore not so much the analysis of borders and frontiers as devices aimed at stopping mobility or fixing populations, but as devices through which unwanted, marginalized and abnormalized mobilities are to be overseen, traced and computed (Bigo, 2008). The focus of the analysis should therefore be on the following areas, drawing on the work that has already been undertaken in these directions: first, the modalities and the technologies through which the “normal” form of mobility is constituted in opposition to the “abnormal” one (profiling, risk assessment) (Aradau and Van Munster, 2007; Bigo, 2008; Bonditti, 2004); second, the points through which these technologies are deployed (points of entry and exit, “zones” of the border not necessarily located at the geographical border, etc.) (Cuttitta, 2007; Salter, 2007); third, the modalities and technologies through which the “abnormal” is identified (identification cards, biometric passports) (Salter, 2004; Torpey, 2000b), fourth, the modalities and technologies through which the “abnormal” is followed, traced and surveilled (Bonditti, 2004, 2008; Salter, 2008).

This theoretical stance overturns the traditional idea of balance between freedom and security. Security is the by-product of the reframing of the limits of liberties. And it is central to ask why if we have security studies, and even critical security

studies, International relations for the moment lack an analysis of freedom and its contemporary reconfigurations; freedom of movement reframed as speed of movement under control, freedom not of individuals, but of a collective group, to which is assigned a core “identity” recognised as the embodiment of the nation, freedom as essentialisation of a democratic state that cannot have illiberal practices, freedom as a form of protection against other ideas and practices, and freedom to deliver as a forced education and a tutelage for all the non free men (Bigo, 1996, 2005, 2006b; Bigo and Carrera, 2010).

Border management practices in the EU

Notwithstanding the fact that the European field of security professionals is not homogeneous, EU security agencies and services share a certain number of orientations, a doxa or common sense, particularly when discussions about “EU borders” are involved. They tend to focus not so much on borders as a “line of defence” (which is the traditional narrative of the military), but on “the targeted control of populations and the tracing of individuals” (Bigo *et al.*, 2008, p. 7). They also share a focus on global, regional or transnational (in)security, as opposed to local manifestations of violence, and a reliance on technical and technological solutions as opposed to diplomatic or political ones (*Ibid.*). Accordingly, the question of “informational prerogatives”, of access (direct or indirect) to, and ownership of, databases, has emerged as a crucial stake in the European field of security professionals (*Ibid.*, p 8). In this regard, previous research has highlighted the growing centrality of intelligence-led rationales and profiling in the practices of EU security professionals. Concomitantly, then, the policing of EU borders, both internally and externally has turned into one of the most important sites for the current transformation of security practices, and the study thereof (Basaran, 2010).

What is at stake in discussions about EU borders among security professionals, then, is less the enforcement of a territorial “line of defence” than the surveillance of populations and individuals on the move (Bigo and Guild, 2005). While EU borders remain important in the discourses of professionals of politics, the actual checks and surveillance related to border management happen both “inside” the EU, at major airports and train stations as well as in random border police and customs controls (e.g. Faure Atger, 2008), and “outside”, through assistance projects and joint operations between the Union and third countries, as well as in the consular offices in charge of delivering visas, and so forth (Bigo and Guild, 2003, 2005). This “de-differentiation” of internal and external security (Bigo, 2006a) also comprises a temporal dimension: the objective claimed by EU as well as Member State security agencies and services is to anticipate on potentially threatening developments, to act on them before they actually happen (Bigo *et al.*, 2010). Technologies, particularly databases as well as systems of data-mining, data-surveillance, and automated analysis, have become in this respect a particular stake.

A striking illustration of these processes is provided by the setting-up and subsequent as well as envisaged evolutions, of the Frontex agency. Frontex was set-up as a Community body, with the key objective of coordinating operational cooperation between the border guard agencies and services of EU Member States

(Carrera, 2007, 2010; Jorry, 2007). While its formal competence lies with EU borders, almost all of the agency's activities in its now four years of existence have dealt with the regulation of mobility, and particularly with the control and surveillance of immigration. Furthermore, Frontex has been significantly involved in the issue of border surveillance technologies, with the publication of two feasibility studies (MEDSEA and particularly BORTEC³) on the technological monitoring and surveillance of the EU's so-called "southern maritime borders", and the realisation of a study on automated border crossing systems in airports (FRONTEX, 2007). Additionally, Frontex officials have been very keen on highlighting the importance of intelligence, information exchanges, and risk analysis in the management of borders, and the role that their agency could and should play in this process.

This focus has been made obvious in the "border package", consisting of three communications and their accompanying documents, tabled in February 2008 by the European Commission (European Commission, 2008a, 2008b, 2008c, 2008d, 2008e). The first two communications (European Commission, 2008a, 2008d) lay down proposals for developing the role and competences of Frontex, while the third one, on "Preparing the next steps in border management in the EU" contains in particular suggestions for the establishment of an EU "entry/exit" system for individuals subject to visa-requirements for entering the EU, of an electronic system of travel authorisation for individuals benefiting from visa-waiver programs, together with a possible automated border crossing system for EU citizens. The envisaged evolutions concerning Frontex comprise in particular the establishment of a European border surveillance system (Eurosur), which would, at its latest stage, combine existing national surveillance and maritime monitoring systems into a "system of systems" (sometimes dubbed FIS or "Frontex information system"), of which Frontex would be the main coordinator. Eurosur, as presented in the communication, would allow for the handling and exchanging in real time of information from a wide range of sources, including personal data, with the aim of establishing a so-called "pre-frontier intelligence picture" (For further elements, see Jeandesboz, 2008). The communication on the "next step in border management in the EU", in this respect, would also entail the creation of a new database, as well as the interconnection of existing or upcoming information systems (potentially SIS-II and VIS), and the systematic collection of personal biometric data of all individuals travelling to and within the EU (For further elements, see Guild *et al.*, 2008; Guild 2010).

These proposals are heavily reliant on technology: information exchange and surveillance devices, on the one hand, including in the case of Eurosur new types of sensors, satellite monitoring and Unmanned Aerial Vehicles (UAV), and on advanced biometrics as well as automated border checks systems, on the other hand, for the "entry/exit system" like the European Entry and Exit system Project copying the ESTA of the US. They also highlight the change in security practices, at the heart of the EU developments, i.e. the increased reliance on "intelligence-led" surveillance,

³ These two documents are not publicly available in full. See Council of the European Union (2006) for the declassified elements of MEDSEA, and Annex 7 of European Commission (2008e) for a declassified summary of BORTEC.

risk management, and profiling, which stand as core challenges for envisaging and understanding the ethical and political implications of security technologies.

Ethical and political implications of security technologies in Europe

Security technologies have evolved into a major stake for EU policy-makers. However, their ethical and political implications have hardly attracted as much attention as their development and deployment. This, as we will develop, is problematic in the sense that the current evolution of security technologies has participated in the transformation of security practices, with an emphasis on proactivity, profiling and prevention, which threatens to render obsolete the existing provisions for the safety of the individual as regards the practices of security agencies and services (Bigo, 2007).

In the activities analysed previously, two main threads of justification are visible as regards the recourse to and investment in security technologies. Firstly, it is presented as a necessity in a context characterised by “new threats” which are deemed unpredictable and less visible. Security technologies, and particularly ICT, are claimed to provide predictability in a context of fluid insecurity, not only to enhance the reactivity of security agencies and services, but also to allow for the anticipation of insecurities and their countering even before they are actualised. Secondly, the support to the development of such technologies, particularly in the private sector, is framed as an economic necessity, as a contribution to the maintenance of an industrial basis in the EU and to the goal of establishing a thriving “knowledge-based economy” (in the words of the Lisbon agenda). In the process, however, very little attention is paid to the ethical and political implications of the development and use of security technologies.

This is due to the fact that the dominant argument on the implications of security technologies and their use for individual freedoms and rights is the idea that there is a “right to security”, and that steps taken in the field of security technologies are justified because they will ultimately contribute to the protection of EU citizens. Underpinning this point is the notion that security can be equated to other fundamental freedoms and rights, and that in the name of a “right to security”, the latter can be encroached upon should the circumstances prove necessary.

We do not claim, however, that fundamental freedoms and rights are never taken into account in discussions about security technologies. But the perspective under which they are considered is biased. The final report of the ESSTRT consortium⁴, one of the projects funded under the European Commission security research funding program PASR, is illuminating in this respect. The report notes, quite soundly, that:

“Technology can help considerably in the fight against terrorism (...) Legal and ethical considerations are, however, important. Some technologies arouse concerns about invasion of privacy; reliability – the risk that people could be wrongly identified as security threats; social exclusion; damage to humans and the environment; and difficulties of regulation” (ESSTRT, 2006, p. 20-21).

⁴ The ESSTRT consortium is a project funded by the European Commission under the PASR 2004 Programme. It is composed of Thales Research and Technology (TRT), UK and Thales e-Security (TeS), UK; the International Institute for Strategic Studies (IISS), UK, and the Crisis Management Initiative (CMI), Finland.

At the same time, however, these concerns are framed in the logic of the “balance” between liberty and security highlighted previously: “Achieving the right balance between civil rights and security is challenging. A broad democratic debate on threats and responses offers the best guarantee that tougher security measures and enhanced powers conferred upon intelligence services and police forces have public consent” (ESSTRT, 2006, p. 20). But, for the report, “[a]nother factor to be taken into consideration is the relative efficiency of technologies. For example, facial recognition systems at present are very unreliable” (ESSTRT, 2006, p. 20).

Several points need to be discussed in the light of these comments. While democratic debates on European security policies and their implications for the fundamental rights and freedoms of individuals are certainly necessary, they are by no means sufficient, for some of the contemporary practices that are related to the technological management of insecurities fall beyond the scope of democratic investigation and scrutiny. Furthermore, the dominant viewpoint, as asserted in the ESSTRT report, frames the issue of privacy in terms of a choice between effective intrusiveness and non-intrusive inefficiency. The underlying assumption is that intrusiveness is a requirement for efficiency, and that privacy undermines efficiency (and thus enhances potential insecurities). Finally, the report favours the notion of “privacy-neutral” prospects, over the possibility of “privacy-enhancing” ones (which are however mentioned previously). Such a perspective by all means impoverishes the scope of discussions related to the ethical and political assumptions and effects of security technologies. In the logic of the ESSTRT report (among others), technological devices are then considered as mere add-ups to existing practices, as technical fixes to a particular practical problem.

Discussions framing the ethics and politics of security technologies in terms of efficiency shadow the transformations that the availability of such technologies has sustained in the management of insecurities. Indeed, in a historical perspective, there is for instance nothing really new about the use of biometrics as means of identification: dactylographic and photographic technologies have been in use for surveillance purposes ever since the end of the 19th century (Mattelart, 2007). The same holds true for documents such as identity cards (Piazza, 2004) or passports (Torpey, 2000a), which have been central to the state’s “embrace” (in the words of Torpey) of individuals, its monopolisation of the legitimate means of movement, and indeed its very construction. Scholars, however, have noted how the use of security technologies, particularly ICT, has transformed the legitimisation, meaning, practices, and implications of security and surveillance, by endorsing a shift from a logic of protection and reassurance to a logic of “risk management” (Amoore and De Goede, 2005; Araday *et al.*, 2008; Beck, 2002; Bigo, 2007).

The notion of risk and logic of risk management are not specifically associated with security in the first place. Risk, in the argument of Beck (1997), is associated with the evolution of modern societies:

“‘Risk’ inherently contains the concept of control. Pre-modern dangers were attributed to nature, gods and demons. Risk is a modern concept. It presumes decision-making. As soon as we speak in terms of ‘risk’, we are talking about calculating the

incalculable, colonizing the future” (Beck, 2002, p. 40; see also Ewald, 1986, with the notion of “insurance states”).

What constitutes a risk and how it should be controlled, of course, is socially constructed, and subject to evolutions (Douglas and Wildavsky, 1982). Hence, while the notion of risk in economics for instance, is considered a positive dynamic, associated with the notion of trust, in the context of security practices and policies aiming at countering terrorism and other alleged “threats”, risk has come to take another meaning:

“The perception of terrorist threats replaces *active trust* with *active mistrust*. It therefore undermines the trust in fellow citizens, foreigners and governments all over the world. Since the dissolution of trust multiplies risks, the terrorist threat triggers a self-multiplication of risks by the de-bounding of risk perceptions and fantasies” (Beck, 2002, p. 44, original emphasis”).

In the shift of security practices towards risk management, another element of the dominant standpoint on security technologies is made evident: security and the “right to security” of EU citizens are reliant on anticipation. As such, the possibility to be seen as doing something becomes tied to the capacity of security professionals to claim that, much like the “precog” mutants of Philip K. Dick in his *Minority Report* novel, they can “see the future” (Ragazzi, 2004). The constitutive factors of this claim at anticipation, and the underlying assumption about the capacities of technologies harnessed in contemporary security practices, are the notions of proactivity, profiling and prevention (previous and following suggestions drawn from Bigo, 2007). Proactivity involves the activity of following the traces, in particular the electronic ones, left by individuals and/or groups which are the target of surveillance: proactivity can be territorially focused but most often concentrates on populations and movements of populations. Profiling constitutes the technique through which the data gathered through surveillance is integrated in a pre-determined analytical framework (e.g. the EU’s “Common Integrated Risk Analysis Model”, CIRAM – see Carrera, 2007), which is expected to produce an image of the present but also to build scenarios of future trends (so-called “risk analyses” or “threat assessments”): profiling as a policing technique takes security practices beyond the realm of criminal justice, where it is the past which is investigated, towards the prediction of the future. Prevention, finally, stands as the ultimate goal of proactivity and profiling: “[T]he idea is not to recover from an event or to respond to it, or even to be protected from it by previous measures, but to assess a future threat and to prevent the event from happening” (Bigo, 2007, p. 11).

The proactivity/profiling/prevention framework is highly dependent upon technology, in its concrete operations, but even more stringently as part of its symbolic economy. In order to ground the claim that they can know the future, security professionals must justify that they have access to knowledge that others do not have, such as secured databases, personal data including details about one’s private life or biometric information. They must also claim a specific know-how (profiling techniques, risk analysis) which is not readily available, but which is also reliant on technological devices (e.g. data-mining, data-integration or analysis software). In

this respect, furthermore, access to sophisticated technology becomes a major asset, since they are considered as a means to know more. This knowledge imperative, finally, leads to a significant growth in the number of actors involved in security practices. The surveillance practices of banks, credit card and insurance companies, are increasingly harnessed for security purposes (e.g. for the “fight against terrorist financing” – Amore and De Goede, 2005), also making possible the outsourcing of “dataveillance” to private companies.

While technologies such as advanced biometric identifiers and sensors or systems of information exchanges are not the main reason for the contemporary transformations of security practices, then, their availability, correlated with the evolution of the doxa of security professionals towards an anticipative stance, becomes a key stake. The combination of a claim to know the future, and an increased capacity to scrutinise and render individuals more “transparent” to the overview of security professionals, particularly, is a cause for concern. Due to these transformations, the landscape of relations between liberty and security is changing rapidly: the available modalities for making individuals more transparent to security practices are evolving rapidly, raising questions of reliability (e.g. in the case of face-recognition devices), of privacy, but also of social justice (Bigo *et al.*, 2010).

One major change is what Beck calls “active mistrust”, where individuals are intrinsically considered as potential perpetrators, and thus subject to categorisations which, since they rest on predetermined models, are prone to failures: the problem, here, lies with the effect of such practices on the presumption of innocence. Another element is that the proactivity, profiling and prevention framework is underpinned by the assumption that by knowing more, better anticipation is possible. Such a stance leads to a vicious circle: it is impossible to know everything about everybody, but attempts at doing so potentially trigger an endless expansion of the scope and volume of the information that is gathered. Here the issue is clearly privacy, and the capacity of individuals to know of the kind of data that is being collected, by whom, and when. Furthermore, in this context, some individuals and groups, because they are particularly emphasised in analytical models, become more exposed to surveillance and its possible consequences. The issue, in this respect, is social justice and the fact that individuals and groups who are already vulnerable become even more so.

CHAPTER VI

Reasonable accommodation of religious diversity in Europe and in Belgium: Law and practice

Emmanuelle BRIBOSIA, Andrea REA, Julie RINGELHEIM and Isabelle RORIVE

The religious landscape in Europe has been considerably diversified as a result of post-colonial immigration. This has had an important impact on the evolution of the relationship between state and religious communities in European countries. However, pluralisation of religious practice also has implications for other areas of social life and legal regulation including first and foremost, labour relations. In particular, in most countries the organisation of labour has to a certain extent, albeit implicitly, traditionally taken the specificities of the dominant religion into account. This is epitomized in the choice of non-working days which usually reflect the holidays of the majority religion. What happens when workers following a minority religion ask for adaptations in regulations enabling them to practice their faith? How do employers react to such demands? And what does the law require in such case?

In United States and Canada law, these issues have long been dealt with under the notion of “reasonable accommodation” (Bribosia, Ringelheim and Rorive, 2009 and 2010). This concept first appeared in US law in 1972 when Congress modified Title VII of the 1964 *Civil Rights Act* which prohibits discrimination based on religion and adds a duty for private or public employers “to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business” (§ 701 (j); Oleske, 2004, p. 532). As a result of this provision, employers have been required, for instance, to provide exceptions to clothing rules, changes in working hours which do not entail the payment of overtime or the infringement of other employees’ rights, and authorisation

of selected absences for religious festivals (Engle, 1997, p. 387-406; Rosenzweig, 1996, p. 2517-2522; Eisgruber and Sager, 2007, p. 87-108)¹.

However, the concept of reasonable accommodation has been most developed in Canada. Introduced in the 1980s by courts specialised in the interpretation of the Canadian Human Rights Act², the concept was confirmed by the Supreme Court in *Ontario Human Rights Commission (O'Malley) v. Simpson-Sears Limited*, decided in 1985 (see Woehrling, 1998, p. 329; Bosset, 2007, p. 3-28). Drawing on principles of equality and non-discrimination, the Supreme Court ruled that employers have a duty of reasonable accommodation. Constructed as a corollary to the prohibition of discrimination, and especially indirect discrimination, the obligation of reasonable accommodation means that the author of a provision or policy, which *de facto* disadvantages an individual on the basis of a prohibited ground of discrimination, must use all reasonable means to adapt the provision or policy to the special needs of that individual so as to protect him/her from its discriminatory effects. Importantly, the obligation does not only concern religion. Any kind of discrimination may potentially give rise to a duty to accommodate (Bosset, 2007, p. 13-14)³. In the US, by contrast, the duty of reasonable accommodation has only been extended to disabilities⁴. In US law, as in Canadian law, the obligation to accommodate has a limit. The accommodation must be “reasonable”. It cannot impose a disproportionate burden – an “undue hardship” –, on the person bearing that burden, whether it be an employer, any other private economical actor or a public authority (Bosset, 2007, p. 10). According to the Canadian Supreme Court, the “reasonable” or “unreasonable” character of an accommodation must be assessed within the context of each case and with flexibility, taking into account such factors as the limited financial resources of the organisation, impairment of third party rights and the efficiency of the company or the institution (Brunelle, 2001, p. 248-251).

In Canada, reasonable accommodation granted for religious reasons has to some extent become an instrument for negotiating cultural and religious plurality. In this regard, it is part and parcel of the Canadian notion of multiculturalism and Quebec's concept of interculturalism (Crépeau and Atak, 2007). This was precisely the view

¹ Besides anti-discrimination legislation, a lively debate exists in American constitutional theory on whether federal and state legislators have a duty of accommodation which can be derived from the right to the freedom of religion as established by the First Amendment of the United States' Constitution, the so-called *Free Exercise Clause*. See Greenawalt, 2006, p. 15 and Novit Evans, 1997, p. 204-227.

² These are laws enacted at the provincial or federal level whose main aim is to combat discrimination based on certain grounds and whose implementation is guaranteed by specialised institutions created for that purpose. As opposed to the Canadian Charter of Rights and Freedoms of 1982, these laws impose obligations on both public authorities and “horizontally” between private parties.

³ As regards religion, the duty of reasonable accommodation may have another basis than non-discrimination. Canadian judges have inferred a similar obligation from the right to religious freedom as established by the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms (Article 3) (Woehrling, 1998, 369 ff; Woehrling, 2006a, 12 ff).

⁴ *Americans with Disabilities Act* (1990), 42 U.S.C. § 12111(10).

taken by the Advisory Commission on the practices of accommodation relating to cultural differences created by Quebec's prime minister in 2007 in response to the controversy arising in the province of Quebec after some instances of formal or informal accommodations generated tremendous media attention (Bouchard and Taylor, 2008, p. 53-58; Gaudreault-Desbiens, 2009, p. 151-175). After a year of research and consultation, the "Bouchard-Taylor Commission", sharing the names of its two presidents, historian and sociologist Gérard Bouchard and philosopher Charles Taylor, concluded that, contrary to what certain media suggested, there had been no sudden increase in demands for adjustment or accommodation and that all in all, such demands were managed efficiently by public institutions. Interestingly, the *Bouchard-Taylor* report highlights that, aside from a small number of accommodations imposed by court, a wide range of adjustments were negotiated amicably by public or private actors. The report thus proposes to limit the phrase "reasonable accommodations" to accommodations obtained through legal means and to distinguish them from what it terms "concerted adjustments", meaning accommodations arising and handled outside the courts, regardless of whether there is, legally speaking, a duty to accommodate (Bouchard and Taylor, 2008, p. 64-65). Taken together, these accommodations practices assume various shapes. They may consist in a mere exemption from the application of an indirectly discriminatory rule (i.e. the decision of the Royal Canadian Mounted Police to exempt Sikhs willing to serve in its ranks from the obligation to wear the traditional Stetson hat⁵) or in the creation of a special regime (i.e. in the famous *Multani* case, a Sikh pupil was allowed to wear the traditional dagger or *kirpan* at school, provided that it be worn under his clothes; that it be carried in a sheath made of wood; and that it be wrapped and sewn securely in a sturdy cloth envelope, to prevent any risk of it causing injury⁶). An accommodation may also consist of the provision of infrastructures or of particular services in favour of those affected, such as specific meals in hospitals or prisons. The focus on contextualisation leads to a large variety of accommodations which are, most of the time, identified on a case-by-case basis.

What is the relevance of these developments for the European context? So far, no legal instrument adopted at the European level has expressly recognised a duty of reasonable accommodation for religious reasons. This however does not mean that there is no room for this concept in European countries. First, following the Canadian example, the question may be raised as to whether an obligation for reasonable accommodation could be drawn from the general prohibition of indirect discrimination based on religion. Such prohibition is enshrined in both the European Convention on Human Rights (ECHR) and the European Union (EU) Employment Equality Directive, passed in 2000⁷. Another potential source for such a duty would be the right to freedom of religion, as guaranteed in Article 9 ECHR. Second, at the national level, one may identify isolated instances of adaptations of general rules granted by law to take into account special needs of certain religious minorities.

⁵ *Grant v. Canada (Attorney General)*, [1995] 1 F.C. 158.

⁶ Canadian Supreme Court, *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 256 and *Woehrling*, 2006b, footnote 45.

⁷ Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (OJ 2000 L 303/16).

Moreover, in practice, employers across Europe face demands from employees belonging to minority faiths to accommodate their religious specificities, which they must deal with in one way or another.

Against this background, this article seeks to consider the relevance of the concept of reasonable accommodation as a device for handling religious plurality in European labour relations. The first part discusses the state of European law as to whether a legal duty to provide accommodation for religious reasons may be derived from antidiscrimination and/or religious freedom norms. It considers both EU law and the European Court of Human Rights (ECHR). The second part uses Belgium as a case-study to explore national laws and policies regarding accommodation of minority religious practices. First, we emphasise that whereas Belgian law, like the law of most other EU countries, does not expressly recognise any right to reasonable accommodation for religious reasons, some instances of adaptation of general legislation already exist which take the special needs of religious minorities into account. Second, we trace the emergence of the concept of “reasonable accommodation” in the Belgian public debate. Third, taking a sociological approach, we enquire as to what sorts of adjustments are *de facto* asked for in the employment sector and how employers cope with such demands. Here, we highlight that despite the absence of any clear *right* to reasonable accommodation, informal practices of negotiated accommodation or, in the words of the Bouchard-Taylor report, “concerted adjustments”, can be observed in various employment settings.

Reasonable accommodation in Europe: The legal framework⁸

European law, at present, does not expressly provide for a right to reasonable accommodation for religious reasons. Yet, arguably, such a right could be derived from existing provisions on antidiscrimination and religious freedom, either from the ECHR, as interpreted by the European Court of Human Rights or from the 2000 EU Employment Equality Directive, which prohibits both direct and indirect discrimination based on religion.

European Court of Human Rights case law

ECHR institutions have frequently had to deal with cases whereby a demand similar to a request for reasonable accommodation for religious reasons was at stake (Evans, 2001, p. 168-199; Stavros, 1997, p. 607-627 and Ringelheim, 2006, p. 167-169 and p. 323-338). In the context of Article 9 (freedom of religion), this concept could *a priori* find support in the criterion of proportionality which determines the compatibility of a measure impairing freedom of religion with the Convention. Article 9 (2) provides that a restriction on religious freedom is only permitted if it is prescribed by law and is necessary in a democratic society to achieve one of the legitimate aims listed in the same provision. The concept of “necessary in a democratic society” has been interpreted by the Court as implying the requirement of proportionality between the means used and the envisaged ends. In a number of cases, the Court has held

⁸ This part of the paper is a revised version of Part II of Bribosia, Ringelheim and Rorive, 2010.

that the proportional character of a measure entails that amongst the various means of achieving a certain end the authorities should opt for those least impairing rights and freedoms (Van Drooghenbroeck, 2001, p. 190-219). Accordingly, the case can be made that if a provision, which is justified by a legitimate objective, infringes upon the religious freedom of certain individuals and that an accommodation would allow avoidance of such an impairment without at the same time compromising the intended aim, this second solution should be favoured as it represents the least restrictive solution to achieve the objective.

Yet, the Court and the Commission refused to follow that path when interpreting Article 9. An example of that position is the decision of the former European Commission of Human Rights, dated 12 July 1978, rejecting the application of a British citizen of Sikh religion claiming that the law requiring the use of a helmet to drive a motorcycle impaired his religious freedom because he was thereby compelled to remove his turban. The Commission simply holds that the measure has a legitimate aim with respect to Article 9 (2), namely the protection of health⁹, and did not find it useful to proceed with a proportionality analysis to see whether an alternative measure guaranteeing the protection of health while allowing the Sikhs to conform to their religious practice was available.

There have also been a number of complaints to the Commission by employees concerning their leaves of absence. In the famous case *X. v. United Kingdom* decided in 1981¹⁰, a primary school teacher in a London public school complained against the refusal by the school authorities to accommodate his working hours so as to allow him to take 45 minutes off at the beginning of the afternoon on Fridays to go pray at the Mosque. While the Commission admits that Article 9 may entail for the State “positive obligations inherent in an effective “respect” for the individual’s freedom of religion” (§ 3), it nonetheless holds that the facts before it did not reveal any interference with the applicant’s freedom of religion. In the eyes of the Commission the decisive element was that:

“[the applicant] of his own free will, accepted teaching obligations under his contract with ILEA [the *Inner London Education Authority*], and that it was a result of this contract that he found himself unable to work with the ILEA and to attend Friday prayers” (§ 9).

This reasoning has been widely criticised by commentators for its formalism (Velaers and Foblets, 1997, p. 292-293; Evans, 2001, p. 130-131; Gunn, 1996,

⁹ Eur. Comm. H.R., *X. v. United Kingdom*, 12 July 1978 (Appl. No. 7992/77), *D.R.* 14, p. 234. An older decision, dated 5 March 1976, concerned the application by a Jewish prisoner, who complained that he did not have access to *kosher* food and that no Jewish service was held in prison. Here, the Commission judged that the demand was unfounded because the prisoner had received *kosher* food, had had contacts with a secular Jewish visitor and the initiatives by the authorities had been approved by the Grand Rabbi. Hence, the authorities “had done everything possible to respect the applicant’s beliefs” (Eur. Comm. H. R., *X. v. United Kingdom*, 5 March 1976 (Appl. No. 5947/1976), *D.R.* 5, p. 8).

¹⁰ Eur. Comm. H.R., *X. v. United Kingdom*, 12 March 1981 (Appl. No. 8160/78), *D.R.* 22, p. 27.

p. 312). By deeming that the teacher's freedom of religion had not been impaired, the Commission was able to dodge the determination of whether such a measure is necessary in a democratic society. A similar determination would have meant verifying whether the authorities had legitimate motive to refuse accommodating the applicant's work hours to avoid the conflict with his freedom of religion, for instance because such an accommodation would have led to an infringement of other individuals' rights or because it would have excessively upset the functioning of the school. The Commission also rejected the complaint based on the violation of Article 14 (non-discrimination clause). The applicant argued that as opposed to Muslims, Christian workers had no difficulty to reconcile their professional obligations with the practice of their religion since the dates of official holidays overlap with the main Christian festivals. The Commission only observed that "in most countries, only the religious holidays of the majority of the population are celebrated as public holidays" (§ 28). Thus, the Commission seems to acknowledge, if implicitly, that the challenged regulation has a different impact on an individual's freedom of religion depending on whether one belongs to the majority religion or to a minority one. However, the Commission did not find it helpful to question the legitimacy of this difference or to ponder the possibility of putting accommodations in place which might mitigate the discrimination suffered by adherers of a minority religion simply because this situation seemed totally "natural" for the simple reason that it corresponded to the norm established in numerous countries.

In this respect, the Grand Chamber decision *Thlimmenos v. Greece*, dated 6 April 2000, marks a turning point in the Court's jurisprudence on the basis of Article 14. Until then, the Court had held that the principle of non-discrimination enshrined in Article 14 only prohibited the State from treating people who were in analogous situations differently without any objective and reasonable justification. In *Thlimmenos*, the Court recognises for the first time that the non-discrimination principle has another facet: it also prohibits the State from failing to "treat differently persons whose situations are significantly different" without an objective and reasonable justification¹¹. The applicant, a Jehovah's Witness, contended that, in spite of having successfully passed the relevant exam, the Greek authorities had refused to appoint him to a chartered accountant's post, on the grounds that he had been convicted of a serious crime five years earlier for having refused to do military service due to religious reasons. The authorities justified their decision because of existing legislation prohibiting any person convicted of a crime to become a chartered accountant. While acknowledging that such legislation pursues a legitimate objective, namely to prevent dishonest or untrustworthy people from this profession, the Court declared that, as applied to Mr Thlimmenos, it lacked any pertinent and reasonable justification. His conviction for being a conscientious objector is considerably different from that of other convicted criminals because his motivations do not "imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession" (§ 47). Nevertheless, Greece replied that since the legislation had general application Mr Thlimmenos could not be exempted. But the Court rejected this argument: it is "by

¹¹ Eur. Ct. H.R. (Grand Chamber), *Thlimmenos v. Greece*, 6 April 2000, § 44.

failing to *introduce appropriate exceptions* to the rule barring persons convicted of a serious crime from the profession of chartered accountants” (§ 48)¹² that the Greek State violated the applicant’s right not to be discriminated against on the grounds of his religion.

Thus, the *Thlimmenos* decision establishes two principles. First, the rule of non-discrimination enshrined in Article 14 of the Convention is violated when a State does not treat differently persons whose situations are different without objective and reasonable justification. Then, in order to avoid such discrimination, the State can be asked to modify a general rule, if necessary by establishing appropriate exceptions. Even though these terms are not explicitly used, this second principle can be compared to the duty of reasonable accommodation (Arnardottir, 2003, p. 101; De Schutter, 2005, p. 53).

Since *Thlimmenos*, however, the Court has not added new applications of this second consequence of the non-discrimination principle in relation to freedom of religion, even though it recognised and developed the notion of indirect discrimination¹³. A number of decisions even seem to step back from this jurisprudence. Thus, in *Kosteski v. the former Yugoslav Republic of Macedonia*, dated 13 April 2006, the Court seems to adhere to the precedents established by the Commission in matters concerning leaves of absence¹⁴. The *El Morsli v. France* decision of 4 March 2008, also based solely on Article 9, further illustrates the reluctance of the Court to infer a right to reasonable accommodation from freedom of religion. Here the Court declares the application of a Muslim woman inadmissible. This woman complained that she was denied access to the French Consulate in Marrakech when trying to deposit her French visa application in order to be able to reunite with her husband in France because she refused to remove her headscarf for an identity control. The applicant held that she had been willing to remove her headscarf in the presence of a female agent and that she could thus have been identified. Nonetheless, the Court ruled that regardless, refusal to provide a female agent for Mrs El Morsli’s identification did not exceed the State’s margin of appreciation in matters of security controls.

The argument of respect for the national margin of discretion is also put forward by the Court to dismiss the issue of reasonable accommodation in six decisions dated

¹² Our emphasis.

¹³ Eur. Ct. H.R. (Grand Chamber), *D.H. and Others v. Czech Republic*, 2007.

¹⁴ Eur. Ct. H.R. (3rd Chamber), *Kosteski v. The former Yugoslav Republic of Macedonia*, 2006, § 37. In fact, the laws of the former Yugoslav Republic of Macedonia allow employees of Muslim faith to take leaves of absence for recognised Muslim festivals, whereas the Christian festivals, Christmas and Easter, are declared official holidays for all citizens. If the applicant had received disciplinary sanctions for not coming to work during Muslim festivals, it was because the employers doubted his being Muslim. They accused him of abusing the right to take leaves of absence during those specific dates granted to the believers of that religion. However, the Court after reminding the abovementioned case law by the Commission used this occasion to declare that it was not persuaded that the sanction against an employee who had taken off to celebrate a religious festivity could be considered an impairment of his freedom of religion.

30 June 2009¹⁵ concerning the exclusion of Muslim or Sikh students from high schools in France pursuant to the application of the 2004 Act prohibiting the wearing of ostentatious religious signs in public schools¹⁶. Some students affected by the measure proposed an alternative solution so as to be able to keep attending school, namely to wear a cap or a bandana instead of the headscarf or a *keski* instead of the Sikh turban. These signs they argued were discrete and had no religious connotation. The Court held that since the prohibition contained in the 2004 French Act does not violate the Convention's Article 9, it is the State's discretion to determine whether the alternatives suggested by the students are "ostentatious" religious signs.

Yet the logic of reasonable accommodation has re-emerged in the Court's case-law on Article 14 in the context of disability. In *Glor v. Switzerland* (2009), the applicant, a diabetic, complained that he had been declared unfit for military service and ordered to pay a military-exemption tax because he was only afflicted with a minor disability (diabetes), while persons suffering from a major disability were not subject to this tax. The Court here insists that a measure which interferes with an individual's rights can only be considered proportionate and necessary in a democratic society if no alternative measure, less invasive of the rights at stake, would enable the same end¹⁷. In the case at hand, rather than forcing the applicant to pay the tax when he was actually willing to do his military service, it would have been possible to implement particular forms of military service or alternatives adapted to people in his situation. Hence it was possible to achieve the objective with a measure less impairing of the applicant's rights (§ 95). Accordingly, the Court finds a breach of the right not to be discriminated against combined with the right to privacy.

This overview of the European Court of Human Rights case law allows a nuanced conclusion. Whereas freedom of religion, as interpreted by the Court to this date, does not provide fertile grounds for the development of a duty of reasonable accommodation, the rule of non-discrimination established by Article 14 seems more promising. Indeed, since the *Thlimmenos* decision, the Court has, in principle, recognised that there can be discrimination when the State, without any reasonable and objective justification, refrains from adapting a general rule, if necessary by introducing exceptions, to avoid affording the same treatment to people who are differently situated where such treatment disadvantages people practicing a certain religion.

¹⁵ These judgments were issued on 30 June 2009 by the Fifth Chamber of the Court: *Aktas v. France*, *Ghazal v. France*, *Bayrak v. France* and *Gamaleddyn v. France* (concerning the prohibition to wear the headscarf at school), *Jasvir Singh v. France* and *Ranjit Singh v. France* (concerning the prohibition to wear the Sikh turban). See also Eur. Ct. H.R. (5th Chamber), *Dogru v. France* (Appl. No. 27058/05) and *Kervanci v. France* (Appl. No. 31645/04), decisions of 4 December 2008, § 75. The facts at issue in these two cases arose before the 2004 Act prohibiting the wearing of ostentatious religious signs in public schools was adopted. It concerned two Muslim girls who had been expelled from school because they refused to take off their headscarf during sports classes but who had proposed to replace the headscarf with a cap.

¹⁶ Act No. 2004-228 of March 15, 2004, *JO*, No. 65, 17 March 2004, p. 5190.

¹⁷ Eur. Ct. H.R. (1st section), *Glor v. Switzerland*, 30 April 2009, § 94.

European Union antidiscrimination law

The concept of reasonable accommodation is not unknown to European Union law. The 2000 “Employment Equality Directive”¹⁸ which establishes a general framework for equal treatment in employment and occupation without discrimination based on religion or belief, disability, age or sexual orientation, does lay down a duty to provide reasonable accommodation but only in favour of disabled people and in the employment sector. It could be extended, on behalf of the disabled, to the domains of social security, education, access to goods and services if the Commission’s proposal for a directive presented on 2 July 2008¹⁹ is approved by the Council.

In contrast, EU law does not recognise a duty of reasonable accommodation as such when religion or belief, instead of disability, is at stake. The question whether such a duty exists may nevertheless arise when deciding certain cases of indirect discrimination. Under EU law:

“[indirect discrimination] shall be taken to occur when an apparently neutral provision, criterion or practice would put persons having a particular religion or belief (...) at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the measure to achieve that aim are appropriate and necessary (...)” (Article 2 (2) (b) of the Employment Equality Directive).

Initially, this principle was established by the European Court of Justice to guarantee the effectiveness of the principle of equal pay between men and women²⁰. The concept of indirect discrimination is indeed based on a substantive view of equality; it acknowledges that an apparently neutral provision may have discriminatory effects towards a certain category of protected individuals.

While directly discriminating against an individual on the grounds of religion is completely illegal, except, within certain limits, for “churches” and “ethos-based organisations” (Article 4 (2) of the Employment Equality Directive), indirect discrimination based on religion can be justified by referring to the classical criteria framing the violation of a fundamental right, i.e. the legitimacy of the pursued objective and the proportionality between the means and the ends. Now, in proceeding with such a proportionality analysis, the issue of a possible reasonable accommodation may arise. Does a measure entailing a specific disadvantage for people of a certain religion, but pursuing a legitimate aim, pass the proportionality test if it can be shown that a reasonable accommodation would avoid the harm caused to these individuals? For instance, a regulation in a chemical laboratory may prohibit the wearing of any headdress and require the wearing of a special apron for security reasons.

¹⁸ Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (OJ 2000 L 303/16).

¹⁹ Articles 3 (Scope) and 4 (Equal treatment of persons with disabilities) of the Proposal for a Council Directive presented by the Commission on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final).

²⁰ See ECJ, Case C-96/80, *Jenkins*, 31 March 1981, (1981) ECR, 911 and ECJ, Case C-170/84, *Bilka-Kaufhaus*, 13 May 1986, (1986) ECR, 1607.

This “apparently neutral” regulation has the effect of placing Muslims wearing a headscarf at a disadvantage. While it undoubtedly pursues a legitimate objective, is it “appropriate” and “necessary” if the wearing of a fireproof headscarf would allow reconciling the security mandate with the practice of religion? In other words, when the possibility of a reasonable accommodation occurs, could it neutralize the justification of the indirect discrimination (Vickers, 2006, p. 20-22)?

The issue is delicate and the indications from the European Court of Justice’s case law are few. As of today, only the 1976 decision in *Vivien Prais* is directly relevant to the topic²¹. Here, Ms Vivien Prais had presented her candidacy for an open competition organised by the Council of the European Communities to hire translators. Once she had been informed of the date on which the written test would take place, she notified the Council that this coincided with the first day of the Jewish holiday *Shavuot*, a date on which the religious commands prohibited her from travelling and writing. After her request to take part in the open competition at another date was rejected, she filed an action with the European Court of Justice claiming that this decision violated the clause in the Staff Regulations according to which candidates are chosen without distinction of race, religion or sex. While rejecting the claim, the Court acknowledged that it is “desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests” (§ 18). The Court also reiterated that a written test must be identical and take place under the same conditions for all candidates (§ 13). Hence, the appointing authority must not accommodate other dates for the test unless it has been notified before the other candidates have been invited. The Court seems to make implicit reference to the concept of reasonable accommodation: in order to avoid (indirect) discrimination, the European institutions must as much as possible accommodate the dates of the tests to religious observances. The concept of reasonable accommodation was therefore present between the lines in European law prior to the Employment Equality Directive and this in the context of religious discrimination.

Reasonable accommodation in Belgium

Until recently, the concept of reasonable accommodation for religious diversity was practically absent from Belgian discourse²². Only in 2009 did it appear in the public debate as evidenced by the explicit reference to the concept in the latest annual report of July 2009 by the *Centre pour l'égalité des chances et la lutte contre le racisme* (the Centre for equal opportunities and the fight against racism, hereinafter,

²¹ ECJ, Case C-130/75, *Vivien Prais*, 27 October 1976, (1976) ECR, 1589.

²² In the 2005 survey concerning the “active manifestation of religious or philosophical beliefs in the public sphere” commissioned by the *Centre pour l'égalité des chances et la lutte contre le racisme*, the term “accommodation” only appears every now and then. Moreover, no theoretical approach to the concept is proposed. *Les expressions actives de convictions religieuses ou philosophiques dans la sphère publique. Situations – pratiques – gestions*, March 2005 (under the supervision by Professors M.-C. Foblets and M. Martiniello), available at the Centre’s website at the following address: http://www.diversite.be/?action=publicatie_detail&id=83&thema=2).

the Centre or the CECLR)²³. Additional evidence can be found in the public debate on the subject in newspapers²⁴ and during conferences²⁵. The lively controversy generally opposes two groups of people and associations. On the one hand, there are those defending a narrow definition of secularism which often refers to the French concept of *laïcité* and the legal prohibition of the wearing of a headscarf in schools. On the other hand, there are those who are in favour of accepting the possibility of certain accommodations in the name of cultural diversity. At the same time the federal minister for equal opportunities, Joëlle Milquet, has inserted this topic into the five priorities of her equal opportunities' programme²⁶.

Together with the debate opposing the Belgian political-linguistic communities (Flemish and Walloons) on federalism and Belgium's future, the controversy concerning cultural and religious diversity causes a major stir in the Belgian political arena, including the political institutions themselves (Parliament, Senate, political parties, etc.)

Specific normative recognitions

Under Belgian law, public or private institutions have no explicit general duty to grant reasonable accommodation on the basis of religion²⁷. Neither does such an obligation seem to be recognised in current case law. Interestingly though, Flemish authorities have adopted the definition of reasonable accommodation contained in the Employment Equality Directive without restricting its application to disability. Hence, this 2002 decree also applies *inter alia* to other grounds of discrimination, including religion²⁸. To our knowledge, however, this decree has not produced any

²³ Centre pour l'égalité des chances et la lutte contre le racisme, Annual Report 2008, *Discrimination / Diversité*, available at the Centre's website at the following address: http://www.diversite.be/?action=publicatie_detail&id=106&thema=2. On this subject see the developments *infra*.

²⁴ *Libre Belgique* on 18 May 2009, op-ed entitled "'Raisonnables', les accommodements?" ("Are accommodations reasonable?"). This article seems to be attributable to the members of *Rappel* (Réseau d'actions pour la promotion d'un Etat laïque, the network of actions for the promotion of a secular state). See also the debate organised in *Le Soir*, on 20 and 21 May 2009, p. 20-21, on the topic "Faut-il accepter les particularismes?" ("Must one accept particularism?").

²⁵ One-day seminar organized on 22 May 2009 by "Bruxelles laïque" and the *Centre Bruxellois d'action interculturelle* on the topic "Accommodements raisonnables: une voie possible vers une laïcité interculturelle?" (Reasonable accommodations: a possible way towards an intercultural secularism?). For more details see the website of Bruxelles laïque (www.bxllaique.be). One-day seminar *Les nouveaux défis à la laïcité dans les sociétés à identités plurielles* (*The new challenges to secularism in societies with plural identities*), organized the 6 March 2010 by the association "La Morale Laïque".

²⁶ Intervention by the Minister during the conference "Actualité du droit de la non-discrimination", organized at the Facultés Universitaires Saint-Louis de Bruxelles, on 19 May 2009.

²⁷ See in this sense, the above-mentioned Annual Report 2008 by the Centre on p. 60.

²⁸ Article 5 (4) of the Decree dated 8 May 2002 concerning the proportional participation in the employment market (*Décret du 8 mai 2002 relatif à la participation proportionnelle dans le marché du travail* (MB, 26 July 2002), as modified on 9 March 2007 (MB, 6 April 2007)). The Decree dated 10 July 2008 establishing the framework of the Flemish policy for equal

formal application of that concept beyond the domain of disability. By not establishing any general right to reasonable accommodation, Belgium does not distinguish itself from other European Union Member States. One of the rare exceptions is Sweden where the employers' obligation to adopt positive measures aiming at adapting the workplace for individuals belonging to specific ethnic and religious communities is sometimes presented as deriving from the necessity of reasonable accommodation (Bell, Chopin and Palmer, 2006, p. 41).

However, the novelty of the question of reasonable accommodation needs to be put into perspective as pertains to European law. An old debate in legal doctrine exists concerning religious objection (*exception de conscience*) to the execution of a contract and especially of employment contracts (Christians, forthcoming). Moreover, in various cases the legislator takes religious specificities into consideration. Under written Belgian law, the 1978 Act on employment contracts maintains a provision already existing under the Act of 10 March 1900 which imposes the obligation "to grant the employee the necessary time to fulfil his religious obligations as well as the civil obligations imposed by the law"²⁹ (Christians, forthcoming). More recently, as in other Member States, written Belgian law has introduced modalities in various sectors which *de facto* function like reasonable accommodations (Réseau UE d'experts indépendants en matière de droits fondamentaux, 2005, p. 35-37; Dassetto, Ferrari and Maréchal, 2007, p. 43-51 and p. 56-59). In order to grasp this evolution, it is necessary to look beyond employment and also take into account measures that have been adopted in other fields. Thus, as in most other European countries, Belgium has an exception to the general rule according to which animals can only be slaughtered after they have been dazed. This rule does not apply to slaughters prescribed by a religious ritual³⁰, provided that they are performed according to conditions established by royal decree. In particular, such slaughters can only be performed pursuant to the Jewish or Muslim ritual and by specialised butchers authorised by the Belgian representative organs of the Jewish religion (the *Consistoire central israélite*) and of the Muslim religion (the *Exécutif des Musulmans*)³¹. In addition, since 2002, the general instructions for prisons guarantee inmates the possibility of obtaining meals which take their religious requirements into account "as long as they do not have to

opportunity and equal treatment (*Décret du 10 juillet 2008 portant le cadre de la politique flamande de l'égalité des chances et de traitement* (MB, 23 September 2008) characterises the "refusal of reasonable accommodation for disabled people" as a discrimination (Article 19). This decree further establishes that in the employment context these provisions do not apply in those cases of discrimination described in the 2002 decree concerning a proportional participation in the employment market (Article 20 (2)).

²⁹ Article 20 (5) of the Act dated 3 July 1978 concerning employment contracts (*Loi du 3 juillet 1978 relative aux contrats de travail* (MB, 22 August 1978)).

³⁰ Article 16 (1) of the Federal Act dated 14 August 1986 relating to the protection and well-being of animals (*Loi du 14 août 1986 relative à la protection et au bien-être des animaux*, MB, 3 December 1986).

³¹ Article 2 (1) of the Royal Decree dated 11 February 1988 relating to certain slaughtering prescribed by a religious rite (*Arrêté royal du 11 février 1988 relatif à certains abattages prescrits par un rite religieux*, MB, 1 March 1988).

be prepared according to formal rituals”³². Hence, Jewish or Muslim prisoners can obtain the same type of meals as those delivered to all other prisoners but without any pork. But they cannot demand prison authorities to provide *kosher* or *halal* meat, i.e. meat butchered according to the rites prescribed by their religion. However, they can receive meals prepared outside of the prison according to formal rituals if their religious community covers the additional costs. Moreover, prisoners can, at their request, receive their meal at times other than the regular hours if their religious beliefs so require³³. This provision allows Muslims to receive their meals after sunset during Ramadan.

Official holidays represent another example of reasonable accommodation for religious grounds under written Belgian law. This issue is closely linked to the fact that the main Christian holidays correspond to public holidays while this is not the case for other religions (Commission du dialogue interculturel, 2005, p. 77). In 2003, a decree by the Flemish government authorised nursery and primary school pupils to take a day off so as to celebrate “in conformity with the pupil’s philosophical beliefs as recognised by the Constitution”³⁴. In contrast, in the French community where no such provision exists, pupils must rely on *ad hoc* measures. Thus, in December 2008 when the Muslim festivity of *Aïd el Kebir* (Festival of Sacrifice) coincided with the exam period in primary and secondary school, the schools’ practices in the region of Brussels varied from school to school: some accepted to postpone the exams by one day, sometimes even organising a pedagogical day on that date. Others asked that pupils justify their absence for family reasons pursuant to a strict application of school regulations.

Regarding the employment sector, the issue of flexible work arrangements depending on the employee’s choice, in particular on religious or philosophical grounds, has recently been placed onto the political agenda. Upon request from the Employment Minister, the National Employment Council (*Conseil national du travail*) avoided taking a clear stance on the point. It basically placed the ball into the companies’ court, holding that they are better equipped to manage issues related to the labour organisation of such a system³⁵. While declaring that “it understands the reasons for wanting to offer employees the possibility to take advantage of flexible days off” the National Employment Council nevertheless considered that “it is not

³² Article 87 of the Ministerial Decree dated 12 July 1971 containing the general guidelines for penitentiary establishments (*Arrêté ministériel, du 12 juillet 1971, portant instructions générales pour les établissements pénitentiaires, MB*, 10 August 1971), as modified by Article 12 of the Ministerial Decree, dated 15 April 2002 (*Arrêté ministériel du 15 avril 2002, MB*, 11 May 2002).

³³ *Ibid.*

³⁴ Article 10ter (2) (f) of the Decree by the Flemish government dated 12 November 1997 concerning the registration of nursery and primary school pupils (*Arrêté du Gouvernement flamand du 12 novembre 1997 relatif au contrôle des inscriptions d’élèves de l’enseignement fondamental, MB*, 6 January 1998, p. 136), as modified by the Decision by the Flemish government dated 21 March 2003.

³⁵ Opinion n. 1687 concerning the “Flexible holiday at the employee’s choice” dated 6 May 2009, p. 3 (*Avis n° 1687 relatif au “Jour férié flottant au choix du travailleur”*).

advisable to introduce an additional paid legal holiday or to designate an existing one for that scope”³⁶. Regarding the hypothesis of replacing a Sunday or a regular holiday, the Conseil reminds us that the system introduced by the Act dated 4 January 1974 concerning holidays, “permits the establishment of a substitute day through collective bargaining either by the social partners or directly within the companies themselves”. It therefore recommends that the labour relation commissions and companies “take advantage of this possibility to replace a holiday with a working day at the employee’s choice in order to take into account the multiple realities of their employees’ religious and philosophical beliefs”³⁷. This opinion illustrates the social partners’ determination (management and trade unions) not to regulate by general rule but to leave the negotiations up to labour relations and companies, thus adopting a more pragmatic rather than principle-driven approach.

***Emergence of the issue of reasonable accommodation
in Belgian public debate***

The issue of reasonable accommodation was addressed only indirectly in the 2005 report by the federal government’s Commission of Intercultural Dialogue (*Rapport de la Commission du Dialogue Interculturel*). That Dialogue’s objective was to “take stock of the issues related to a multicultural society as it develops in Belgium (...) neither avoiding the “tough” questions nor becoming blind due to media hype around certain elements (headscarf, terrorism, international context...) which, even though important, sometimes hides the daily reality of “living together””. The report covers numerous topics related to “living together” in a multicultural society. As far as the active manifestation of religious beliefs in the public sphere is concerned, it focuses on religious signs (Commission du dialogue interculturel, 2005, p. 54-56 and Annex 3), but avoids deciding on the controversies which arose within the Commission and which echoed the intense debates which took place in the Belgian public on this issue (Bribosia and Rorive, 2004; Delgrange, 2008 and forthcoming; Van Drooghenbroeck, 2010 and forthcoming). The term “reasonable accommodation” never appears in the report. However, some concrete proposals for taking religious diversity into account reflect a logic corresponding to the concept of reasonable accommodation. This is the case for the recommended measures in the civil service area allowing “all civil servants to live their culture and religion (for example with regards to festivals and dietary practices) while respecting the State’s functions and the necessity of neutrality” (p. 69) as well as for the recommendation “to the public powers to study the possibility of choosing one’s holidays” on the basis of the “basic individual right to benefit from the holidays most important in his/her eyes” (p. 77).

Since 2008, the Centre for Equal Opportunities and Opposition to Racism has explicitly tackled the concept of reasonable accommodation on the grounds of religion, especially through exchanges with the French Anti-Discrimination High

³⁶ Recommendation No. 21 addressed to the labour relation commissions (*commissions paritaires*), to the social partners and to companies with regards to the possibility of introducing a flexible holiday at the employee’s choice as a replacement for a Sunday or another regular holiday, dated 6 June 2009, p. 2.

³⁷ *Ibid.*

Authority (*Haute autorité française de lutte contre les discriminations*, the HALDE) and the Quebec Human Rights Commission (*Commission des droits de la personne du Québec*) on the topic of intercultural harmonisation³⁸. The results of those contacts became reflected mainly in the 2008 Annual Report “Discrimination/Diversity”, published on 8 July 2009, in which the Centre explicitly refers to the concept of reasonable accommodation (p. 98). It begins by stating – in our opinion too decidedly – that “reasonable accommodation for religious reasons is not recognised as a right under Belgian legislation” and that “there is no legal obligation to respond to such kind of claims” (p. 60). However, the Centre thereafter summarises the findings on reasonable accommodation and practices of intercultural harmonisation contained in the *Bouchard-Taylor* report and highlights the utility of studying the way in which other countries deal with problems also faced by Belgian society (p. 62-63). The informational tool concerning the so-called “belief signs” (*signes convictionnels*)³⁹ posted by the Centre on its website in Autumn 2009⁴⁰, represents another manifestation of the growing interest for the concept. This document seeks to provide an overview of the provisions in force in the employment, public and education sectors as well as proposing general recommendations by the Centre in this domain. One of the thematic highlights is specifically dedicated to “reasonable accommodations/negotiated adjustments” (p. 49). After explaining that the concept was established by anti-discrimination legislation pertaining to disability, the Centre asks if it should be extended to religion or culture and also questions the most appropriate terminology: “reasonable accommodations” (*accommodements raisonnables*), “practices of harmonisation” (*pratiques d’harmonisation*) or “negotiated adjustments” (*ajustements concertés*)? Elsewhere in the same document, the Center insists on the importance of promoting of a “common life based on the intercultural harmonisation and on the respect for everybody’s convictions”, highlighting at the same time that “intercultural and interbelief harmonisation must follow the path of negotiated adjustments as much as possible. The *civic* path based on negotiation and compromise is preferable to the *judicial* or the *legislative* path” (p. 4).

At the political level, the concept entered the agenda of certain political parties in 2009. Amongst the French speaking ones, Ecolo (the Green party) explicitly inserted the development of the practice of reasonable accommodations into its programme for the June 2009 regional elections. In the name of its objective to create a “truly

³⁸ These contacts were further strengthened during a closed seminar organized by the Halde on 11 and 12 September 2008 on the topic “France, Québec and Belgium: the challenge of secularism and reasonable accommodation on the basis of religion”.

³⁹ The notion of “belief sign” is defined as meaning “any object, image, clothing, symbol more or less visible which expresses the belonging to a religious, political or philosophical belief for those who ‘send’ the sign or for those who ‘receive’ it, p. 6. See <http://www.diversite.be/signes> (last visited on 18 June 2010).

⁴⁰ Centre pour l’égalité des chances, “Les signes d’appartenance convictionnelle. Etat des lieux et pistes de travail”, November 2009. This document can be consulted on the Centre’s internet website at the following address: <http://www.diversite.be/signes>. Pdf version: <http://veruiterlijkingen.diversiteit.be/hoofddoeken/files/File/Signes%20convictionnels.pdf> (last visited on 18 June 2010).

intercultural” society, this party, basing itself on the Quebec experience, advocates for the rapid institutionalisation of this mechanism. This proposal, however, no longer appears in its 2010 federal election programme. The other French speaking parties seem divided on the issue even though the Brussels socialist party also referred to the Quebec model of management of intercultural conflicts through reasonable accommodation as a source of inspiration in the fight against discriminatory practices in its programme for the June 2009 regional elections⁴¹. The Flemish parties rarely politicise this issue which nevertheless receives positive responses from private and public actors.

The interest in reasonable accommodation shown by the Centre as well as by most associations in the intercultural domain certainly has favoured the introduction of this issue by the federal minister for equal opportunities, Joëlle Milquet (Cdh), into the Roundtables on Interculturality’s agenda whose objective it is to propose recommendations to the government on matters relating to the management of diversity⁴². These Roundtables were convened in 2009 and their closure was planned for September 2010 before the government fell and new federal elections were held on 13 June 2010. The “definition of a policy of ‘reasonable accommodations’ in matters of interculturality” appears in the (open) list of 13 covered topics. In this context the Centre has commissioned a university study to establish an appraisal of the harmonisation practices and of the reasonable accommodations in employment (*see infra*). Thus, the Centre followed an earlier recommendation by researchers (Bribosia, Ringelheim and Rorive, 2009).

Demands and practices of reasonable accommodation in the workplace

Until today there has been no real coverage of the demands or practices of reasonable accommodation in the workplace in Belgium. However, two sources can be relied upon: consultation organised by the Centre and research conducted within the framework of the Roundtables on Interculturality. The objective of the consultation concerning the “active manifestations of religious or philosophical beliefs in the public sphere” organised by the Centre in 2005 was to “feel the pulse of decision-makers who are sometimes prompted to concretely manage cultural and religious diversity, by means of a relatively systematic consultation organised throughout the country and in different sectors of activity” (CECLR, 2005). Without entering into details of the results for each sector (CECLR, 2005, p. 19 ff), the survey reveals a great variety of attitudes ranging from a general prohibition to the conditional acceptance of active manifestations of religious beliefs, namely ostentatious signs, specific attitudes and behaviours, or specific requests related to religious or philosophical rules. The report contains no express reference to a right to reasonable accommodation but one can find indications of actors searching for “accommodations” “as far as possible” or “as long as the labour organisation is not made too difficult” (p. 13). The report illustrates

⁴¹ Brussels Federation of the Socialist Party, “Programme des socialistes bruxellois pour les élections régionales du 7 juin 2009 – Chapitre 8”, p. 72-73, available at: <http://www.ps.be/Source/PageContent.aspx?MenID=18344&EntID=1> (last visited on 18 June 2010).

⁴² Agreement of the federal government dated 18 March 2008. For more details see the internet website at: <http://www.interculturalite.be/Les-assises-2009,3?lang=fr>

a “proliferating pragmatic creativity to resolve sometimes complicated situations the Belgian way, intended in the best sense of the term” (p. 6). Whereas a major part of the consulted contact persons were reluctant to introduce a general regulation and preferred a pragmatic case by case approach, others wished nonetheless for “the formulation of guide posts or of a framework of reference allowing to limit the concerned manifestations” (p. 11).

Moreover, the Centre’s practice of attempting dispute resolutions in reported cases of discrimination based on religious beliefs also reflects an approach oriented towards solving issues through compromise by finding reasonable settlements for religious diversity⁴³.

Within the framework of the Roundtable on Interculturality’s activities, the Centre commissioned a university field study (Adam & Rea, 2010) which seeks to take an inventory of harmonisation practices and of reasonable accommodations in the employment context.

This is an extension of the consultation begun in 2005 which attempts to obtain a more precise picture in a specific domain, employment, where the debate seems to be more discreet than in that of education.

Due to budgetary and time constraints this research was limited to five domains in the public sector (education, health, administration and “parastatal” (or semi-public), immigration and integration) and four domains in the private sector (wholesale, banking & insurance, alimentary industry, cleaning). Without claiming to be an exhaustive investigation or a representative overview of the situation on the employment market, methodologically, the research consisted of the interrogation of private and public or semi-public sectors where the descendants of Moroccan or Turkish migrants are most present. The rationale for this was that there would be more demands for reasonable accommodation in those domains based on a principle of probability. All of the companies in the concerned domains were contacted as well as management and trade unions and the new actors in charge of the management of some of these issues in companies including the diversity managers present particularly in Flanders. However, not all of the companies responded and some had not experienced such situations. The inquiry was based on individual interviews and focus groups. The interviews were structured to assess the demands for reasonable accommodation formulated for cultural or religious reasons, the provided answers, the procedures put in place to reach that answers, and the degree of satisfaction with the results from the different involved parties. The situations are both numerous (more than 400) and contrasting. Though this research did not look for representativity, it did try to highlight the typical demands and modes of resolution adopted by the organizations.

What is known today as the issue of reasonable accommodation represents an ongoing topic of discussion within companies often having nothing to do with religious or cultural questions. Two of the most frequent accommodations concern either weekly working hours or the duration of holidays. Requests for an accommodation of weekly working hours is made by parents who share the care of their children. Requests for changes in the duration of holidays assumes that an employee may take a longer

⁴³ For some examples see: Bribosia, Ringelheim and Rorive, 2010, p. 38.

annual vacation than legally prescribed and concerns either individuals who wish to embark on an extended travel or individuals, especially of foreign origins, who would like to visit their family in their country of origin. These requests are frequent and are directly dealt with between the employees and those in charge of personnel, either at the management or local level with the foreman.

Thereafter, as far as demands related to the practice of a minority religion are concerned, it should be noted that this is not a new phenomenon. For instance, spaces for prayer were made available for Muslim workers in a number of steel companies in Wallonia and Flanders during the 1970s and 1980s. The same happened in some mines in Limburg. During a time when employment immigration was in high demand, private employers easily complied with the demands by immigrant Muslim workers. This seems to have changed now that policies seek to halt or limit immigration. Even though this is not a Belgian example, one can cite the strike at the Talbot-Citroën plant in 1982 (Tripier, 1990) where the demands by immigrant workers initiating the movement were not limited to eligibility at social elections but also included the possibility to pray during working hours and the provision of a room for that purpose.

The 2010 field study has highlighted a number of categories of demands for accommodation, depending on whether they concern dress code, diet, space for prayer or holidays for religious festivals. The following paragraphs will outline the different situations for each of these categories before providing a first and brief analysis of the responses given.

Demands for accommodation concerning the dress code

One situation is predominant regarding the dress code: the use of headscarves by female employees. Wearing a long beard, a natural characteristic associated with the Salafi movement, is often mentioned without however being problematized in the same way. No prohibition has been proposed concerning this matter which leads in some ways to a gendered differential treatment if not outright discrimination towards women. In a cleaning company (company A) where Belgians of foreign origins were numerous, a female employee asked whether she could wear the headscarf during working hours. She directly asked her foreman who, pursuant to consultation with the construction manager, allowed the piece of clothing. This solution was achieved without the intervention of the human resources' department. However, the employee was forced to take off her headscarf on one of the construction sites on which she was working because the client – i.e. the company where the cleaning company was operating – demanded her to do so.

The situation is more nuanced in the hospital sector. For instance, in one public hospital (B) the persons in charge of human resources refused to allow a woman to wear the headscarf. Generally employee neutrality in public hospitals is provided as a justification even though at times the reasons are more generic. Some argue for example that the wearing of a headscarf represents a risk when performing certain tasks. Indeed, this distinctive sign is often associated with values and positions that are viewed as not conforming to the law or to the philosophical or political orientations of public hospitals (contraception, abortion, euthanasia, in vitro fertilisation, etc.). In Flemish and French-speaking Catholic hospitals (C) the requests by female workers

to wear the headscarf were accepted by means of an agreement concerning the type of headscarf. Thus the human resources management proposed a company headscarf for any person wishing to wear a headscarf, based on a time in which some of the nurses were nuns. This authorisation was inserted into the employment regulations. Since this is a company with “religious background”, there is no mobilisation around the principle of neutrality in the discourse.

In some hotels, rooms are cleaned by hotel employees and not by outsourced personnel. Generally the accommodation takes place on the workplace with the person in charge of organising the work. Nevertheless, a difference appears with regards to the standing of the hotel. In 2 or 3 star hotels the headscarf seems to be more tolerated than in 4 or 5 star hotels where it is more likely to be prohibited.

Confronted with a large personnel turnover at the reception and at the cash register, the management of a furniture wholesale company (company D) called the employees charged with the replenishment of the shelves to solve this labour shortage. In that case the company realised that certain female employees refused to work at the reception or at the cash registers because that implied taking off their headscarves which, on the contrary, was accepted in the warehouse. The company appealed to an imam and thereafter to a permanent trade union representative of Moroccan origins belonging to the Christian trade union (CSC). Following these meetings and two meetings by the workers’ council, the management accepted that the employees could wear a headscarf in the company’s colours, blue and yellow, at the reception and at the cash registers. This negotiation is certainly also due to the specificity of this Swedish company which is very attached to questions concerning cultural diversity and whose Brussels location is in a neighbourhood inhabited by multiple ethnic minorities.

In a municipal administration (E), a female employee presented herself with the headscarf the day of her contract signature. The person in charge of the personnel told her she could not be hired unless she took it off, invoking the neutrality of public service and the fear that this situation might spark conflicts amongst the employees. In another municipal administration (F), on the contrary, the request by female employees to wear the headscarf was accepted, provided that this would occur in the back office whereas at the front desk it was prohibited. In these two municipal administrations the responses were given by the person in charge of human resources. This position can be found in other companies, in particular in a large wholesale company where the diversity manager played an important mediating role.

Demands for dietary accommodation

As far as food is concerned, the most important requests concern the possibility to propose meals that do not exclusively consist of pork or that also offer *halal* meat in company canteens. In the banking sector two types of situations have been observed. In historical Belgian banks (G) employee’s requests not to have only pork-based meals have been accommodated. However, the management refused to integrate *halal* or *kosher* meals for the personnel due to the excessive costs of those demands, which had been supported by the Christian trade union. On the contrary, in an American bank (H) all the requests were accepted. The management of the bank provided vegetarian meals

and thereafter ordered meat in *halal* and *kosher* butcheries. This open-mindedness can basically be explained by similar practices existing in the United States.

In one cleaning company (I) in Brussels where the majority of the trade union delegates are of Moroccan origin, the meals served during the workers' council consisted exclusively of *halal* meat. Thereafter Belgian employees asked that pork should also be served. In that interesting case the contrasting demands originated from trade union representatives of different origins wishing ultimately for the offering of a choice of meals.

The desire to offer a variety of food taking into account the employees' requests also occurred in an agro-food business (J) where during a personnel party all the dietary obligations were taken into consideration (*halal*, Spanish-Italian and Belgian meals). In order to ensure maximum participation of personnel to a similar party, a semi-public transportation company (K) took the initiative to propose a *halal* meal for the entire staff before any formal request was made.

In one hospital (L), Muslim employees complained that the company canteen only offered one meal at night which was often composed of pork meat. These employees demanded that only *halal* meat should be served. The management agreed but in the workers' council the trade union representatives opposed that solution and asked that two different meals be proposed. Due to the excess costs associated with two different meals, the management decided nonetheless to offer *halal* meat only at night. A similar situation arose in a hospital (M) where Muslim employees asked for food which would be more in line with their religious beliefs. The request was addressed to human resources who in turn referred it to the trade union representatives. The demand was not met because it was not representative of the entire staff and would have created a cost to be shouldered by all the employees.

Demands for accommodation concerning prayer space

Demands for prayer space involve both authorisation to pray at the workplace and the provision of a suitable space for that activity. In a public company (N), a foreman found an employee praying in a space accessible to the public. This situation gave rise to a debate amongst the team which consisted mainly of Muslim employees. Even though the foreman deemed that in the name of neutrality of public institutions, this practice should be prohibited, in particular in a space accessible to the public, it was decided by common agreement that the employees (park caretakers) could pray in the locker rooms during their break. In another semi-public company (O), domestic garbage disposal, the employees asked to pray during working hours. The owner of the company, who became personally involved in the solution, invited an imam who convinced the employees to pray after work, based on the rationale that the Quran authorises individuals to catch up on their prayers after the prescribed hours for work reasons. Thus the employees agreed to postpone their prayers. In yet another semi-public company (P) the employees of a private cleaning company use a room reserved exclusively for the use by its employees for prayer. This practice is tolerated in particular since the foreman and the inspectors of that company are themselves Muslim and appear to be more open to this request. Thus, in these two companies

these practices are possible due to the proximity between the employees without the involvement of the human resources department.

In one hospital (Q), the management planned to provide a space for prayer to its employees. Personnel were offered the use of the devotional room initially reserved to patients as there were not many requests. The employment regulations of a transport company (R) formally prohibit the practice of prayer in the name of the neutrality principle but sometimes tolerate it in the field with the knowledge of the human resources department, especially when supervision is decreased, such as break time for busdrivers. Nevertheless, prayer is not accepted in spaces for collective use such as locker rooms though it is not prohibited in the work space, in that case, the bus. In a wholesale company (S), the management had signed a charter of diversity which authorised employees to pray in the workplace but only during their break. The employees must organise amongst themselves without disturbing the organisation of labour and without any specific space having been allocated to them. Last but not least, the practice of prayer has been authorised during break time in a municipal administration (T). The demand had been advanced by two employees who negotiated the allocation of a specific space with their hierarchical superior. However, following complaints by other employees who viewed this as a favourable treatment incompatible with the principle of neutrality, the accommodation was reversed.

Demands for accommodations concerning holidays

Demands concerning holidays for religious festivals are of two different kinds. The first is quite widespread and concerns the festival at the end of Ramadan and that of Eid al-Adha. The second one concerns the organisation of labour during Ramadan. Without entering into the details of specific practices, two different types of treatment emerge depending essentially on the size of the company and the number of employees. As far as the two specific festivals are concerned, a major part of the employees take the day off based on the principle of personal preferences. The problem arises in companies where the number of Muslim employees is high. In that case either the company accepts to work with reduced personnel, if that is possible, or it anticipates those holidays in its planning of the organisation of labour. These demands presuppose an arrangement between employees, particularly in public sector companies where continuity of service has to be guaranteed. In the Flemish speaking educational system a paradoxical situation can be observed. Whereas the pupils have the right to stay home during religious festivals, the (Jewish and Muslim) religion teachers do not have that choice. Requests to extend this right to teachers have been made. However, they have been unsuccessful so far because they raise the issue of equality with the other Jewish or Muslim teachers who teach different subjects. As far as Ramadan is concerned there is no fixed rule given that the time period is longer. In this case it is working time arrangements amongst employees that are most common.

Analysis

The examples above demonstrate the multiplicity of situations and responses. In both the public and private sector, the number of employees of Muslim origins in the workforce determines the explicit formulation of demands as well as the

necessity to solve them, whether by recognition and negotiation or inconspicuously and informally. On the basis of Boltanski and Thévenot's theory on the economies of worth (1991) it is possible to oppose two principles of justice to the expressed demands. One takes place in the private sector and the other takes place in the public (and semi-public) sector. In the private sector the principle of efficiency predominates whereas in the public sector the principle of representativity is dominant. Indeed, in the former domain decisions to tolerate the employee's demands, often under certain conditions, are taken in the name of efficiency. This efficiency relates mostly to the management of the labour organisation. In companies with a particularly high number of personnel of Muslim origin (cleaning, transport, agro-food), production depends on the employees' presence and motivation. Hence, for the sake of convenience, attempts at accepting the employees' demands are made in order not to destabilise the production and team organisation, a fact that becomes particularly evident with regard to the demands for holidays coinciding with religious festivals. On the contrary, in public companies and at times in semi-public ones, the principle of neutrality of the public service is often invoked.

However, it seems there are some exceptions to these principles. As noted before (Rea and Ben Mohamed, 2000), tolerance for headscarves in both private and public companies, for example, can be limited on the basis of the criterion of visibility. Thus the headscarf can be accepted in the back office but rejected at the front desk. In that case, the argument of economic efficiency prevails in the private domain (company A), in other words the desire not to frighten the client. For the public domain tolerance consisting of the suspension of the principle of neutrality can be limited by the fear of complaints by customers (company F) or of conflict with other employees (company E).

It is important to stress that these demands for reasonable accommodation in the workplace do not simply oppose employees on one side and employers on the other. As a number of situations show, the position of other employees and trade union representatives is also important. In fact, rejection of demands is often the result of opposition by other employees and certain trade union representatives (companies E, I, L, T). On this point, it seems clear that these issues cause debates even within employees' collectives and with their representatives which is why it is difficult to expect a unified response from trade unions. It is equally clear that the issue of diversity is more openly addressed in the Christian trade union (CSC) than in the socialist trade union (FGTB). Moreover, it should be noted that in international companies (D and H) which are particularly attentive to diversity issues, the resolution modes are based on an entrepreneurial culture of multiculturalism management. Similarly, in companies with religious backgrounds (company C), a functional solution is often proposed. Far from the political and media debate, a certain pragmatism seems to dominate in the employment context even though, in certain circumstances, especially with regard to the headscarf, political and philosophical discourses around the principle of neutrality of public, and sometimes private, services influence the responses provided to demands for reasonable accommodation.

Aside from this, reasonable accommodations are relatively contingent and dependent on the involved actors and the combination of actors. Undoubtedly, these

demands are most often solved by means of “local justice” (Elster, 1992). The foreman and the intermediary middle management have significant discretionary powers. Most examples show that the employees only rarely address themselves to the people in charge of human resources.

Proximity is fundamental in formulating the demands and in providing a response that is often only temporary at this level. This local justice is essentially elaborated for issues relating to food or to prayer at the workplace. Thus, the discretionary power of the foreman leaves ample spaces for arbitrariness. The response heavily depends on that person’s beliefs. Where the foremen are Muslims themselves it is proximity that prevails whereas when they are non-Muslims the argument of reverse discrimination can be invoked.

This local justice also depends on the combination of the involved actors. Three different typical situations emerge. In a first case, negotiation is completely local and reasonable accommodation occurs between the requesting employee and his/her closest foreman. The proposed solutions in that case are relatively unstable given that they can change due to the intervention from external (clients or users) or internal actors (hierarchical superiors). In the second case the reasonable accommodation is achieved thanks to the mediation by a traditional actor such as the trade union delegate or representative. This triangular configuration often ensures a stable accommodation. Sometimes intermediaries, other than traditional figures in industrial relations, (diversity manager, imam) intervene as mediators (companies D and O) pursuant to requests from the management or human resources. The intervention of those intermediaries implies an increased formalisation of requests and the involvement of the company’s hierarchy. Finally, reasonable accommodation can lead to formalisation in employment regulations or in the company’s diversity charter. In these situations, human resources departments often act preventively.

As regards the entire study, whereas numerous demands were registered, a majority of the actors, whether employers or trade unions, were adamant that this topic remains discreet. In fact, trade unions fear the influence of this issue in negotiations with employers on topics which they deem to be more important such as salaries, accommodation of working times and careers. Employers share the same point of view even though they are not as categorically opposed. Like the National Employment Counsel (*Conseil national du travail*), employers and trade unions fear any legislative initiative on the subject and prefer practices of local negotiation, namely by the company. Most actors in the employment sector prefer the absence of publicisation of this issue. These same actors are suspicious of mobilisation for a cause by actors external to the employment sector (associations) because they want to remain in control of the agenda and of the mode of historically constructed autonomous negotiation (Alaluf, 1999). Eventually this leads to another issue, namely the representativity of employee representatives, in particular in public service where employees, and even more so their representatives, rarely belong to ethnic minorities.

Conclusion

The development of European anti-discrimination law has led to the emergence of the concept of “reasonable accommodation” in European legal and political

vocabulary. The European Employment Equality Directive of 2000 only recognises the duty of accommodation in favour of disabled people. However, the introduction of this concept unavoidably poses the question whether, as under Canadian law, a similar duty for religious grounds can be deducted from existing provisions or, in the absence of such provisions, whether it would be advisable to provide for such a mechanism through written law, as in the American case. The answer to the first question is less evident than would seem at first sight. While no duty of reasonable accommodation on the basis of religion is explicitly established under European Union law, the prohibition of indirect discrimination might be interpreted by the European Court of Justice or by Member State jurisdictions as requiring, in certain cases, that the author of a provision or of a rule of general application adapt that measure to avoid discriminating indirectly against certain individuals because of their religion. The European Court of Justice implicitly adopts a similar reasoning in its decision *Vivien Prais* – a decision admittedly decided prior to the adoption of the Employment Equality Directive and which remains unconfirmed. In any case, European Union law does not prevent Member States from defining the obligation of reasonable accommodation more broadly than the Employment Equality Directive. Besides, since the *Thlimmenos v. Greece* ruling, the European Court of Human Rights recognises that, as a result of the principle of non-discrimination enshrined in Article 14 of the Convention, the legislator may, under certain circumstances, be asked to introduce appropriate exceptions in legislation to avoid disadvantaging people practicing a certain religion, without any objective and reasonable justification.

The relative novelty of reasonable accommodation should not lead us to forget some older practices that this concept builds upon in the European context. For example in Belgium during the 1970s and 1980s demands, such as those for a prayer room, formulated by immigrant employees often received an affirmative answer of a pragmatic nature, especially in private companies for production reasons. Today, as demonstrated by the study conducted in the framework of the Roundtables on Interculturality, the desire by employees to have some of the constraints related to practice of a minority religion – generally Islam – recognised in the employment sphere gives rise to a number of cases where local and informal solutions were negotiated by actors in the labour market without reference to any legal obligation. One can nevertheless observe different attitudes depending on whether one looks at the private sector or the public sector on the one hand, or at the type of demands on the other hand. For instance, adjustments in meal composition as well as demand for holidays during religious festivals seem to cause little opposition even if they sometimes clash with practical or financial obstacles. This is not the case for demands concerning headscarves or space for prayer in the workplace. Here, employers, particularly public employers (but not only), are much more reluctant to accommodate demands although some examples of accommodation exist in those cases as well.

Obviously, these determinations do not imply that recognition of a legal obligation of reasonable accommodation for religious reasons in Europe is not relevant. First, conceptually, reasonable accommodation expresses an important idea in the evolution of the principle of equality. If individuals belonging to certain minorities have difficulty accessing employment or services, the problem does not necessarily

lie in the characteristics these individuals have with regards to the majority but it can also be the result of an environment conceived without bearing their situation in mind. By inviting reflection as to how this environment might be modified, this concept purports to guarantee equal opportunities to disabled individuals or to those practicing a certain religion and to ensure their integration in social, economic and cultural life. From this point of view, not only people must adapt to their environment. Equality demands that the environment itself, as far as this is possible, be altered in ways which allow everyone to fully participate in society regardless of their specific characteristics. Second, from a practical standpoint, recognition of a right to reasonable accommodation in the employment or other contexts would reinforce the individual's position *vis a vis* the authority upon which the duty rests. Indeed whether demands for accommodation on the basis of religion will be taken into account or not will not depend on the employer's discretionary power along with all the risks of arbitrariness that it entails. Employers would be obligated to search for a reasonable solution within the limits established by law or by the courts. Thus by establishing common rules applicable to all companies and other related sectors, the "legalisation" of accommodation practices could contribute to guarantee legal certainty and the equality of individuals in the treatment of their demands.

However, the introduction of a legal duty for reasonable accommodation could also cause some inconveniences. One can fear that the possibility of new demands for justice would also lead to increased conflicts within companies, not only between employees and employers but also amongst employees, where the legitimacy of recognizing religious specificities is sometimes called into question. One consequence is the potential for employers to develop strategies which seek to avoid hiring Muslim employees, fearing that they might then invoke the right to reasonable accommodation. Losing the discretionary power to reject demands for accommodation might therefore shift discrimination to the moment of hiring. Another difficulty highlighted by the American and Canadian experience is faced by the judges whenever a religious rule invoked by the applicant for accommodation is contested within the concerned religious community. The Bouchard-Taylor Commission report nevertheless puts these risks into perspective. According to the authors, the Canadian experience of "reasonable accommodations" is generally positive. As a whole, Canadian institutions and economic actors have successfully integrated the mechanism of reasonable accommodation.

It is maybe too early to determine whether recognition of a legal duty of reasonable accommodation would be the most appropriate instrument to guarantee the right to non-discrimination by religious minorities in Europe. But one can already envisage a middle ground between the recognition of a general right to reasonable accommodation on the basis of religious grounds in the workplace and the preservation of the *status quo*. This would consist of introducing certain specific accommodations for employees as specified by the legislation. In the Belgian context a sufficiently strong convergence of opinion allows for a legislative intervention which would guarantee the same rights to all employees while keeping in mind the constraints of companies: holidays for religious festivals and adjustment of meals to meet religious prohibitions. On other

topics such as headscarves, on the contrary, it seems currently difficult to build a consensus whereby the issue could be regulated for the entire employment sector.

CHAPTER VII

The social construction of Otherness¹

Didier FASSIN

The relation to others as a means for the construction of the self certainly corresponds to the elementary form of life in society. As social scientists, we know, however, that who the others are and what the self is cannot be taken for granted. As a consequence, the social construction of otherness, and correlatively of identities, should be viewed as a priority by both anthropologists and sociologists. This is precisely what “The Others in Europe” is about. My contribution is a reflection based on the collective research for “The New Frontiers of French Society” (Fassin, 2010) which I have coordinated over the last four years.

From borders to boundaries

As regards contemporary Western Europe – and although I refer here mainly to the French case, I believe many observations can be generalized to this broader spatial and political context – a central hypothesis regarding the social construction of Otherness can be phrased in the following manner. In the last two or three decades, Otherness has shifted significantly from the outside to the inside. We used to think of Otherness mostly in terms of immigration and we are increasingly approaching it in terms of racialization. Traditionally, limits between the self and others essentially involved external, territorial, and juridical borders; however, they have progressively become internal, cultural, and social boundaries. From borders to boundaries: one can illustrate the evolution through this simple formulation. Interestingly, the opposite has occurred in other places, most notably in the United States where the question

¹ This text is based on a research conducted thanks to a grant of the French National Research Agency (ANR). I am grateful to Saskia Bonjour for her remarks and suggestions and to Andrea Rea for associating me to this collective reflection.

of internal boundaries is intrinsic to the history of the country and where its external borders have recently become a major issue with the appearance of millions of undocumented immigrants into the public space.

Having suggested such a radical transformation, I would like to avoid any misunderstanding by adding that obviously the shift from an external other to an internal other does not imply that we are casting aside anxieties about immigration and borders. The obsessive focus on illegal aliens, asylum seekers, and statistics of deportations; the paranoid development of detention centres, airport waiting zones, and camps inside and outside Europe indicate, on the contrary, that these issues remain a crucial political question. However it is not so much the otherness of those who are now considered unwelcome that is at stake as the otherness of those who are now among us. In effect, new others have appeared who are not outsiders but insiders. They are not as different as foreigners coming from abroad and are only distinct on ethnic, racial and often religious bases. They form minorities which are discriminated against by the majority. They often see themselves as not entirely or not legitimately belonging to the nation despite the fact that they are formally recognized as citizens.

Indeed, immigration and racialization are not independent. On the contrary and as illustrated by Paul Silverstein (2005), they are intimately linked – historically and even genealogically. Immigration is definitely racialized (not all immigrants are unwanted, not all descendants are required DNA tests to confirm their kinship relations, and an African experiences more complications at the French border than an American). Correspondingly, those who are racialized in the poor outskirts of France's large cities are of immigrant descent (most of them are the direct descendants of men and women from former colonies). The intellectual challenge is therefore to articulate the questions of borders and boundaries rather than to oppose them. From this perspective, the reluctance of most European governments to admit Turkey into the Union is interesting. Beyond the less controversial arguments of human rights or economic destabilization, it is increasingly evident that this is an issue of both border and boundary. It concerns redefining not only the geographical frontier of Europe (not so long ago Turkey was one of the most important powers on the continent) but also the ontological imaginary of Europe (as white, Western and Christian).

To expand on my main proposition I have added a secondary hypothesis. I am interested in a political transformation which involves not only a question of a change of perspective in the definition of otherness (from the immigrant other to the racialized other) but which also simultaneously involves a change in sentiment towards this other (from indifference to disquietude). The social construction of otherness is increasingly mobilizing representations of danger and ideologies of fear. Until the mid-1970s, immigration was perceived as a "solution" to economic and even demographic problems; immigrants remained largely invisible in their shantytowns or their hostels. Since then, immigration has appeared as a "problem" necessitating new solutions. Initially it was viewed as an economic threat in the context of growing competition for work and resources. Later it became a concern for public security particularly during the aftermath of the 2001 terrorist attacks in the United States. Similarly, racialization has been increasingly linked to issues of public order including ordinary delinquency or urban riots, more specifically in France and Britain. Racialization soon became a

justification for the routinization of racial profiling, a practice condemned until the 1990s and which is now generalized. But again, this dangerous other is not only seen as such in terms of economic competition and public security. It is also, though less openly, regarded as a menace to European and national identities which are presented as what many implicitly hold them to be: white, Western, Christian and formally democratic as opposed to Blacks or Arabs, Asians or Muslims and supposedly non-democratic, disrespectful of human rights and oppressors of women.

My argument so far – the edification of new barriers, the racialization of immigration, the culture of fear and the resulting rejection of others – gives a rather pessimistic tone to my analysis of the social construction of otherness. This impression should, however, be mitigated by the non-contradictory observation that even in this obsessive and paranoid mode, Europe is definitely discovering that it is changing or rather that it has already changed. This is a point that most commentaries miss from both the right and the left sides of the political spectrum. The former denounces the threat of alien and racial others while the latter criticizes the xenophobic and racist turn. However, neither sees that profound transformations are taking place. In fact it is precisely because these changes are taking place that tensions arise. Whatever resistance exists, it cannot reverse the phenomena that are now a part of our history including the presence of numerous families from former colonies living mostly in underprivileged housing estates; the diversification of skin colours and patronymic consonances in all social strata, even if it is much more visible in lower classes; and the demographic development of Islam as the second religion. Significantly, France now has a Black movement embodied in the *Conseil Représentatif des Associations Noires*, and recently began building mosques so that Muslims are not relegated to praying in basements. It took a century for France to realize that it had been constituted through immigration (social scientists themselves were not very active in integrating this idea which remained absent from most historical works until recently). Thus it should not be too much of a surprise that it might take one or two more decades before the French (including the intellectuals) accept the reality of their racial and religious diversity.

From reluctance to recognition

Public recognition of the evolution being examined here – with the reformulation of immigration and racialization issues – is quite recent. France is a good illustration of how profound change can long remain ignored, yet suddenly become almost dazzling in its presence. In this respect, the 2005 riots represented a brutal discovery by most French people as well as political leaders of facts they had ignored until then. President Jacques Chirac's speech after the riots subsided was quite revealing from this point of view. He admitted the failure of the social contract that the Republic was assumed to offer when he acknowledged the existence of racial discrimination. However, he also demagogically associated the violent outbursts with illegal immigration despite the fact that the great majority of the rioters were citizens often born in France.

To bring a personal note to my analysis, I can cite an anecdotal but significant observation. A year before the riots, I organized a series of conferences with Eric Fassin (2006) on racial issues. I remember my own lexical embarrassment at that time

since, until then, I would never have used words like “Blacks” or “Arabs”, much less “race”. I also recall that as we embarked on this academic initiative some colleagues expressed understandable discomfort. After all, were we not lending some legitimacy to words and questions that were considered not only scientifically illegitimate but also politically dangerous? One year later, “race” had become a rather common and generally accepted interpretation of the riots. Some denounced unassimilated ethnic groups as developing anti-White racism; others conversely saw the events as the consequence of racial exclusion or inequality. Either for bad reasons (stigmatization) or superior reasons (recognition of discrimination), the concept of “race” had become commonplace in the public sphere. Thus, whereas I had initially been suspected of dangerously introducing a racial lexicon, after the riots I began to call attention to the risk of categorizing the rioters in racial terms. Let us consider this anecdote for what it tells us of the changes taking place.

Until very recently, France has seen itself and was often seen by others as colour-blind. Even the French academia, from Gérard Noiriel (1988) to Dominique Schnapper (1991), was reluctant to open what most intellectuals and scientists saw as Pandora’s box. Discussing race, other than to denounce racism (one of the few questions that sociologists and anthropologists, along with philosophers, could only approach in normative and moral terms) was considered potentially performative and therefore dangerous. It made race real (or at least gave consistency to its possible existence and legitimacy to the use of this vocabulary). This self-proclaimed French exceptionalism should not be taken for granted, since in many countries – including the United States and contrary to what is often assumed in France – the discourse on race is controversial. However, one cannot deny that several historical factors contribute to the reluctance of French society to see itself as racializing and discriminating.

Three factors should be considered in particular. First, the imaginary of the Republic has been a severe obstacle to the recognition of the Republic’s failure to implement its principles, the equality principle in particular. The idealization of the State as being related directly – and equally – to citizens remained intact in spite of the many discrepancies between affirmed values and observed facts, particularly in the colonies. Successive Constitutions mandated that there could be no differentiation in the “human family” and in 1958 the Fifth Republic proclaimed “no distinction of race”. Second, the ideology of the Nation produced a deep belief that the natural destiny of all those who resided on French territory was to become French, both culturally as a result of the process of assimilation that the education system provided, and legally as a consequence of the *jus soli* allowing the individual born in France with at least one parent born in France to become French. This model has certainly facilitated integrating aliens and making differences less visible although studies show that, independent of the acquisition of citizenship, distinctions often continue to exist, here again as a distant echo of the colonial period. Third, the referential of Class, especially in social sciences, has worked as a powerful obstacle to admitting the possibility of determinations other than socioeconomic. French statistics rely almost entirely on a classification of professional categories, which is a proxy of social class, for their analysis of difference and inequality, whereas even the parents’ nationality, as an imperfect proxy of race, is forbidden in official data.

The combination of these three factors – the imaginary of the Republic, the ideology of the Nation, and the referential of Class – concerns the dominant majority. But their efficacy has been reinforced by objective and subjective conditions of the dominated minority. On the one hand, objectively, immigrant individuals and families were marginalized. Men in their hostels were often transported back and forth to the factory and families lived in slums and sometimes even in camps. Exploitation of the former and exclusion of the latter left them outside of society. On the other hand, subjectively, these immigrants and their families internalized the illegitimacy that was imposed upon them. They knew that they were tolerated as long as their labour was useful but they also understood that they could not claim rights or denounce injustices, except in isolated cases when, for instance, they went on strike. In fact, many considered it necessary to tolerate this situation for the future of their children and to sacrifice their generation for improved conditions for the next generation. Tensions arose the moment these expectations were not fulfilled.

The famous 1983 March for Equality and Against Racism (often referred to as “*La Marche des Beurs*” despite rejection of this moniker by many protestors) was a first sign of change. However, it is significant that the March was still grounded on the paradigm of immigration. The protest’s two principal demands concerned the creation of a ten year residency permit for immigrants and the right to vote for foreigners of which only the former was obtained. Nothing was said at that time of what began to be called the “second generation”, that is the descendants of immigrants who were often not immigrants themselves. The dominant discourse was that of “integration” and the economic insertion of the parents guaranteeing the social inclusion of their children was emphasized. Fifteen years later, when the first official report on discrimination was made public in 1998, this promise remained unfulfilled. Racial discrimination had resulted in segregation, unemployment and impoverishment. As such this reality was not new. What was new was the fact that these phenomena concerned French people born in France whose only differences with other French people born in France was their skin colour, name, origin, or religion. The sentiment of injustice culminated when two children, chased by the police for an act they had not committed but were suspected of, precisely because of who they were racially, died in an electric transformer where they had hidden. The 2005 riots started that same night and lasted more than a month. By that time, the racialization of French society could no longer be ignored.

From notion to concept

So far I have referred to the notion of racialization without questioning it. But what does it mean? Or rather in which sense can we speak of racialization? Of course much has been written on racialization. Michael Banton (1977) introduced it to the social sciences and restricted its use to discourses mentioning race explicitly while Robert Miles (1989) extended its meaning to implicit reference to racial differences. Stephen Small (1994) believed that it avoids the reification of race while David Theo Goldberg (2002) suggests that the inflation of its use makes it an empty concept. My point is certainly not to summarize the sometimes heated scientific and ideological

debates about the word and its meanings but simply to indicate what may be its heuristic value, i.e. what could turn the notion into a concept.

Let us start with a negative definition and explain what racialization is not. Racialization is not about race and it is not about racism. First, discussing racialization does not imply the existence of races as biological, phenotypical or even cultural entities. On the contrary, it suggests that races are social constructs with social efficacy but without existence as such. Irish and Italians have been racialized in the United States; Romani, and even more so Muslims, are racialized in Europe. None of these groups correspond to a particular race. Second, racialization is not equivalent to racism even though some mistakenly reduce it to that level. Certainly those who racialize others often do it for racist reasons in order to discriminate against or even exterminate them. But racialization exceeds racism. One may have racially discriminatory practices in employment selection without being racist, simply anticipating clients' racism and therefore not hiring a Black or Arab worker. One can also define oneself on a racial basis sometimes precisely to combat racism. Speaking of racism almost always implies a moral judgment but analyzing racialization consists of accounting for a social phenomenon.

If racialization is not about race or racism, what is it about? There are two ways of understanding the concept. On the one hand, racialization refers to a process. It corresponds to the imposition of a racial interpretation on social groups or social facts. It means that groups or facts which were not seen as racial come to be regarded as such as the result of an ideological process that Michael Omi and Howard Winant (1986) call racial formation. On the other hand, racialization signifies a problematization. It corresponds to a manner of viewing society in order to make sense of it and especially to define what is relevant as a problem. According to Michel Foucault (2001/1984), it defines a historical moment when the language of race becomes socially prevalent or when society poses itself questions in these terms. As a process, racialization is a social production resulting from interactions between individuals, generally within relations of power. As a problematization, racialization is a social construction by which an account of the world is given, principally within relations of description. The two meanings are not exclusive but correspond to distinct realities apprehended through distinct levels of reading. They can even be dissociated: for instance, until the late 1990s in France, racialization existed as a process (immigrants were racialized, in particular) but not as a problematization (the problem was not posed as such in the public sphere).

But which forms does racialization take in everyday life? How does it become manifest? Where can we recognize it? Since it has often been seen as more or less equivalent to racism, its meaning has been considerably restricted. Empirical observations suggest, however, a diversity of significations which may be conceptualized as grammatical persons. As the first person, I racialize you. In other words I ascribe you to what I see as a racial group or as racial characteristics. As the second person, you racialize yourself; generally in response to my first move which means that you recognize yourself as what you have been imputed to be. As the third person, the individual present on the racialization scene provides an account, either

through narratives, statistics, or analyses. Let us examine each configuration in more detail.

The first move – both logically and chronologically – is ascription. Race is imposed on a person or a community. It can take different forms, such as biological, phenotypical, or cultural, but the common denominator is the essentialization and radicalization of difference, as Colette Guillaumin (2002/1972) has emphasized. Racial ascription is a reification of otherness. The racialized person or community has no option to accept or reject the definition or qualification that is given. Schematically, the moral intention linked with this ascription can take two orientations. On the one hand, it can be negative which implies a hierarchy of worthiness or a differentiation of sentiments. Those who are racialized are either despised or hated which in turn leads to attitudes of discrimination (and even exclusion) or rejection (and even extermination). This is the most frequently documented case and corresponds to the classic form of racism. On the other hand, it can be positive which implies a distinction and often an argument of protection. Those who are racialized are supposedly separated, and even segregated, for their own good. Certain ethnopsychiatric and more generally culturalist practices have thus pleaded for different health, social or even juridical systems (culturalist hell is always paved with good intentions). In this case, one could speak of benevolent racism. Whatever its moral basis, racial ascription does not recognize the right of the person and the community to define and qualify themselves – and therefore escape racial ascription.

The second move – in the sense that it is usually, but not always, consecutive to the first – is the recognition of oneself through the imposed racialized language. Frantz Fanon provided a remarkable illustration of this phenomenon with the insult “dirty nigger!” through which he indicates he discovered his blackness. Racial recognition is a self-identification. The person or the community ascribed to a certain racial definition or qualification identifies with it in order to reverse the stigma. In France, the *Conseil Représentatif des Associations Noires* uses the language of colour by which Black people are discriminated. Most of its members are less interested in building a racial community than in forming a community of experience – the experience of racial discrimination. Conversely, Arabs in France, who also endure racial prejudices, usually reject this designation and, significantly, have no social movement based on this supposed racial belonging. The contrast between the two minorities emphasizes the importance of strategies in the process of recognition. British or South African Black movements are interesting from this perspective in the sense that they adopt and transform the racial discourse. They define themselves as Blacks, but simultaneously re-qualify what it means to be Black by including all non-Whites in this category. While they seem to accept their ascription, in reality they subvert it.

The third move is exterior to the racial scene. It is represented by the witness or the observer who attempts to give an account of the scene. He or she is neither racializing nor racialized; he or she is describing and interpreting what he or she sees and how he or she understands it. Description and interpretation can involve testing, ethnic statistics, racial questions in censuses, anecdotes reported in the media, commentaries by intellectuals and politicians, and of course academic writing. Certainly these multiple and heterogeneous procedures align themselves with various logics. Some try

to combat racial discrimination (through surveys in private companies, for example), others want to produce racial constituency (a black vote, for instance), and others may even attempt to delegitimize minorities (by counting the number of players of colour on a football team). I indicated that the witness or the observer is not racializing. This assertion should certainly be amended. The act of fabricating figures, narratives or analyses using racial categories has a performative effect and contributes indeed to the existence of what is named. Actually whiteness would never have been recognized for what it is if social scientists had not qualified it and demonstrated its relevance. More generally, the third person can become a first person (when he or she ascribes a racial category) or a second person (when he or she participates in the recognition of the racialized group).

The three dimensions of racialization are of course related. Their articulation could be formulated in the following manner. Through ascription, racialization is imposed on individuals and they passively become racial subjects. This is a process of subjection. Through recognition, racialization becomes self-identification and the individuals or community actively become political subjects. This is a process of subjectification. Through description and interpretation, racialization is a means of deciphering the social world. This intellectual operation produces new objects and is a process of objectification. But of course, there is no mechanical linearity between the three persons and moreover the positions may change as the second person can ascribe in return and the first person can recognize himself or herself in the process, just as the third person can contribute to ascription and recognition.

Conclusion

By trying to comprehend the social construction of otherness, I have developed a sort of multi-layered discussion of my original proposition. The picture may now be somewhat clearer, even if it is more complex.

The social construction of otherness implies the social construction of identities. It means imagining borders and boundaries. In recent years the two have tended to become more and more entangled as the question of immigration has developed into an issue of racialization. This process has involved aliens and their descendants. But it is not limited to them. Racialized others presuppose racialized selves. Producing Blacks or Arabs or Romani through prejudice and discrimination is also producing “Whites” of a certain kind of whiteness – just like photographs are made from negatives. Going one step further, racialized others also construct themselves as selves and construct their others as others. Minority youth in the underprivileged suburbs of France thus use “French” to designate the majority population, which they see as others. By employing this formulation, a euphemism for Whites, they reveal that they do not recognize themselves as the citizens they legally are. In other words, the racialization process is more than the result of an interaction: it is an intersubjectivation. In this dynamic, the third party which I characterized earlier as witness or observer is also part of the intersubjectivation. He or she is not an impartial judge, but, rather, an actor participating in the racialization process.

The European scene initially seemed rather simple. We had nationals and foreigners, citizens and aliens. It became more complicated when it appeared that

nationals could be seen as foreigners and that citizens still continued to consider themselves as aliens, mostly for reasons of colour, origin, culture, or religion. In France most specifically, the first reaction to this changing reality has been mere denial: this does not exist, it is not true. When it became impossible to ignore the evidence, a second reaction was often of denegation: it certainly exists, but it is not what you think. The witness or the observer was systematically accused of threatening the social order by his or her description or interpretation. As is often the case, the messenger was blamed for the bad news he or she delivered. Recent preoccupying developments in European countries suggest that it is now definitely time to confront these issues with lucidity and serenity and to hold our societies accountable for their construction of otherness.

CHAPTER VIII

Ethnic discrimination and minority identity: A social psychological perspective

Maykel VERKUYTEN

Discrimination occurs when members of a group are treated unjustly on the basis of their membership to that group, for example rejecting a woman for employment simply because she is a female, an elderly person because he is relatively old, or an ethnic minority member because she is Turkish Dutch. These examples show that discrimination is an inter-group phenomenon. People are treated on the basis of their group membership, typically by others who belong to a different social group or category. Ethnic minorities can face different kinds of discrimination in various social settings and by different others, including co-ethnics. However, in general, they are discriminated most often by the more powerful majority group. Their discrimination can involve various spheres of life (e.g., the labour market, housing) and can be situational and temporary or more structural and systematic.

Social psychologists examine the subjective meanings and consequences of perceived discrimination and the ways in which members of discriminated groups cope with unjust treatment and exclusion. Psychologically, being a target of discrimination is particularly painful when it involves a valued group membership. People are not only individuals but also group members and these memberships can have great emotional and value significance (Tajfel, 1981). Ethnic discrimination implicates one's ethnic group membership which often is very important for minority group members (Verkuyten, 2005). Ethnic identity is part of a person's sense of "who we are" and discrimination is an ongoing reminder of the rejection and devaluation of one's ethnic minority group in broader society. Thus, even when individuals are not discriminated against personally, they have to deal with the negative treatment and disadvantaged position of their ethnic group. It is often the more advantaged members of disadvantaged groups who engage in actions on behalf of the group, not the most disadvantaged (Gurin and Epps, 1975).

Research has indicated that ethnic identity plays a complex role in perceptions of and experiences with discrimination (see Schmitt and Branscombe, 2002). Theoretically, the question is how ethnic identity is involved in these perceptions and experiences. Here, I focus on ethnic identification for which there are two main possibilities. First, ethnic identification can be an antecedent of perceived discrimination because group identification provides a framework or lens to interpret the social world (the “group identity lens model”). Second, ethnic identification can be a consequence of discrimination because discrimination implicates one’s ethnic self and therefore makes ethnic identity more relevant and important (the “group identity reaction model”). The first part of this chapter focuses on the former and discusses the social psychological reasons why ethnic minority members tend to minimize and underestimate, rather than exaggerate, the possibility of discrimination. In the second part, the focus is on increased ethnic identification as a result of discrimination. Attachments to one’s minority group can be an important buffer to the negative psychological effects that discrimination typically implies and forms the psychological basis for collective action. Increased ethnic identification resulting from discrimination can also lead to a less positive attitude towards the majority group and the host society. This possibility will be discussed in terms of the so-called “integration paradox”.

Group identity lens model

This model hypothesizes that ethnic identification is an antecedent of perceived discrimination. This model is in line with self-categorization theory (Turner and Reynolds, 2001) which posits that when a particular social identity is salient it provides a “lens” through which the perceiver sees the world and makes sense of it. Group identity functions as a group lens that makes individuals sensitive to anything that concerns or could harm their group and themselves as members of that group. Thus, increased ethnic identification will lead to increased discrimination perceptions and these perceptions will result in coping responses. Different studies have found supporting evidence for this model (see Major *et al.*, 2002). Thus, a minority member may perceive more discrimination because of the importance or centrality of ethnic identity to her sense of self.

It is often assumed that this association between ethnic identification and discrimination perceptions stems from an internal psychological process. People who identify more strongly with their group are more concerned about things that affect their group negatively and therefore will be more sensitive to and vigilant about discrimination, even in cases where there is no discrimination. Accusations of ethnic minorities being over-sensitive, complainers and exploiting victimhood are frequently heard in public debates.

Self-categorization theory, however, does not claim that everything is in the “eye of the beholder”, but, rather, that there is a social reality to represent and that veridical perceptions are possible and sought. Individuals are strongly motivated to seek appropriate evidence and arguments for understanding their social world. The mechanism of epistemic motivation implies a drive to understand and have a grip on the world, and thus to create adequate knowledge (Fischer and Connell, 2003). Furthermore, individuals also want to have some sense of control over their social

world. Discrimination attributions mean that others determine what happens to you and thereby imply a loss of personal control.

Many studies have found that members of minority groups perceive a higher level of discrimination directed at their group as a whole than at themselves as individual members of that group. Taylor and colleagues (1990) labelled this phenomenon the personal/group discrimination discrepancy (PGD). This discrepancy is a robust finding within an array of disadvantaged groups who were asked differently phrased questions (see Taylor *et al.*, 1993). Several explanations have been offered for this phenomenon, such as the minimization or underestimation of personal discrimination and the exaggeration of discrimination directed at the group as a whole. The former explanation has attracted the most interest. Minimization of personal discrimination can be the result of psychological and social processes.

Psychological and social costs

Psychologically, blaming outcomes on discrimination acknowledges that one's outcomes are under the control of prejudiced others. A sense of personal control is essential, however, for psychological well-being and effective functioning, and is typically more important than avoiding self-blame. The minimization or underestimation of discrimination allows ethnic minority members to maintain such a sense of control. Thus, although an explanation in terms of discrimination attributions might protect feelings of self-worth (e.g., "that employer discriminates me and therefore it is not my fault that I did not get the job"), it threatens the belief in having control over personal outcomes in one's life (e.g. "not I, but the employer, makes decisions about my life"). The result is that ethnic minorities are inclined to minimize and underestimate the extent to which they are personally victims of discrimination, rather than to exaggerate discrimination experiences (Ruggiero and Taylor, 1997).

Interpretations in terms of discrimination typically also imply accusations and thereby have social costs. The negative social costs related to these interpretations can be another reason for the minimization of discrimination (Kaiser and Miller, 2001). In this case it is not psychological minimization but rather social minimization because of the perceived social costs of reporting discrimination publicly. Kaiser and Miller (2001) demonstrated that individuals who report discrimination are perceived negatively by others (e.g., being "complainers") even when discrimination was the clear cause of the event. In addition, Stangor and colleagues (2002) found that in the presence of majority group members, ethnic minorities are relatively unwilling to report that negative events are the result of discrimination. Thus, minorities tend to avoid blaming negative outcomes on discrimination because they fear the social costs associated with making such claims. These social costs do not only relate to the negative reactions of majority group members. Co-ethnics can also react negatively toward individual group members, for example when they fear that they themselves or their entire ethnic group will be labelled as complainers who avoid outcome responsibility (Garzia *et al.*, 2005). The social disapproval from co-ethnics is particularly painful because social support is typically expected from them. The social costs involved may prevent discriminated people from reporting and confronting the discrimination they face in their daily lives.

Perceptions and experiences

The discussion of social costs indicates that the perception of discrimination can stem from something external to minorities rather than from misperceptions and hypersensitivity. This might also be the case for the positive relationship between ethnic identification and perceived discrimination. Specifically, it is possible that majority group members react more negatively toward strongly identified ethnic minorities than to those who weakly identify with their minority group. As a result, the former group of minority members may actually face more discrimination than the latter one. Native Dutch, French or Belgian people, for example, might discriminate more against Moroccan immigrants who identify relatively strongly with their own group than against Moroccans who feel less committed to their Moroccan culture and community. This can be understood when we realize that ethnic identities (like other social identities) are not like private beliefs or convictions that, in principle, can be sustained without expression and social recognition. Social identities depend crucially on acknowledgement and acceptance by others (see Verkuyten, 2005). Anthropologists, for example, have shown how people use particular behaviours to form and negotiate their ethnic identity in everyday interactions; and, discourse analysts have shown how social identities are maintained in ongoing conversation. All of this research indicates that social identities are sustainable to the extent that they are expressed and affirmed in acceptable practices. A Moroccan French identity, in any real sense, implies, for example, that one is able to claim and express desired images, positions, and self-understandings in a variety of contexts and especially in public spaces. And being a Moroccan is often a more “problematic” or accountable issue in public life than in private life. Compared to low identifiers, minority members who identify relatively strongly with their ethnic group will more frequently perform or enact their identity in language, dress, posture and so on. This “doing of ethnicity” confirms their ethnic identity by expressing the value of the group symbolically. Ethnic behaviours communicate one’s distinctive identity. It tells others who you are, to which group you belong and what this group membership means to you. The wearing, or not wearing, of a headscarf communicates what kind of Muslim you consider yourself to be and how you want to be seen and recognized by others.

The “doing of ethnicity” will, however, elicit more frequent negative and discriminatory reactions from the majority. Majority members might react negatively toward strongly identified ethnic minorities because these minorities are seen as threatening the majority’s cultural identity and as rejecting beliefs that legitimize the status hierarchy. Symbolic threats are based on perceived group differences in practices and behaviours that express particular values, norms, and beliefs. Ethnic minorities that act differently and have a different worldview can be seen as threatening the cultural identity of the majority group. New practices, norms, beliefs, and symbols can be considered opposite to what one values leading to the fear that other cultures will override one’s own way of life. Multiple studies have shown that perceived threats by immigrants and minorities to society’s way of life are related to more exclusionary reactions towards these groups (e.g. Sniderman and Hagendoorn, 2007). For example, in her study of 17 European countries, McLaren (2003) found that beliefs challenged by immigrants or which undermine national values were the

strongest predictor of negative attitudes toward immigrants. The same has been found in relation to Muslims in various European countries (e.g. Velasco Gonzalez *et al.*, 2008). Public discourses in Europe on the “West-Muslim cultural war” (Scroggins, 2005) and the presumed lack of socio-cultural integration of Muslims appears to underlie prejudice towards Muslims.

This alleged “cultural war”, and, more generally, the discrimination of minorities, is not only about dealing with differences but also about the prevailing status arrangements in society. Majority members may assume that strongly identified minorities endorse status-legitimizing worldviews such as meritocracy and the belief in individual mobility to a lesser degree than weakly identified minorities. Research has shown that these assumptions are not unfounded (Major *et al.*, 2002; Sellers and Shelton, 2003) and, thus, that there are reasons to expect that high ethnic minority identifiers challenge the status quo more strongly than low identifiers. For the majority group, discrimination is one way to deal with this challenge, thereby making it more difficult for high minority identifiers to publicly perform their identity and to enter the social system. Across six studies, Kaiser and Pratt-Hyatt (2009) found that majority group members actually expressed more negative reactions toward strongly identified ethnic minorities than toward weakly identified minorities. This indicates that high identified minorities who claim to experience increased levels of discrimination are not oversensitive or complainers or wallowing in victimhood. Rather, they actually face more discrimination.

This is not to say that there is no strategic use of victimhood by ethnic minorities. There certainly is. Presenting oneself as a victim of discrimination and racism creates a sense of guilt within the majority and the status of victim confers a feeling of entitlements and the right to remedies and compensations (Moscovici and Pérez, 2007). Victimhood can have strategic value because it offers the opportunity to make others feel guilty and responsible and thereby exculpate oneself.

Group identity reaction model

Research has demonstrated that recognizing discrimination against one’s ethnic group and oneself as a member of that group has negative consequences for one’s psychological well-being (see Pascoe and Richman, 2009). These consequences are particularly negative when the discrimination is pervasive and systematic. This raises the question of how ethnic minority members cope with the pain of exclusion and discrimination. Group identification is one important means of coping. The “group identity reaction model” (or “rejection-identification model”) is based on the idea that being a target of discrimination leads individuals to identify more strongly with their ethnic minority group and that stronger identification is beneficial for psychological well-being. People can cope with out-group threats like discrimination by adopting group-based strategies that increase identification with their minority group. In turn, group identification can attenuate the negative effects of discrimination on well-being. Some experimental evidence has shown that threats can indeed increase group identification or lead to greater emotional attachment to one’s group (Jetten *et al.*, 2001). Further, survey research among ethnic minority groups shows that increased perceptions of discrimination predict increased ethnic group identification. This has

been found, for example, in three studies among Turkish-Dutch people (Verkuyten and Yildiz, 2007) and in a longitudinal study of immigrants in Finland (Jasinskaje-Lahti *et al.*, 2009).

Discrimination presents a threat to one's ethnic identity, causing minorities to turn increasingly toward their minority group. Strong attachment and emotional investments in one's group can be an important buffer to the negative psychological effects that exclusion typically implies. Minority group identification is associated with less depression and anxiety, more positive self-feelings, and other measures of personal adjustment (Pascoe and Richman, 2009). Group identification supports well-being by providing security and a sense of belonging and acceptance. These feelings counter the psychological costs of feeling rejected and excluded by the majority. Group identification can also provide greater opportunities for social support from co-ethnics. Social support can take various forms including emotional and practical support, which are particularly important for emotion-focused coping and problem-focused coping, respectively.

Collective action

There is an additional benefit of turning toward one's ethnic minority group in response to discrimination. Group identification does not only counter some of the psychological costs of discrimination but also offers a basis for collective action. Collective action is defined as any action that aims to improve the status, position or influence of an entire group, rather than of one or a few individuals (Wright *et al.*, 1990). This kind of action occurs when a person's behaviour is structured by a particular group membership with its shared values, norms and goals (Tajfel and Turner, 1979). Group identification implies that individuals start to think and act on the basis of what the group defines and thereby think and act in concert with other group members. Discrimination and other forms of exclusion convey a negative social identity. Social identity theory (Tajfel and Turner, 1979) argues that group identification can lead to two general strategies for constructing a positive social identity despite threatening and discriminatory behaviours by the majority.

Social creativity is the first strategy. This strategy implies that ethnic minorities emphasize characteristics and dimensions where their group fares more favourably as compared to the majority group. For example, ethnic minority groups often will acknowledge that the majority is superior regarding status-defining dimensions such as wealth and education but perceive their own group as superior regarding such non-status defining dimensions as family integrity and morality. Politically, social creativity amounts to differentiation from the mainstream by rejecting the norms and standards of the dominant culture and emphasizing separate norms and values that define one's ethnic minority group positively. One example is the development of an oppositional identity which implies a process of cultural inversion (Ogbu, 1993). With cultural inversion, the norms, values, beliefs and practices that are associated with a dominant culture are defined as inappropriate for one's ethnic minority group and an alternative cultural frame of reference is developed.

Social competition is the second strategy for an ethnic minority group facing discrimination and exclusion. Members of discriminated groups can act collectively

to actually challenge and try to change the status quo. And because majority members may band together to resist change, forms of social conflict and open hostility can be the result. Empirical research has shown that group identification is an important predictor of willingness to engage in collective action on behalf of the group (see Simon, 2004). Group identification has been found to possess a unique mobilizing power over and above feelings of relative deprivation and cost-benefit calculations. This is particularly likely when there is a strongly developed and politicized sense of identification with a social movement (Simon and Klandermans, 2001). Group identification also provides an alternative basis for a sense of control that is undermined by experiences of discrimination. Acting collectively can bring about a change in the social system and thereby provide a sense of collective efficacy.

Sociostructural context

The “group identity reaction model” argues that perceptions and experiences of discrimination make members of ethnic minority groups increase their group identification which can lead to positive psychological and social effects. However, social identity theory (SIT; Tajfel and Turner, 1979) proposes that increased group identification in response to discrimination is not inevitable but depends on the perception of the socio-structural system. SIT specifies three socio-structural variables that, interactively, would influence people’s responses to discrimination and – more generally – to finding themselves in a disadvantaged social position. Specifically, beliefs about the stability and legitimacy of the status system and the nature of group boundaries would affect people’s responses and strategies for group differentiation. Stability refers to the extent to which group positions are considered to be changeable. Legitimacy refers to the extent to which the status structure is accepted as just. Permeability (or “openness”) refers to the extent to which individual group members can leave one group and join another. Perceived stability, legitimacy, and permeability would, interactively, determine group identification of ethnic minority members. Membership in disadvantaged groups confers a negative identity and instigates identity management strategies. Depending on the nature of the social structure, ethnic minority members adopt different strategies to achieve a more positive social identity. One way in which this can be done is to follow an individualistic social mobility path and dissociate oneself psychologically from one’s devalued ethnic minority group (Wright *et al.*, 1990). As Tajfel and Turner (1979, p. 43) argue, “individual mobility implies a disidentification with the erstwhile ingroup” and, it can be added, an increased identification with the majority group and host society. This strategy presupposes that the group boundaries are seen as relatively permeable or open, indicating that membership in the high status group can be achieved. Furthermore, this individual strategy is especially likely when the status differences are perceived as stable and legitimate. Under these conditions, collective strategies to achieve positive ethnic identity are more difficult, making individual strategies more likely.

There is empirical evidence for this reasoning (see Bettencourt *et al.*, 2001). For example, in a study among Turkish Dutch people it was found that when the inter-ethnic relations were considered as relatively stable and legitimate, perceived permeability was associated with lower Turkish identification and higher Dutch

identification (Verkuyten and Reijerse, 2008). Hence, in a stable and legitimate intergroup structure and when the Turkish-Dutch participants saw opportunities to be accepted in the Dutch majority group, they tended to psychologically dissociate themselves from their Turkish community and to associate themselves more with the Dutch. These results support the claim that in a perceived stable and legitimate intergroup structure with permeable group boundaries, ethnic minority group members tend not to use strategies of group identification and social competition, but rather group disidentification and individual mobility (Tajfel and Turner, 1979). Increased group identification and collective actions are more likely when the boundaries are considered to be rather impermeable or closed such that ethnic minority members cannot improve their individual position. In addition, for collective action to occur the group's social position has to be assessed as undeserved or illegitimate and there should be a belief that the social structure is not stable but can be changed.

The integration paradox

“It is precisely minority group members who are initially the most strongly focused on social acceptance and mobility in the dominant society who explicitly turn away when they experience rejection and seek safety in a defensive, own group identity”.

This quote is from a qualitative study on processes of radicalization among ethnic minority youth in the Netherlands (Buis *et al.*, 2006, p. 208-209). The researchers use the term “integration paradox” to indicate that minority members who are relatively successful in their educational pursuits and in the labour market are sensitive to ethnic acceptance and equality. Full recognition and inclusion by the majority group are particularly meaningful and important because of their structural integration and efforts to succeed. Experiences and perceptions of non-acceptance and discrimination, despite successful integration into society, push them to turn towards their own minority community and away from Dutch society, for example, by developing more negative attitudes towards the native population.

Some of the empirical implications of this “integration paradox” are counter-intuitive. An example is the proposed relationship between the level of education and ethnic attitudes. The literature consistently finds that the higher educated, as compared to the lower educated, hold more favourable attitudes towards other ethnic groups. In addition, numerous studies have shown that intergroup contact has a positive effect on ethnic attitudes (see Pettigrew and Tropp, 2006), and higher educated ethnic minorities tend to have more voluntary contacts with the native population (e.g., Martinovic *et al.*, 2009). The “integration paradox”, however, implies that higher educated minorities will be less positive towards the native majority group. This might mean that there are two processes. On the one hand, higher educated minorities have more frequent voluntary contacts with the native population than lower educated minorities and more contact is associated with more positive attitudes towards the majority group. On the other hand, higher educated minorities will feel less accepted in the host country and perceive more discrimination than lower educated minorities, resulting in less positive attitudes towards the majority group. In addition, according to the “integration paradox”, feelings and perceptions of non-acceptance and discrimination

make minority members identify more strongly with their own ethnic group and this higher identification, in turn, would lead to a more negative attitude towards the native population.

We examined these two processes among large samples of the four largest ethnic minority groups living in the Netherlands, those of Turkish, Moroccan, Surinamese, and Antillean descent (Ten Teije *et al.*, 2010). It turned out that the pattern of associations was quite similar for these four minority groups. As regards the first process, the findings demonstrated that higher educated ethnic minorities indeed had more voluntary contacts with the native Dutch and that contact was associated with a more positive attitude towards this group. More importantly, there was also empirical evidence for the second process. Higher educated participants perceived less acceptance of ethnic minority groups in Dutch society and more group discrimination than lower educated participants. These perceptions were related to stronger ethnic group identification and, thereby, to a less positive attitude towards the Dutch.

In addition, the acceptance and treatment of co-ethnics rather than personal experiences with discrimination were found to be important for the attitude of the higher educated. This supports the idea that the more advantaged members of disadvantaged groups tend to engage in group comparisons and develop more negative attitudes towards the advantaged group. Higher education might increase one's awareness and concern about the vulnerable and relatively marginal position of ethnic minorities in society. In addition, when they perceive and experience ethnic discrimination, higher status minority members might be more assertive (Baumgartner, 1998). Although we did not explicitly test these interpretations, we did find that the higher educated perceived more group discrimination than the lower educated, whereas there was no difference for personal discrimination. In turn, and independently of personal discrimination, higher perceived group discrimination was associated with stronger ethnic group identification. Thus, in agreement with the "group identity reaction model", the feeling that one's ethnic minority group is not accepted or discriminated in society was associated with higher ethnic group identification. In turn, higher ethnic group identification was related to a less positive attitude towards the Dutch.

Conclusion

Being excluded or treated unfairly is painful, particularly when it is based on a group membership that is central to one's sense of self. Many ethnic minority group members attach great importance to their ethnic background (Verkuyten, 2005). They derive an ethnic identity from their group membership, and therefore prefer their ethnic group to be socially recognized, accepted and valued. This confers a meaningful and positive ethnic identity on them that they want to maintain and protect. In contrast, a devalued or misrecognized ethnic identity represents an identity threat that is likely to lead to the deployment of a wide range of identity-management strategies (Tajfel and Turner, 1979). Discrimination contains the message that one has lower status and does not belong here. It threatens people's feelings of self-worth and need to belong. It also conveys the message that others decide one's outcomes in life and thereby threatens one's sense of personal control.

Ethnic group identification can be an antecedent or a consequence of discrimination perceptions and experiences. As an antecedent, ethnic identification provides a framework or lens for perceiving and experiencing the social world. That means that high identifiers will be more sensitive to the possibility of discrimination. But this higher sensitivity does not imply that they are over-sensitive complainers and tend to exaggerate discrimination. Exaggeration and the strategic use of victimhood do occur, but, in general, ethnic minorities are rather reluctant to attribute outcomes to discrimination.

The perception and experience of ethnic discrimination can also result in increased ethnic identification. Being a target of discrimination leads individuals to identify more strongly with their ethnic minority group because this is beneficial for psychological well-being and forms the psychological basis for collective action. When people think in terms of their group membership they will be inclined to act on the basis of the shared norms, values and beliefs that define their ethnic group. Ethnic minority members are more likely to adopt collective strategies when the social system is considered illegitimate and unstable, and there is little opportunity to achieve membership in the high status group.

Often the more advantaged members of discriminated groups are more aware and concerned about the relatively vulnerable and marginal position of their ethnic group and are more assertive in instigating action and protest. The “integration paradox” indicates that full recognition and acceptance by the majority group is more important and meaningful for the higher educated than for the lower educated. Experiences of discrimination and non-acceptance, despite their efforts and successful integration in society, cause the higher educated to emphasize their ethnic identity and turn away from the host society. Thus, ethnic minority members who are the most successful can become the ones who are most negative towards the native population because they are relatively more concerned about the existing group-based rejection, exclusion and inequality.

CHAPTER IX

Why do minorities rarely report experiences with discrimination?

Exploring qualitatively what inhibits or favours claims of discrimination

Alejandra ALARCON-HENRIQUEZ and Assaad AZZI

Introduction

Ethnic discrimination against immigrants and their descendants is a major problem in the labour market. The consequences of such discrimination include higher unemployment rates, precarious employment and lower wages for ethnic minorities which in turn contribute greatly to existing inequalities between “nationals” and “non nationals” (ILO, 2007). Elaboration of anti-discrimination laws by several European governments is an important step in the struggle against inequality but only a few victims actually utilize these tools. Indeed, a recent large-scale survey on discrimination in Europe published by the EU Agency for Fundamental Rights (FRA) revealed that a majority of ethnic minority members do not report the discrimination they experience (FRA, 2009a). According to Hirschman (1970), if dissatisfied individuals do not denounce their dissatisfaction (voice strategy), the structure they live in cannot be changed. Opportunities to express one’s discontent are also a means to prevent these individuals from leaving the structure (exit strategy). Indeed, one way of coping with perceived injustice is to withdraw from broader society (Azzi, 1998), e.g. through separation or marginalization (see Berry, 1997). In order to prevent further exclusion of immigrants and their children who were born and raised in Europe, it is important to tackle the situation and investigate the reasons for reduced reporting of discrimination by vulnerable minorities. The FRA study indicated a lack of knowledge on the part of minorities about organisations offering advice and support on this issue but this is not the only reason. The belief that claims of discrimination would not change the situation or that discrimination is insignificant are the other main reasons provided by the respondents (FRA, 2009b).

We will explore this question further in the present study. Employing qualitative methodology, our main objective is to investigate why minorities will or will not

denounce their experiences with discrimination within the framework of the measures created by the host society to voice individual dissatisfaction. In the FRA study, participant opinion regarding discrimination was sought through closed questions including an initial explanation of what discrimination means to the authorities. Contrary to the FRA study, we relied on open-ended questions in order to understand and utilize the vocabulary and discourses of minorities so as to better understand their perception of unequal treatment in Belgium, the host society in this study. How do members of ethnic minority groups define “discrimination”? Which unequal treatments are defined as just or unjust? According to members of these groups, which unequal treatments must be reported to the authorities? We will also investigate the impact of knowledge of anti-discrimination laws and organisations on the opinion of ethnic minorities. Does awareness of anti-discrimination measures facilitate the tendency to denounce discrimination and what other factors either hinder or encourage discrimination claims?

We use theoretical frameworks from social psychology to shed light on the various discourses held by the participants in our study. Focusing mainly on collective action, social psychologists have investigated the motivations of disadvantaged group members in their struggle against inequalities. Collective action appears when an individual “is acting as a representative of the group and the action is directed at improving the condition of the entire group” (Wright *et al.*, 1990). In general, collective action is represented as a collective movement, involving more than one individual. But following Wright’s definition, filing a complaint of discrimination could be considered a form of collective action if the plaintiff seeks to improve the status of the group as a whole and not only his personal situation. One plaintiff can lead to the creation of case law for example, which in turn can establish – or reinforce – the social norm of equality amongst the population. For example, the case of *Brown v. the Board of Education* in the US, whereby the Supreme Court decided that racial segregation in schools was unconstitutional, is regarded as a turning point that contributed to paving the way to the civil rights movement (e.g. Kluger, 1976). Thus the use of legal action in the struggle against inequalities could be considered a collective action and a contribution to social change. In this study, we will analyze whether the obstacles to and the factors favouring collective action as mentioned in social psychology literature can also be applied to legal anti-discrimination actions. The use of institutional opportunities to fight inequalities has – to our knowledge – not been studied yet in social psychology; nor has the way in which such institutional provisions may contribute to social change, for instance by modifying social identifications and norms of disadvantaged group members. This qualitative study is a first attempt in this direction.

Methodology

We conducted interviews with 15 individuals, including seven female participants and eight male participants. Our study’s participants were recruited from an association for “social and professional integration” in a neighbourhood with high immigration rates. The association offers diverse career services including information on training opportunities, assistance in writing curriculum vitae and cover letters, advice

on defining clear professional goals, etc. All of the participants are immigrants or descendants of immigrants and came to the association seeking help in finding a job. The study's participants had different foreign origins: Moroccan ($N = 7$), Turkish ($N = 4$), Guinean ($N = 2$), Albanian ($N = 1$) and Italian ($N = 1$). Most of them were Muslim ($N = 12$). They were asked to participate in a study regarding obstacles encountered in their job search. The interviewer did not mention the true objective of the study (representations of discrimination) at that moment but only later on so as not to influence the participants' statements. Indeed, we wanted to know if the participants would spontaneously mention religious or ethnic discrimination as an obstacle in their job search.

The interviews were semi-structured. We explored the following themes or questions:

1. What were the obstacles encountered during their job search?
2. What were their experiences with religious or ethnic discrimination?
3. What is their perception of group discrimination?
4. What knowledge or opinion of anti-discrimination laws and organisations do the respondents have?
5. What is their reaction to a real discrimination case? The actual objective of the study was also explained at this point. We provided an example of ethnic discrimination which appeared recently in the news. A young man of Turkish origin had applied for a job in the security sector and had received a negative response by e-mail. An earlier e-mail exchange between the secretary and the employer was accidentally attached to the e-mail in which the latter wrote: "Can you get rid of this person? A foreigner for a security job, that's unheard of".
6. What is their opinion of legal action against incidents of discrimination and possible outcomes. We explained that the Turkish man later consulted an anti-discrimination organisation and filed a complaint against the employer for discrimination. We mentioned the outcome of the procedure whereby the employer was found guilty by the Court and forced to discontinue all discriminatory action.
7. What would they do if they were in the victim's shoes?

Results

Representations of religious or ethnic discrimination

For most of the participants ($N = 10$), religious or ethnic discrimination is defined as a lack of acceptance, rejection or dislike by the other because of their origins.

"Everybody knows there is racism. But it will always continue. They will always find an excuse to say: we don't want you" (participant 11).

"They don't like us because we are Muslim. They will say they prefer a Belgian to a foreigner" (participant 12).

Discrimination is sometimes felt as a lack of respect or poor treatment that diminishes an individual's sense of worth ($N = 5$).

"My brother-in-law is from Morocco and they do not want to give him work because he doesn't speak French very well. They make fun of him. At the town hall too

they play with him. They ask him to come another day. They play with words because they know he cannot speak French very well. That's the way it is" (participant 11).

The way individuals are treated by the authorities or by other members of the group gives them information about their status in the group, i.e. – in our study – in Belgian society. If these individuals feel excluded from the distribution of resources (e.g. restricted access to employment) or if they sense a lack of respect, they can perceive themselves as marginalized and devalued by the group. Such treatment sends the message that he or she is not recognized as a member of the group (Tyler and Lind, 1992).

One way to deal with status inferiority is re-categorization at a higher level (Mummendey *et al.*, 1999). For example, seeing themselves as human beings rather than as undesired Belgian immigrants enhances a positive self-image. According to Wenzel (2000), self-categorization is a key component in claims for justice. Individuals feel entitled to demand being treated equally to other members of a group if they perceive themselves as being part of that group. Eight participants perceived discrimination as the failure to respect egalitarian principles whereby everyone deserves equal treatment as human beings. We note that all participants referred to these egalitarian principles after we alluded to anti-discrimination laws, organisations and their possible outcomes. For these participants, only one criterion should be used to judge whether an applicant is the right person for the job: his abilities.

"It's unjust. If we have the skills, we have origins that are not suitable for... it has nothing to do with it. We are all human beings; we have the same rights as anyone else" (participant 9).

One participant evoked the right to be treated as equal to any other Belgian, since he has Belgian nationality.

"If we have a Belgian identity card, ok they still can see we are Turkish. But if we have an identity card, they have to treat us all the same" (participant 12).

One third of the participants, on the other hand, saw discrimination as normal and trivial despite our mentioning the existence of anti-discrimination measures in Belgium. They accepted the idea that one cannot be forced to hire or to like someone. These were all male participants.

"I had that once with [company X]. I wanted to work with them but he said no immediately. I don't know why. The employer saw my face and he said he didn't have time. I knew it was racism (...) I didn't care. It's normal. I've had that before, often" (participant 11).

"I have the impression that foreigners are discriminated against (...). We cannot say anything. If they don't want them, they don't want them. What can we say? Thanks, bye and we move on" (participant 12).

According to three participants, people that discriminate against ethnic minorities are not to blame. For them, discrimination is a result of ignorance or incomprehension of cultural differences.

"I don't blame anybody, not even the person who discriminates. Maybe he is victim of an ideology? He was indoctrinated to think that people with other origins

are not good. Maybe he didn't learn otherwise and that's it. He doesn't accept others" (participant 7).

As for the example of discrimination provided to the participants, one participant blamed the victim, not the employer, for having been discriminated against. However, this participant changed her opinion once we mentioned the existence of anti-discrimination laws and organisations in Belgium:

"It depends on how people talk too. There are people who ask things in a polite manner and people who are proud and don't want to be told what to do and get angry. Maybe the young Turk had a problem?"

Do you know there are laws in Belgium that condemn discrimination?

No.

And that there are organisations in charge of combating discrimination?

No. It's wrong to say that then?

Well, discrimination in employment is prohibited by law. The young Turkish man filed a complaint against the employer and went to Court. The company was found guilty. What do you think about this legal option?

It's not normal to refuse someone on the basis of his nationality. Only his work matters. If he does his work correctly, they cannot attack people like that. It's not kind anyway. It hurts nevertheless. It's wrong to say that. It's racism" (participant 15).

When individuals are uncertain of their judgements, they turn towards others – preferably experts – to seek information and social norms to guide their impressions (Sherif, 1980). We do not know if the attitude change seen above reflected a true internalization of the given injunctive norms (see Cialdini *et al.*, 1990) – the prohibition of discrimination in employment – or merely a sort of public conformity whereby the participant was not actually convinced (Kelman, 1958).

Personal and group discrimination perceptions

Spontaneous evocation of discrimination experiences

Only four participants mentioned religious or ethnic discrimination as a possible obstacle in their job search before the interviewer introduced these issues. Two participants spontaneously mentioned their origins as an obstacle to finding employment with certitude. For example:

"One obstacle there is my [education] level... sometimes they don't accept blacks. For examples in a restaurant, certain clients don't like to be served by blacks" (participant 2).

The two others mentioned their origin as a possible reason for not being called back by the employer:

"I receive negative responses to my letters and they don't explain why. I don't know. Maybe [because of] my appearance? (While touching his beard) I don't have a Belgian face" (participant 10)

Personal experiences with discrimination and perceived group discrimination

When asked directly if they have experienced religious or ethnic discrimination in employment or other sectors, only five participants – i.e. a third of all participants – answered negatively. We note that most of them were female with little experience seeking employment (participants 1, 4 and 9) and/or who sought employment in their own neighbourhood with employers of the same origin (participants 1, 8 and 9). The four female participants had also never heard of discrimination against other members of their ingroup. Two women mentioned the few interactions they experienced with non immigrants. The only male participant who had not experienced discrimination was the participant with Italian origins. He was nevertheless aware that his fellow ingroup members were severely discriminated against in the past and that currently other minorities are targets of discrimination in Belgium.

According to relative deprivation theory, disadvantaged group members do not always perceive the injustice they face as they are unable to compare themselves to members of advantaged groups. They compare themselves to what is accessible to them, namely fellow ingroup members living in the same conditions (Taylor and Moghaddam, 1994, quoted by Taylor and Smith, 1998).

Eight of the ten participants reminiscing about a personal experience with discrimination evoked it with uncertainty and precaution:

“Once I thought about that [discrimination]. We had a job interview and several people had applied. There was a Belgian colleague from my training course. We had a technical questionnaire. They told me I had good results. Then during the interview, they told me that it was good but that my Dutch skills could be a problem. My Belgian colleague succeeded. He didn’t speak Dutch either but he was hired. I don’t accuse them. I don’t say that I was discriminated against, but I thought it was strange: we had the same level, the same training” (participant 5).

These findings confirm the results of Ruggiero and Taylor (1995) which show that disadvantaged group members tend not to attribute their negative outcomes to discrimination. Indeed, even when participants in their study were told there was a good chance (e.g. 75%) that they had been discriminated against by an evaluator, they attributed the failure to their own performance. Only the participants who were told they had definitely been discriminated against (100%) attributed the negative outcome to discrimination. However, if we consider the studies of Crocker *et al.* (1998), individuals who are aware of their stigma never really discard the possibility of having been discriminated against. On the contrary, compared to individuals without a devalued social identity, members of disadvantaged groups have the tendency to interpret the others’ reactions towards them with ambiguity because they know their social identity can have an effect. As a result, stigmatized individuals may experience difficulties assessing their own abilities which in turn could have consequences on important life choices such as determining their professional career. If, for instance, negative outcomes are attributed to their own skills rather than to discrimination, this can induce negative self-esteem. Other consequences are the anxiety and rumination caused by the analysis of the ambiguous situation and loss of trust in interpersonal relations (see Crocker *et al.*, 1998).

Claims of discrimination were perceived as a sign of weakness for two participants.

“Weak people are the ones who feel discriminated against. They start to think about it, get a headache, don’t feel well. Someone who is 18 years old who is discriminated against will think: oh I’m not lucky. Someone who is older doesn’t get emotional about it” (participant 7).

Previous studies in social psychology show that claims of discrimination have social costs. Independent of the certainty of discrimination, disadvantaged group members who claim discrimination are less valued by advantaged group members (Kaiser and Miller, 2001) and fellow disadvantaged group members (Garcia *et al.*, 2005) than individuals attributing negative outcomes to any other external cause. Indeed, while individuals try to maintain a positive image of their social identity, an admission that ingroup members have been discriminated against implies a devaluation of the ingroup and the possibility that they could experience the same in the future. By rejecting ingroup members whose actions or claims reflect a negative image of the ingroup, individuals preserve a positive social identity.

The social costs of claims of discrimination in advantaged and disadvantaged groups can also be explained by other factors. According to Katz and Hass (1988), certain ideologies influence people’s attitudes towards disadvantaged group members. Protestant work ethic (PWE) values for example suggest the belief that anyone who is willing and able to work hard has a good chance to succeed in life. This in turn strengthens the tendency to blame disadvantaged groups for their unfavourable social position. When disadvantaged group members endorse these values too, it can lead to decreased perceptions of discrimination and increased endorsement of status justifying beliefs (e.g. McCoy and Major, 2007). PWE was evident in the discourses of several participants, including the following quotation:

“No, I don’t think so [that there is discrimination]. If you want a job you can find one. Sometimes you hear from people that they have been discriminated against, but it is rare” (participant 4).

System justification theory (see Jost, 2004 for a review) maintains that individuals tend to legitimize the social system they live in, even if the system is not beneficial for them at an individual or collective level. In societies where individualism and meritocracy are valued, existing social inequalities are deemed justified. From that perspective, advantaged and disadvantaged group members assume responsibility for their economic status and justify social dominance and its reproduction.

Reactions to experiences of discrimination

Various feelings were expressed by the participants when reporting their experiences with discrimination. Sometimes more than one feeling was expressed by the same participant. Eight participants felt powerless when personally confronted with discrimination and were also unwilling to undertake any kind of action regarding the situation. For example, all of the male participants who had personally experienced discrimination employed such expressions as “it’s not worth it”, “it will not change anything”, “we cannot say anything” or “it’s a losing battle”. Only one of the three female participants personally confronted with discrimination made similar statements. The other two felt mainly surprise or hurt (see below).

If attributing negative outcomes to discrimination rather than to our own skills can protect our individual self-esteem, it can undermine self-esteem at the social level, as mentioned above. Moreover, attributing outcomes to external causes such as discrimination diminishes our sense of control over our actions (Ruggiero and Taylor, 1995). Studies in clinical psychology point to the importance of a positive view of ourselves and a sense of control over our life in order to maintain mental health (e.g. Taylor and Brown, 1988). Experiences with discrimination shatter such assumptions of control. The negative effects of such experiences can be minimised through downward comparisons with people in worse situations in order to preserve positive views of ourselves (Taylor and Smith, 1998).

Six male participants did not wish to recollect or talk about the discrimination they had personally experienced for several reasons. One felt it weakened his motivation to search for a job:

“Personally, I leave it there. I look somewhere else. I will not start to focus on that problem and that’s it. Moreover there is a risk that it is confirmed that it is because of that [discrimination]. If employers start to think like that, why search and try to sell myself? Because it’s a losing battle. Sincerely, I don’t think it is worth thinking about it. Otherwise it will impede me in my continued job search” (participant 5).

Another believed that discrimination can be overcome by persevering and doubling his efforts in order to compensate for the stigma, i.e. for the devaluation of his social identity:

“Before, I used to act nervously, but now it leaves me cold. I learned one thing: if I want to have something, I have to put that aside, work harder and not give up” (participant 6).

When combined with feelings of anger or annoyance, some of the participants mentioned that they are afraid of what they might do to the perpetrators:

“A lot of things are felt, but we have nothing to say. What are we going to say? Otherwise we want to hit this kind of people. You want to slap him, that’s all” (participant 12).

Finally, some think that they do not have the right to complain:

“Because when we are not integrated, when we aren’t in our country, we don’t have the right to... You don’t know what to think” (participant 13).

Social identity theory (Tajfel and Turner, 1986) assumes that three main factors influence an individual’s perceptions and reactions to their (disadvantaged) position in the societal structure: perceived stability, permeability and legitimacy. If individuals perceive the current situation as stable (that it cannot be changed), they would not engage in actions to challenge the status quo. In our study, seven of the ten participants that experienced discrimination expressed the feeling that the situation could not be changed (see above). The belief that one could move upwards from one (low-status) group to another (high-status) or that the social boundaries between the groups are “*permeable*”, facilitates engagement in status enhancement at an individual level, but not at a group level. Indeed, improving the status of his group as a whole might not

be necessary if for instance an individual believes he or she can succeed socially and professionally solely through personal efforts (see e.g. participant 6 above). Finally, if differential treatments are perceived as legitimate – e.g. because the individual was not integrated as participant 13 mentioned above – consequent group inequalities will not be challenged.

Two participants who felt powerless also spoke of a loss of self-confidence in their job search:

“I totally lost my self-confidence. I was completely disoriented. With all the refusals and rejections I had, I thought I wasn’t capable of anything, thus that I wasn’t worth anything. It discouraged me” (participant 2).

When personally confronted with unequal treatment because of foreign origins, people do not always have feelings of injustice. While six interviewees clearly felt the wrongness of religious or ethnic discrimination, one participant was in doubt whether to qualify discrimination as just or unjust:

“Is it just, unjust? I don’t know anymore. If there is an injustice, I’m the only one to blame. I’m not going to blame the society or work. I can only blame myself. I didn’t prove myself and that’s it. I can understand them” (participant 7).

As mentioned in this quotation, discrimination can increase the victim’s comprehension of the perpetrator. Four other participants claimed to understand the perpetrator’s perspective:

“I heard people saying they prefer a Belgian but they explain it and I understand” (participant 10).

Three participants were shocked or surprised when confronted with discrimination for the first time. One states that he grew accustomed to it:

“The first time I was insulted, it shocked me, but afterwards not anymore. The second time, third time, fourth, I thought it was normal. We have nothing to say” (participant 11).

According to cognitive dissonance theory, when individuals perceive dissonance between what they think and what they experience, they can adapt their beliefs in order to match reality. Consequently, individuals can justify experiences of deprivation and suffering in order to reduce dissonance (Jost *et al.*, 2004), as illustrated in the following quotation:

“I was a little bit shocked. Afterwards, I asked myself why he talked to me like that. Then I thought that maybe he was right. Maybe someone who wasn’t trustworthy had worked with him previously, a foreigner who didn’t do his job well” (participant 15).

Two participants felt hurt when personally confronted with discrimination. For example:

“When I was pregnant I heard my Italian sister-in-law say: what will your baby look like? I hope he will not look like an Arab. I was shocked. It surprised me and it hurt me. For her it was normal to talk like that. I didn’t think it was possible for people to think like that” (participant 14).

Two other participants of Turkish origin were likewise saddened when thinking of incidents of discrimination towards fellow ingroup members such as the young Turkish man provided in our example:

“It hurts. They don’t have a brain” (participant 4).

Social identities are definitions of the self in terms of membership in one or more social groups. Under certain circumstances, individuals see themselves primarily as members of a group and act in line with this social identity. As a result of this sense of belonging, events relevant to the ingroup will evoke specific emotions in individuals (Mackie *et al.*, 2004).

A sense of common fate is also shared by members of other ethnic minorities when hearing the example of discrimination against the Turkish man:

“All Arabs aren’t thieves¹. They are Belgians too. I don’t like that. I’m against that. They blame the others. In the past they blamed the Spanish and the Italians here. My grandmother told me. There is always a scapegoat in Belgium” (participant 3).

According to Vollhardt (2009), past group victimizations and shared experiences trigger empathy and solidarity with other victimized groups.

Five participants discussed their experiences of discrimination within their social circle. Consistent with the social comparison theory of Festinger (1954), individuals tend to talk about their experiences with their social circle in order to get comparative information that could help them understand their experiences, but also to be reassured emotionally. In some cases, this social circle does not favour action against discrimination:

“I was told: it’s true. It’s a pity but try to persevere, to find a job and don’t think too much about it” (participant 5).

“In your social circle, some will encourage you and others will think you’re crazy because you are living in *their* country so you aren’t at home. Some will say that you have the right to be protected and others will say that you are wrong” (participant 2).

Knowledge of the existence of anti-discrimination laws and organisations

One participant did not answer these questions. Of the fourteen remaining participants, seven were unaware of anti-discrimination laws and organisations combating discrimination. One participant knew about anti-discrimination laws but not about anti-discrimination organisations.

Nine participants would have engaged in legal actions similar to those of the victim provided in the example if they had been in his position, mostly because the victim was able to prove that the refusal was a result of discrimination. They also estimated that anti-discrimination laws may limit discriminatory practices.

“Because when there are no laws, generally people believe that they aren’t committing an offence and thus can do just about anything they want. If there is a law and it says: don’t cross that line, maybe it will make them think” (participant 5).

¹ In Belgium, Turks are often categorized as Arabs even if they are not Arabic-speaking.

Anti-discrimination laws are also seen as an opportunity to denounce such practices and to let everyone know that discrimination exists.

“Nobody has the right to discriminate against people. Discriminated communities should be defended. People should be made to speak out and not leave it like that. Discrimination should be denounced and prevented from happening again in the future” (participant 9).

Anti-discrimination organisations are perceived as offering support to victims of discrimination, providing them with protection and advice, and also as institutions that can facilitate the integration of foreigners.

“It’s a good initiative. It helps people who really feel rejected to move forward and integrate themselves into society. It’s very important. This way victims feel supported, reassured. We have someone who defends and protects us. It is comforting” (participant 2).

Five participants stated that they would not engage in actions similar to those taken by the victim cited in the example. Among the reasons mentioned is the fear of negative consequences when dealing with the justice system (participant 2). Others did not think these actions would prevent discrimination in everyday life. If an employer does not want to hire a foreigner, he can conceal the real reason of his refusal by inventing another reason (participants 3, 7, 11). Furthermore, some felt that this option required too many resources (money, effort) and would waste their time (participants 7, 11, 13). One of the participants believed that, as compared to a public demonstration, going to Court is not visible enough to denounce discriminatory practices to the public (participant 3). And finally, another participant expressed his lack of trust in institutions (participant 11):

“I went to the police headquarters. The policeman in front of me said: dirty Arab. It was a policeman, he works for the law. He has to take the deposition. It’s life, one has to [assume a submissive stance] and move on”.

According to Mummendey *et al.* (1999), the extent to which individuals expect collective action to be effective, i.e. successful in terms of changing intergroup relations, is the most proximal predictor of whether or not they will undertake collective efforts to improve the status and resources of the ingroup. FRA reports (2009b) state that more than half of North African interviewees in Belgium perceive ethnic discrimination when stopped by the police. If these results are representative for Belgium, the risk that individuals with stigmatized immigration background will lose confidence in the legal authorities looms large.

Discussion and further directions

Through the discourses mentioned in this study, we distinguished a variety of ways to deal with the injustice of religious or ethnic discrimination. Whereas unequal treatment in the labour market based on origin or religion is considered unjust within the framework of the host society, not all the participants of our study perceive it as wrong. Knowledge of social norms seems to influence opinion but not always. Indeed, even if some of our participants knew about the prohibition of discrimination,

they experienced it so often that they considered it to be trivial and normal. Cialdini *et al.* (1990) make a distinction between “injunctive” and “descriptive” norms. Injunctive norms refer to behaviours (dis)approved by society and descriptive norms refer to behaviours that actually take place in reality. For a third of our participants, discrimination is so pervasive that it becomes a descriptive norm which definitely functions as an obstacle in the struggle against discrimination. It would be interesting to investigate the conditions under which “injunctive” norms have a higher impact than “descriptive” norms.

Nevertheless, the overall majority of respondents perceived the negative dimension of religious or ethnic discrimination, seen as the non-acceptance of minority group members in Belgium. Not all of the respondents were conscious of the stigmatisation of their group of origin, especially women with almost no interaction with outgroup members. If most of the participants are aware of discrimination towards their ingroup, only two participants were sure of having experienced discrimination personally, replicating prior research on this issue. As mentioned in previous studies, we confirm the idea that a facilitating factor in the perception of discrimination is the notion of egalitarianism, according to which every human being has the right to be treated in an equal manner. Reference to the existence of anti-discrimination laws, organisations and possible favourable outcomes tends to reinforce identification with the superordinate category, Belgium or humankind, for some of our participants.

However, it is a huge step between the perception of discrimination and actually claiming discrimination. Certain participants are aware of the negative image they project when denouncing discrimination. One third of our participants do not see the benefits of claiming discrimination. For some of them, the possibility of improving their social position on an individual level – the belief in the existence of a meritocracy – discourages them from engaging in costly actions aimed at enhancing the status of the disadvantaged as a group. For others, on the contrary, nothing can change the current situation. On the other hand, most participants do believe that denouncing such injustice is important, if only to spread awareness amongst the population to prevent future discriminatory practices. Anti-discrimination organisations are seen as attempting to integrate immigrants and their descendents into the host society which is perceived as a benevolent and reassuring action. Awareness of their existence could be a way to favour integration or assimilation into the host society. But institutionalized opportunities to voice dissatisfaction regarding a lack of equal treatment are not always perceived as having been created for immigrants. Some participants did not feel entitled to claim discrimination via the institutions of the host society because they don't have the impression that the same society considers them as being part of the group. Indeed, their experiences with discrimination leave them with an impression of being disliked and rejected by Belgian society which considers them as outsiders. In this context, why would they have the right to claim equality?

We did not ask our participants if they would engage in anti-discriminatory action to improve the status of their group as a whole or their personal situation, but several spontaneously mentioned that they would do it for collective reasons above all. If this is the case, stressing the collective interests of engaging in legal anti-discrimination actions rather than the individual benefits, e.g. creating case law and preventing

others of being discriminated against in the future, would be a bigger incentive to engage in such actions. Following the present qualitative research, we conducted an experimental quantitative study to test this assumption and the results illustrated that institutional support for collective interests favours legal anti-discrimination actions when participants strongly endorse egalitarianism. Institutional support has less impact when participants endorse more meritocratic ideologies (Alarcon-Henriquez and Azzi, 2010).

In the end, according to our exploratory study, who would engage in legal anti-discrimination actions? First, a third of our participants did not perceive discrimination towards their ethnic or religious ingroup. This was the case mostly because they did not have much contact with advantaged group members. Second, of the two thirds that perceived discrimination, half of them consider it so pervasive that claiming it would not change anything to the current situation. Of the five remaining participants, two did not feel entitled, as immigrants, to claim their rights to be treated as equals. Three participants who perceived group-based discrimination to a lesser extent and were aware of existing opportunities to voice their dissatisfaction provided by the host society might engage in legal anti-discrimination actions. None of them were sure of having been discriminated against. They only had suspicions.

The difficulty of proving that one has been discriminated against has been solved in the Belgian legislation by reversing the burden of proof: the defending party has to prove the non existence of a discriminatory treatment. For the plaintiff, an assumption of discrimination is sufficient. But the participants did not have enough knowledge of these legal measures. Aside from all the other factors, these following factors stand out in our opinion as the main obstacles for immigrants and their descendents to challenge inequalities through legal action: lack of intergroup contact, pervasiveness of discrimination, lack of categorization at a super-ordinate level (host society or humankind) and lack of awareness of anti-discrimination measures. Existing institutionalized opportunities to act against inequality fail to achieve their goal of reaching the most vulnerable groups in Belgium as mentioned in the FRA reports. According to the results of this qualitative study, better informing the public about the existence of anti-discrimination legal options, as recommended in the same reports, does not come close to solving the problem for those who are discriminated against the most often.

CHAPTER X

Communitarian rhetorics within a changing context: Belgian Pan-African associations in a comparative perspective

Nicole GREGOIRE and Pierre PETIT

The concept of African transnational “communities” is now one of the most explored ethnoscap¹ in anthropology and postcolonial studies (Appadurai, 1996). Many authors have shown the strength of migratory, economic, religious and political networks linking Africans and people of African descent living in different parts of the world (Bonacci, 2008; Chivallon, 2008; Gilroy, 1993; Guedj, 2009a, 2009b; Hall, 1990; Harris, 1982). Moreover, they have illustrated the increasing importance of religious or ethno-nationalist discourses celebrating the unity of an imagined community (Anderson, 1983). This paper advocates the necessity of contextualizing and “re-territorializing” the analysis of such globalized identities (Capone, 2002). In order to avoid cultural essentialism and, on the other side, the fascination for the “dance of flux and fragments” (Cooper, 2001), it is crucial to take into account the peculiar social and historical contexts in which those identity constructions are taking place. This paper thus explores the redefinitions of an African-oriented ideology developed mainly from 1900 onwards – Pan-Africanism – by the “new African diasporas” (Koser, 2003) within the Belgian context. In particular, using ethnographic data collected from African associations² based in Brussels, we will depict how the term “Pan-African” came to be used by an emergent associational elite in order to

¹ “Ethnoscap¹” – or “landscapes of group identity” – is an anthropological concept developed by Appadurai (1996) to describe the global circulation of cultural practices and representations people in movement are building in order to feel connected with their society of origin.

² We use the expression “African associations” as it is employed in the associational milieu to refer to associations mainly directed by and meant for people of sub-Saharan origin. The ethnographic data in this text are based on fieldwork conducted in the African associational milieu mainly in Brussels by Nicole Grégoire beginning in 2007. The fieldwork

build an “African community” within a context of racial stigmatization. We will question the place of agency and structure in this phenomenon and the reason it differs so much from Pan-African movements in the New World.

African diasporas and the emergence of African associations in Belgium

Significant migrations from sub-Saharan Africa began during the 1960s in Belgium. At the end of the colonial period, more and more students from former colonies and protectorates – Congo, Rwanda and Burundi – came to Belgium to be trained as the administrative elite of their newly independent countries. National origins and migration trajectories progressively diversified. Student migration gradually implied other African countries and family reunification led to the feminization of the African presence (Kagné, 2000, p. 4). Degradation of living conditions in African countries after their independence and the tumultuous democratization processes of the 1990s led to further displacements within the continent and beyond. In Belgium, the number of asylum seekers grew significantly during the 1990s (Kagné *et al.*, 2001, p. 13-14). This situation also discouraged many students from returning to their homeland. According to a 2006 census based on nationalities at birth, 93,687 people of sub-Saharan origin are established in Belgium (i.e., approximately 1% of the total Belgian population), most of them from Congo (DRC), Rwanda, Ghana, and Cameroon (CECLR, 2008)³.

Parallel to the evolution of migration trajectories, African associations began to develop in the 1960s. Students’ clubs, women’s associations, artistic, religious, professional or political groups were created on a national, regional or ethnic basis (Kagné & Martiniello, 2001, p. 35-38). Many of these associations remained informal, i.e. with no official statutes published in Belgium’s Official Bulletin. A formal African associational milieu emerged only in the early 1990s. African associational leaders and observers refer to this decade as one of “associational efflorescence” (Gatugu, 2004; Manço, 2003; Meyers, 2000). Those leaders often deplore the climate of competition that opposes associations on the question of subsidies and/or public recognition. Many of them share the ideal of building an “organized” and “united community” in the present context of subordination and stigmatization⁴. During the last decade, several small-scale meetings (15 to 50 participants) were organized with this goal in mind and they benefited from a certain visibility in the Belgian public sphere. These meetings formed the basis for a potential social movement (Werbner, 1991). An important number of actors involved in these gatherings are leaders or founding members of five associations that label themselves “Pan-African”. In this context, the term basically refers to those associations’ criterion of membership that goes beyond “ethnic” or national origins and reaches a sub-continental level. They are not just “Kasaian” or “Congolese” associations, but claim to be open to people of all sub-Saharan origins. Before describing them and in order to understand the present

consisted of participant observation of various activities (charity dinners, festivals, roundtables, commemorations, etc.) and biographic interviews.

³ We would like to thank Quentin Schoonvaere for these data which were used for the 2008 CECLR report.

⁴ The words put in quotation marks are our informants’ own words.

meanings of the term “Pan-African” in Belgium, it is necessary to contextualize the expression historically.

Pan-Africanism: A short historical overview

The term “Pan-African” is historically linked to a political and cultural movement dating back to the beginning of the 19th century⁵. Institutionalized in 1900 through the first Pan-African Conference, the movement sought to fight discrimination of “Black” people around the world. It developed Afrocentrist rhetorics, i.e. promoting the seniority and achievements of African antique civilizations and celebrating African historical and cultural unity and common destiny, within the continent and beyond. It did so in order to advocate and promote the rights of Africans of the diaspora, particularly in the US and the Caribbean, on the one hand, and the rights of African people under colonial domination, on the other hand. Pan-Africanism advocated for the emancipation of African countries and sought their unification into an integrated political system. However, after their independence, the hope for a unified Africa proved to be in vain and the movement declined, at least as far as its political ambitions were concerned.

However, long after the fall of the colonial regimes, the Pan-African ideal has not completely faded. As we will demonstrate, it is kept alive through various kinds of cultural nationalism⁶ deeply rooted in the American continent. Secondly, in Africa, the Pan-African ideal persists through the African Union, a Pan-African political institution originating from the 1963 African Union Organization and whose ambitions are quite limited compared to the historical Pan-African agenda (Doumbi-Fakoly, 1997, p. 33; M’bokolo, 2004, p. 52). Pan-African values are also revisited through various circles and associations in different parts of the world. As M’bokolo (2004, p. 25) states it: “As an expression of the solidarity between Africans and African-rooted people and as a will to ensure freedom and development to the African continent (...), Pan-Africanism keeps on feeding ‘African renaissance’ projects”.

Pan-African associations in Belgium

What is the legacy of Pan-Africanism in Belgium? Which meanings do people currently give to the term “Pan-African” in the Belgian African associational milieu? Two orientations can be distinguished.

“Homeland politics”: the heirs of Pan-African activism

A first reformulation of Pan-Africanism in Belgium consists of political activism focusing on the African continent. It draws its inspiration directly and explicitly from the historical Pan-African movement. On the one hand, this Pan-Africanism is historically linked with the students of the diaspora, e.g. with the *Fédération des*

⁵ For good historical analyses of Pan-Africanism, see M’bokolo (1995), Holl (1997), Killingray (2005), Bonacci (2008), Guedj (2009b).

⁶ By “cultural nationalism”, we mean social movements that are concerned not so much with the creation of an autonomous state but with “identity and the regeneration of the national community through the development and the strengthening of a national essence – a distinct civilization which is the product of a distinct history and culture” (Ivarsson, 2008, p. 9).

Etudiants d'Afrique Noire en France (FEANF). Launched in 1950 in Bordeaux, this association sought to mobilize “towards the independence and unity of the African states” (M'bokolo, 2004, pp. 41-52). Internationally renowned, this association was emulated in Belgium. As a result of the involvement of former students in groups inspired by FEANF and who influenced the next generation of students, several present-day Pan-African circles continue the tradition of this movement. They usually convey Afrocentrist theories and focus their actions on African politics. For example, a radio presenter on the African broadcast *Sous l'Arbre à Palabre*, transmitted each Sunday on “Radio Campus” at the *Université Libre de Bruxelles*, explained that the broadcast is led by a circle of Afrocentrists and he explained how he was initiated into Pan-African political ideas:

“There, I've been politically trained by (name of an intellectual belonging to the 1960s student generation). Although it is not an association, ‘Sous l'Arbre à Palabre’ works as such. Its editorial line is Afrocentrist and progressive” (11/04/2007).

The continuity of Pan-African activism can also be attributed to intellectuals who recently arrived as asylum seekers. These Pan-African activists belong to transnational associations that often do not have an official status in Belgium. The *Cercle Kwame N'Krumah* is a good example. It was founded in Lomé University (Togo) and then recreated in Belgium. In an interview with a Togolese journalist, one of its representatives describes the Cercle as follows:

“Politically, what we do to heighten our compatriots' awareness of the Togolese issue is certainly known in Belgium, in Togo and other African countries such as the Ivory Coast and the DRC. Indeed, since the implacable dictatorship sent us into exile in the beginning of the 1990s, we have not sat idly by. We have organized our compatriots into associations such as the Cercle Kwame N'Krumah, the ‘F2P’ (Pan-African Patriotic Front) etc. (...) The Cercle Kwame N'Krumah was created to bring back Dr Kwame N'Krumah's philosophy and ideas, which remain immortal. The solutions for African developmental and emancipation problems are to be found in those Pan-African ideas. What is Pan-Africanism exactly? It is African unity following the example of the European Union which is presented today as a guarantee of development and security”⁷.

As illustrated here, Pan-African activism in Belgium is not solely a phenomenon elaborated in migratory situations. It also stems from individuals who have been activists in their homeland. Their migration stimulates Pan-African activism revivals in the diaspora, in the host country and beyond. Since they focus on homeland political situations and following Lafleur's typology, the activities of these circles can be described as “homeland politics”, i.e. “political activities that immigrant communities develop in the host country in domains exclusively relevant for their homeland” and which “are used to mark immigrant communities' support or hostility to the homeland ruling authorities” (Lafleur, 2005, p. 27).

⁷ Mouta Gligli : “Les élections n'ont jamais apporté de vrais changements au Togo”, interview by Zeus Aziaduwo in the journal *Liberté Hebdo*, 198, 02/05/2007, available at <http://www.letogolais.com/article.html?nid=3093> (accessed 23/12/2009).

“Immigrant politics”: a migrants’ federative Pan-Africanism

Lafleur distinguishes homeland politics from a second type of activism labelled “immigrant politics” which focuses instead on improving living conditions for the immigrant community. In Belgium, “Pan-African”-labelled associations of this type have emerged during the last two decades. With a legal statute, visibility in the public sphere, and (for some of them) strong commitment to represent “the African community” of Belgium, or even of Europe, they put forward another interpretation of Pan-Africanism. Here, “Pan-African” does not refer to current politics in Africa nor to the past prowess of African civilizations (although these topics may be discussed). Members of these associations rely on the expression in a generic sense to distinguish them from other African associations that gather people of a single “ethnic” or national origin. The term “Pan-African” here suggests organizations that go beyond these particular origins and encompass the entire “Black” sub-continent. Most of their active members are first-generation migrants who came to Belgium as students and have been living there for an average of twenty-five years. They are usually in regular work, sometimes in public service. They have committed themselves to a variety of African associations for several years. Thus, they form a social network that can be considered as part of an associational elite due to their long-term involvement, their intellectual background, their professional status, and the social capital they have managed to build within Belgian society, particularly through their political and media connections.

In 1994, the creation of the Council of African Communities in Belgium and in Europe (*Conseil des Communautés Africaines en Belgique et en Europe / Raad van de Afrikaanse Gemeenschappen in België en in Europa* – CCAEB/RVDAGEB) constituted the first attempt to create an “African community” in the public sphere. It was the very first organization with the explicit goal to federate all African associations, regardless of their ethnic or national background. It brought together almost eighty associations. Interviews with some of its founders have demonstrated a link between the federation’s emergence and three important socio-political evolutions of the time⁸. First, the creation of an imagined European community stimulated the will to establish an “African” corollary. As one of the founders explains:

“They were preparing the 1992 Europe (...). There were posters showing white people and Europe: “We, Europeans”, etc. You see? (...) And I took it very badly; I felt that I had no place. (...) And I said: “It’s a platform for Africa that we need, we need a federation of associations, so that we can find a place in this Europe” (18/05/2007).

Secondly, the 1990s were also a decade of strong debates at the European level about immigration and integration. Some consultative agencies, such as the European Union Migrants’ Forum, were created to involve migrant organizations in these discussions. One of the leaders of the CCAEB/RVDAGEB became the General Secretary of this Forum.

⁸ For detailed descriptions of these evolutions, see Guiraudon (2004), Rea (2007), Vinikas *et al.* (1993).

Thirdly, at the national level, the rise of the far right in Flanders in 1988, and the riots that took place in 1991 in some of the so-called immigrant neighbourhoods in Brussels focused the attention of federal and regional Belgian governments on the question of integration. They released unprecedented funds for the creation of intermediary structures between public authorities and people with an immigrant background⁹. This context stimulated many initiatives and marked the beginning of an ethnic associational efflorescence (Manço, 2003, p. 18-19). Another CCAEB/RVDAGEB founder describes the necessity that was felt at the time of taking up one's position with regards to other ethnic groups present in Belgium:

"That was quite irritating to me: this lack of a Pan-African vision. (...) The sub-Saharan people were by no means visible here. Others could arrive there [in the public space] and claim: 'We, the Italian community', 'We, the Greek community', 'We the Turkish community', 'the Moroccan one'... But no one said 'the African community', then..."(24/01/2009).

The CCAEB/RVDAGEB took advantage of this favourable political context to attain representation in Belgian and European consultative bodies involving ethnic organizations in order to lobby in the name of "African communities". However, this favourable context declined considerably by the end of the 1990s, a process that can also be linked to changes in the Belgian policies of integration. In particular, the federation was prompted to split so as to follow the Belgian federal system which required associations to be part of either the French- or the Flemish-speaking community in order to benefit from subsidies. Consequently, a Flemish federation, the RVDAGE/Vlaanderen (RVDAGE/VL), was created in 1996. This allowed funds from Flemish public institutions to be channelled to affiliated African associations. But the division of the federation also meant the creation of two distinct Advisory Boards and, consequently, overburdened the organization as increased funding possibilities attracted additional associations into the federation. This pressure led to internal conflicts that weakened the twin federations and caused them to lose their credibility at the end of the 1990s (Grégoire, 2009).

In 2004, the creation of MOJA brought about a new turn in the construction of an imagined "African community". Significantly, MOJA means "one" in Swahili: once again, the emphasis is on uniting people from various sub-Saharan countries. Thirty-five persons founded MOJA, mainly from the DRC, but also from Cameroon, Gabon, Mauritius, Kenya and Rwanda. The consciousness of constituting an elite appears very explicitly on MOJA's website which states that the association has gathered "most of the Belgian politicians of African descent and big names of the sub-Saharan associations" as well as "business people and academics/researchers"¹⁰. Some MOJA administrators are also members of Pan-African activist (homeland politics-oriented) and Afrocentrist associations of the type described above; but as

⁹ The Belgian State is subdivided into three linguistic Communities (Flemish, French and German) and into three Regions (Flanders, Wallonia and Brussels-Capital). Integration has been a regional competence since 1994 (Gsir, 2006). For a detailed description of this policy and its consequences see Ouali (1992a, 1992b) and Rea and Brion (1992).

¹⁰ Our translation. <http://www.moja.be> (accessed February 2009).

a broader organization looking for recognition in the Belgian public sphere, MOJA does not openly advocate these views. The association emerged in a political context marked by the growing concerns of political parties regarding “ethnic votes” and, consequently, by their growing interest in Belgian candidates of sub-Saharan origin. This constituted a new opportunity for the development of a representative structure for the “African community”. In an interview, a founder of MOJA explained how the initiative was launched after a conversation he had with an association colleague who was also a local councillor:

“He [the colleague] said to me: ‘I’ve got an idea. But I’m a politician. My idea is that in a country like this one, where community issues take up a lot of space (...), African associations, politicians, and all other people concerned should gather to lay the foundations of something representative and firm to face the socio-economic reality of this country. (...) You, as an associational leader, are supposed to be more neutral. Then I’d like you to conduct this meeting where we are going to discuss the possibility of launching something quite credible’” (19/06/2007).

Although it only published official statutes in 2004, MOJA, as a result of its political network, was received in 2003 by the Belgian government’s *informateur*¹¹ as a “representative of the African community” after having organized a “Forum of the African Community”. The same occurred in 2007 before and after the federal elections. However, while the association gathered many members at first, it rapidly ended up being managed by a small group of three or four persons. A founder explains:

“When MOJA was created, everybody paid to become a member. We got 6,000 euros at once! It was just after [Federal deputy] Di Rupo’s appointment to the post of government *informateur* and he received MOJA as the representative of the African community. Everybody wanted to become a member because they thought they could earn money. At the next General Assembly, 50 percent of the members were already missing. At the next one, we did not reach a quorum. Now, we should call for a meeting but we don’t manage to do it” (04/04/2007).

These two short portraits shed light on the relation between the development of a migrants’ federative Pan-Africanism in the African associational milieu in Belgium and the national and European political agendas. Referring to the dialectically linked polarities of identity processes, the “African community” was, at the beginning of the 1990s, more a matter of attribution than of self-definition (Jenkins, 1997, p. 52-73). Although people of sub-Saharan origin have always had to deal with being labelled by the majority as “African” or “Black” in their daily life, their associations remained largely based on national or regional origins. Expressions of Pan-Africanism mostly remained limited to individual opinions or political activism aimed at the continent of origin. The evolution of the European and Belgian authorities’ concerns can – at least partly – explain the transition to Pan-African references in the formal associational milieu during the 1990s: their will to take people of foreign origins into account in

¹¹ In Belgium, the government’s *informateur* is a political personality named by the King after elections. He or she must meet different political actors in order to define a potential governmental coalition. He or she also meets members of “civil society” to hear their claims.

the new political context opened the door to “community” representatives, and was instrumental in creating these “communities”.

Towards an interpretive community

This political context was the basis for the development of a social process we could conceptualize in terms of “interpretive community” – thus focusing our attention on the actors’ agency. Paul Gilroy, and, a few years later, Pnina Werbner, proposed to consider certain Black British movements in such terms, for they produce and refer to a common symbolic repertoire to federate segments of a heterogeneous population toward collective action (Gilroy, 2002; Werbner, 1991). For example, Pnina Werbner evokes Black activists in Britain who refer to “themes and symbols” drawn from “Pan-Africanism, World Islam, Third World anti-colonialism” and so forth in their struggle “against racism and material subordination”. She argues that, in doing so, they create a common discourse that relates to “the contemporary conditions of the group within the larger society” and that can become “a cultural basis for unified political action which can encompass the different ethnic and immigrant segments” (Werbner, 1991, p. 26).

We can hereby establish a parallel to the situation we have discussed so far. Despite the departure of and dissension amongst members¹², the creation of associations like the CCAEB/RVDAGEB and MOJA points to the will of an emergent associational elite to build a unified image of people of sub-Saharan origin. This elite forms a social network likely to be activated for collective action. It organizes public events that denounce racism and discrimination in Belgium as well as the consequences of underdevelopment in African countries, and which seek to unify African-rooted people as a result of common references, grievances and goals. These events constitute the common symbolic repertoire of this nascent interpretive community. Three of them are discussed hereafter.

Celebrating Black heroes

The first event aimed to set-up a kind of hagiography revisiting historic achievements of Black people. In 2004, the CCAEB/RVDAGEB attained funding from the Brussels-Capital Region and from local authorities for a youth delinquency prevention project. This allowed the association to rent a hall in *Matonge*, a reputedly “African neighbourhood” in Brussels. By analogy to this toponym, the hall was called *L’Espace Matonge*. Since most African associations do not have a permanent

¹² We have already talked about members’ defections from both associations. It must be added that some former CCAEB/RVDAGEB and MOJA leaders founded new Pan-African associations with more specific ambitions. Those associations are the *Union des Femmes Africaines/African Women’s League* (UFA/AWL), founded in 1998, and *Raffia Synergies*, founded in 2005. As its name suggests, the former has a specific gender perspective. It promotes African women’s associational activities through the organization of charity dinners, conferences and a “Women’s Action Award” ceremony that takes place on Pan-African Women’s Day during the first week of August. The second organization was founded in 2005. Similar to the Rotary or Lions Clubs, it seeks to create networks of African-rooted professionals in order to develop mutual help and solidarity with the continent of origin.

room at their disposal, the hall has, from its inception, been repeatedly used for hosting debates, conferences, charity dinners, shows and festivals organized by various African associations. “*L’Espace*” is often described, in this small milieu, as a hyphenated place, a symbolic space where Pan-African ambitions are given concrete expression. In 2006, MOJA and the CCAEB/RVDAGEB organized the first “African Day of Black Heroes”. Five political “heroes” were celebrated: two representatives of the Civil Rights Movement (Rosa Parks, Martin Luther King), one American Black nationalist (Malcom X), and two important French figures of anti-colonialism (Cheikh Anta Diop, Frantz Fanon). Mixing heroic and victimary rhetorics in order to underline and overcome the African-rooted people’s subaltern position in Belgium, MOJA explains on its website that the event sought to “tell Black Heroes’ stories in order to rebuild a victorious history”. The association justified the necessity of such an enterprise as follows:

“The hero is the one whose life has been a ceaseless struggle for the liberation of Black people from the yoke of an image and a false history within which those who dominate them try to maintain them. (...) To inform the disillusioned Africans about the capacity of their own people, about the life of these heroes, is to give them back self-confidence and hope for their future. (...) To tell the story of those heroes to the young Africans of Belgium or Europe, is to try to break, at least in their minds, the spiral of self-destruction, of the lack of self-confidence and of the society’s rejection”¹³.

“Learning a lesson” from recent successes

These Pan-African associations are not only concerned with revisiting the past. Their leaders also call upon more recent events in order to “create a community consciousness” – these are their words – oriented toward the overcoming of African-rooted people’s minority status. Barack Obama’s victory in US presidential elections was an opportunity to go further in the construction of an interpretive community. On the evening of his investiture (20/01/2009), the Pan-African associations’ leaders met at *L’Espace Matonge* with other associational leaders in order to watch the TV broadcast of the event. During the debate that followed, Obama’s victory was rebuilt as a symbol of the victory of a “community consciousness” within Black movements, however divided they have been in the US. For instance, one of the speakers was warmly greeted when he said that:

“the Black Panthers, Martin Luther King: for a while we thought that they were working each on their side, but in reality, although they had different positions, they were converging toward a similar goal. (...) In reality there was a federation of orientation”.

So, in Belgium, if Pan-African associational leaders and others gathered at *L’Espace Matonge*, it was to “learn a lesson” – that was the title of the evening – from the American presidential success in order to elaborate upon future collective action that would enhance African-rooted people’s possibilities for social mobility, slowed

¹³ <http://www.moja.be> (accessed February 2009).

down by the permanence of exclusion and of racially-based social characterisation. Indeed, as another speaker put it:

“Today, there is a glass ceiling. We see what lies beyond. And today, it’s up to us to set up the strategy to reach, beyond the ceiling, the point that we wish to reach. (...) Fortunately, some of us have reached a certain age. Some of us don’t necessarily have this ambition to be the leader who makes things happen any more. This is how we all were before. (...) Now, we enter the time when we will realize the goals of a group, of a community”.

These words reflect a central goal of this interpretive community, namely that more and more people stigmatized as “Black” should acquire positions of responsibility in Belgian society. They reject the “Black condition” and strive to overcome the racial minority status (Ndiaye, 2008). This also appears clearly in the memoranda sent by MOJA to the government *informateur*. In the 2007 version, the association wrote that “the African community of Belgium [is] concerned with the full expression of its citizenship and with being fully recognized as part of Belgian society”, which means “to be present and visible in the media and in the social, economic and political public space”, “to dismantle the schemes that stigmatize and undermine African people” and “to chase away people using or willing to use racism in general, and anti-Black racism in particular” (MOJA, 2007, p. 2).

Keeping the link with Africa: Commemorating African victims of underdevelopment and migration

For the associational elite, what is at stake is not only the act of “making a community” around a minority experience in Europe. A third mode of construction of this elite’s symbolic repertoire relates to identifying with the suffering of African populations and with the tragedies of those who decided to leave Africa. Therefore, each summer in a “platform of Pan-African associations”, they organise a commemoration at the national airport in Brussels in memory of Yaguine and Fodé, two young clandestine passengers found dead in 1999 in the baggage hold of an airplane coming from Guinea-Conakry. The ceremony varies from one year to the next, but the integral part of the commemoration remains a French and a Flemish discourse given by two associational leaders; the reading of the teenagers’ heart-breaking letter to “Excellencies, members and representatives of Europe”; and the placing of a spray of flowers with a banner with the names of Yaguine and Fodé with the date they were discovered in the airplane. This commemoration is not only a plea to Belgian and European authorities and people; it is also a plea to the Africans of Europe to remind them of their responsibility for the development of African countries. One of the organizers explains:

“It’s the whole issue of migration and its reasons, but it’s also the question of European Africans’ reflecting on what they can do for the development of their continent of origin. These two children are emblematic of the drama of underdevelopment” (19/06/2007).

Here, the “Pan-African” label takes its transnational historical meaning by evoking the common destiny the African diaspora has with its continent of origin.

In contrast: African-American cultural nationalism in the US

These migrants' federative Pan-African associations are also worth considering in comparison to what they are precisely not. Taking into account the globalization of ethnoscaples mentioned in the introduction, one could expect Belgian Pan-African leaders to share common features with the African-American cultural "Black nationalism"¹⁴ nowadays in the foreground in the US. While both movements are heirs of the same historical Pan-Africanism, they differ greatly on some issues.

First, voluntary associations have always been more powerful in the US and have generally benefited from higher membership than in European countries (Dekker *et al.*, 1998), although associational involvement in the US diminished during the last decades of the 20th century (Putnam, 2000). African-American associations gather more people and resort to much more confrontational rhetoric than their Belgian Pan-African counterparts. They have played a central role in the development of Black nationalism. The National Association for the Advancement of Coloured People (NAACP), of which William E.B. Du Bois was a founder in 1909, or the United Negro Improvement Association (UNIA), founded by Marcus Garvey in 1914, are good examples. The latter had millions of members, inside the USA and beyond. In Belgium, by contrast, membership of Pan-African associations amounts (at best) to less than one hundred. Nowadays, Black nationalism in the US is still supported by a dense associative constellation, the leaders of which express their demands very boldly in comparison with the Belgian Pan-African associational leaders. For example, the National Black United Front (NBUF), founded in 1980, aims "to unify Black people from various social/political persuasions, to build a politically conscious, unified, committed and effective Black mass movement and to confront white supremacy in its various manifestations"¹⁵. Such a fiery speech would not be delivered by Belgian Pan-African leaders, who are much more moderate and who would not phrase their political agenda in terms of confrontation with "white supremacy" in a context where public racial categorizations are taboo and where "Black" is euphemized as "African".

Second, the question of "cultural identity" is much more salient in the US than in Belgium. Belgian federative Pan-Africanism is concerned with access to rights and/or public funds, not so much with the ontology of "being African" that preoccupies many African-American militants. Indeed, after the wane of the highly politicized, sometimes revolutionary movement of the Black Power in the 1960s and 1970s, Black nationalism in America has gradually turned, in the 1980s, into a mobilization more focussed on cultural than political issues. Afrocentrist theories constitute its main expression today (Austin, 2009; Fauvelle-Aymar, 2002). Molefi Asante, their most famous advocate, follows the thesis developed in the 1950s by Cheikh Anta Diop, a Senegalese intellectual. According to the latter, History's first great civilization was born in Africa. Pharaonic Egypt, a racially black civilization, laid the foundations of Greek, and consequently of European civilizations in general. It was also responsible

¹⁴ See note 6.

¹⁵ <http://nbufhouston.blogspot.com/>, <http://www.assatashakur.org/forum/houston/39570-12th-annual-sankofa-caravan-ancestors.html> (accessed 15/10/2010).

for the populating of Africa¹⁶. A substantial identity links all African civilizations – including (according to Asante) African-American communities. Through slavery and colonization, the Europeans tried to ruin this civilization. Well aware of the political stakes of history, Diop and Asante advocate the recognition of Africa’s central role in human history and they urge Africans (and African-Americans) to re-appropriate their past.

Although these assumptions gave rise to heated debates about the scientific value of these theories (Fauvelle-Aymar, 2000), Afrocentrism is also worth considering in its historical and social context, i.e. as an identity process. In the US, scholarly Afrocentrism has eventually led to an exhortation to “popular afrocentricity” such that African descendants should re-learn customs that are in accordance with their African “essence” (Asante cited in Guedj, 2009b, p. 15-17). They need to separate themselves from the hegemonic White society through distinct daily attitudes and folklore including peculiar dance and music, African clothes, specific celebrations like *kwanzaa* (new year’s eve) and revisited religious practices like voodoo, *orisha*, *akan*, *kemet*, etc. (Capone, 1999; Guedj, 2004, 2009a). Highly militant movements such as the NBUF partake in these Afrocentrist aspirations. “We must remember that we are a great people with a culture and civilization which extend to antiquity”¹⁷. The NBUF organizes a yearly pilgrimage to places linked to the slave trade during which emphasis is on respect of “traditional African religion” including the Ifa ceremony, white clothes to respect the *egun* (ancestors in Yoruba), etc.

As a matter of fact, Black nationalism is also evident in a variety of churches and other religious associations, be they neo-traditional, Afrocentrist Christian, or Afroasiatic Islamic activist (Guedj, 2003). Furthermore, the movement is institutionalized through a variety of schools offering Afrocentrist teaching to African-American children and through university departments such as Temple University’s African-American Studies where Molefi Asante is a professor (Austin, 2009).

In comparison with the effervescence of American Black nationalism with its huge capacity of political mobilization and its penetrating power in state institutions, Belgian Pan-African associations seem to remain in the background. The situation of African-Americans and of “Afropeans” obviously differs in many ways. The former have been established from the 16th century onwards, mainly as a consequence of the slave trade. They have a long tradition of fighting for fundamental rights in the American nation while the latter are first- or second-generation migrants, who, although they deplore racial discrimination in the Belgian society, have never had to fight for their rights in the same way. Their involvement in Belgian political life seems to be geared rather towards recognition by the public institutions or political parties than a fierce struggle against “White supremacy”. With regard to Black cultural nationalism, the situation is also very different. The Africa of the Afrocentrist African-American, including ancient Egyptian glory and cultural and religious unity, has less appeal among first-generation African migrants in Belgium and is not expressed so explicitly

¹⁶ See Diop (1959). On Diop’s and Asante’s thoughts see also Fauvelle-Aymar (2000) and Guedj (2009b, p. 11-13).

¹⁷ See note 15.

in the public sphere, although it has a certain echo among several associational actors. Indeed, most African associations are led by first-generation migrants and remain largely based on national, regional or “ethnic” grouping criteria. Just a few African association leaders identify themselves with the entire sub-continent. Pan-African federative associations are only emerging in Belgium, with a certain elite constituting a symbolic repertoire but not (yet) reinventing wide “African” cultural practices. Moreover, those who claim to represent “African people” as a whole have adopted an accommodating strategy (Myrdal, 1996, p. 720) that prevents them from advocating a voluntary political and cultural removal from “white” society which is simply inconceivable in a country promoting multiculturalism but wary of institutionalising cultural differences in such a divisive way in the public sphere. The idea of Afrocentrist schools for black children would seem properly appalling to Belgian authorities and “public opinion”. The “multicultural society” of present-day US – which allows the very idea of such schools – is to a large extent a consequence of the way the “Black and White divide” has shaped American history, especially during the Civil War and the Civil Rights struggle. In Belgium, the main division at stake for the last century has been the one between French and Flemish speakers which has left little room for any other cultural nationalist discourse, especially from groups whose presence has long been thought of as temporary.

In sum, the position advocated by the Belgian Pan-African associational elite appears to be quite far from African-American nationalism. We have only presented here a few aspects of the symbolic repertoire it is gradually constructing. We hope to have shown, nevertheless, that the symbolic elaboration of this nascent Belgian Pan-African interpretive community, although much more muffled than its overseas equivalent, does not come out of nowhere. It also revisits the long history of relations between the West and Africa and feeds on a transnational imaginary. Pan-African references are well-known among these associational elites, some of whom support Afrocentrist views but would not state them in political claims destined to Belgian authorities. The migrants’ federative Pan-Africanism came forth in a political context that greatly influenced its orientations. The aftermath of the 1990s was, in Belgium as in Europe, the result of a decade rich in discussions about European citizenship, integration and discrimination. This prompted an unprecedented associational dynamism with a concern for the institutional representation of “the African community” and for the growing political participation of Belgians of African origin. An associational elite emerged and is now striving to constitute a “community consciousness” oriented toward collective action. Hence, if one can speak of identity politics, it must be underlined that, in its current state, the symbolic repertoire inspiring the movement leans toward the option of “making a community” on the basis of a “pragmatic black consciousness” – a consciousness founded upon what is defined as common interest, rather than upon a cultural essentialism proclaiming the existence of a “Black people” (Ndiaye, 2008; Shelby, 2002).

CHAPTER XI

Second generation associations and the Italian social construction of Otherness

Bruno RICCIO

Introduction

Italy is now home to second-generation children of the first wave of migrants into Italy. These immigrant youth are organizing themselves politically, socio-culturally and religiously through the creation of associations¹. They have reached adulthood at a time when Italian society is characterised by a serious “multiculturalism backlash” (Vertovec and Wessendorf 2009). Members of the second generation are often depicted as “different” by the majority society, a phenomenon typical of contemporary cultural racism which draws absolute boundaries to legitimise the incommensurability of cultures and the normalisation of social exclusion and discrimination. Nevertheless many second generation associations try to avoid culturalism and embrace contemporary diversity by going beyond ethnic and national boundaries and by challenging common sense representations. These associations are characterised by cosmopolitan ambitions, familiarity with new media, public assertiveness, transnational connections and good linguistic skills which facilitate communication with Italian institutions. The primary objectives of second generation associations are to fight discrimination and to facilitate equal opportunities for social mobility for youth of immigrant background. Yet, these youth associations encounter various difficulties such as frustration in their inability to ensure active participation, avoiding dependency and elitism.

The reflections presented in this paper result from a study on second generation associations in the city of Bologna undertaken together with a post doctoral student (Riccio and Russo, 2009). From a methodological point of view, our contribution

¹ I consider “second generation” in a loose sense including children of migrant background who grew up in Italy as well as those who were actually born in Italy.

wanted to avoid metonymic essentialism. We do not pretend that the experiences documented by exploring the social lives of both members and leaders of the associations constitutes a representative case of the Italian second generation as a whole. We wanted to study a burgeoning social phenomenon, that of youth of immigrant background organising themselves to enter local public space, with local variations being very important in understanding the management of diversity in Italy. In addition to 20 interviews and participant observation at public events, we held two follow-up group discussions with eight of the interviewees in which we focused on the main points emerging from the research².

I will provide some context by discussing contemporary multidimensional racism in Italy and the delicate issue of citizenship. Then, I will focus on the challenges experienced by second generation associations and their struggle against discrimination. I will explore their main characteristics, objectives and strategies emerging from the experiences of their members, leaders and outsiders' perspectives. I will conclude by reflecting on what this recent social phenomenon teaches us about everyday practices of citizenship.

Backlash against diversity

The contemporary Italian "backlash against diversity" (Grillo, 2005) is exemplified by the recent decree on security (July 2009) which, in addition to legalising security patrols by non-trained personnel, obliges doctors and health practitioners to denounce irregular migrants. This causes a dangerous reduction in access to health services for members of ethnic minorities. One month earlier, during the last electoral campaign for European and administrative elections, the Ministry of Internal Affairs adopted measures aimed at preventing migrant and asylum seeker entry into Italy through forced repatriation with no check on potential asylum statuses resulting in a serious erosion of humanitarian standards.

All over Europe, during the 1990s and even more so now, there have been various attempts to deport or exclude migrants who are regarded as disposable workers but seldom as citizens entitled to access social welfare. It is now considered "normal" to allow free movement amongst the wealthy countries but it is considered dangerous to facilitate migration from countries that combine poverty and, especially after 9/11, Islam. In Italy illegal migration has become a focus for aggressive campaigns from the right. This has contributed to the politicisation of migration issues and has

² This study emerges from a broader research project, "Urban Contexts, Migration Processes and Young Migrants" (PRIN project 2006-2008) supervised by Professor Matilde Callari Galli. The project aimed to explore the socio-cultural experiences of young people of migrant background in two urban and multicultural settings: Bologna and Perugia (cf. Callari Galli and Scandurra, 2009). Preliminary findings have been discussed at ULB during the international workshop "The Others in Europe" in March, 2009. Later, between May and July 2009, I was a guest at the Max Planck Institute for the Study of Religious and Ethnic Diversity (MMG) in Göttingen and I gave a longer version of the paper to a seminar organised by the Department of Socio-cultural Diversity. I thank all the participants from both events for their feedback. Susanne Wessendorf, Ralph Grillo and Saskia Bonjour provided further comments on an earlier version of the paper.

helped increase pressure for migration control and the “representation of migrants as problems” (Grillo, 1985). Furthermore, and more relevantly, the situation of ethnic minorities of immigrant origin, some of whom may be citizens and members of the second generation, has been badly affected by these increased anxieties concerning immigration.

There is a dangerous dialectic between government policy and public opinion already hostile to immigration. The media increasingly present immigration as a threat, contributing to the “moral panic” which negatively affects public opinion. In everyday political rhetoric, culture and cultural difference are increasingly politicised and opposition to foreigners is cast in terms of common sense themes such as law and order and the defence of – sometimes national, sometimes local – economic interests. In other words, right-wing (and other) ideologies are increasingly dominated by cultural racism. This kind of discourse underlines diversity resulting from cultural differences and concludes that, because of these cultural differences, integration is impossible. In 2008 for instance, the new Mayor of Rome, talking about the Roma minority in the capital, explained that some are good citizens, but others, “also because of their culture”, tend to steal and misbehave.

A “culturalist” reading of difference may result in residential segregation of migrants. For instance, explanations such as the devaluation of prices due to a supposedly inherited tendency of migrants to live in overcrowded conditions are used by property owners to legitimise processes of discrimination in the housing market (Riccio, 2002). Furthermore, as Cole suggests when focusing on Italy to explore the emergence of a “new racism in Europe”, popular hostility towards migrants is legitimised by depicting it as a natural response of people protecting their territories (Cole, 1997). More recently, comparing contexts as far apart as Cameroon and Flanders, Ceuppens and Geschiere (2005) argued that these discourses of “autochthony”, apart from revealing the obsession with belonging and the exclusion of strangers in day-to-day politics worldwide, seem able to target different groups at different times. The Northern League trajectory provides a good example here, since it moved from the stigmatisation of the southern Italian in the 1980s to that of international migrants in the 1990s. What is missing is a public debate about the legitimisation of exclusionary practices in everyday life which is created by this new racist discourse.

As Andall’s work in Milan has shown, “the very notion of the possibility of being both black and Italian remains a marginal concept within the broader framework of the contemporary immigration debate in Italy”. In other words, “being black and being Italian were perceived as mutually exclusive categories. This view was not only evident at the institutional level of the police but also amongst employers and by the gate-keepers of Italy’s physical borders” (Andall, 2002, p. 400). Therefore it is not a matter of mere cultural racism. Phenotypic characteristics have also become more and more relevant in fostering Italian internal boundaries. In 2008, a worrying series of events occurred. Abdul Gruiibe, a young boy who was born in Burkina Faso and raised in Italy was beaten to death in Milan in September 2008 by the father-and-son proprietors of a bar who suspected him of stealing money. Only later they realised that he had only stolen a package of cookies. However, during the attack the two shouted “Dirty black”. In another instance, Emmanuel Bonsu, a 22 year old Ghanaian,

was injured in Parma in a scuffle with the police. Afterwards, it was discovered that police officers had taken pictures of themselves with the young Ghanaian who bore visible signs of being beaten. In Rome a Chinese man, Tong Hongsheng, was beaten by a group of youngsters, and a Somali woman, Amina Sheikh Said, 51, said she was strip-searched and interrogated for hours at Ciampino Airport in Rome. In July, six African migrants were gunned down in Castel Volturno, a stronghold of the Neapolitan Camorra. All these events, conflating occasional harassment by the police and violent attacks by informal as well as highly organised illegal groups, alongside more mundane everyday discrimination in the labour market, demonstrate that, in addition to the cultural racism mentioned above, there also exists very real everyday racialisation as part of contemporary Italian politics of exclusion. Phenotypic targeting, racialized aggression, racial hierarchies framed in biological terms (what might be called “classic racism” as distinguished from the “new cultural racism”) although politically unacceptable, continue to be used by people throughout Europe. As Didier Fassin (2000, p. 315) explains when talking about France:

“If racism was previously seen as the rejection of foreigners, the discovery of internal boundaries dividing a French community which finds it increasingly difficult to perceive itself as national contrasts with the official discourse prevailing until the 1990s. Nationality no longer suffices to define the basis for exclusion of the Other: the concrete criteria according to which a landlord refuses housing, an employer rejects a job application, a policeman decides to check for identity papers ... must be considered. These are phenomenological criteria that tend primarily toward appearance, particularly skin colour, and mainly target people not identified as European”.

Contemporary Italian racism rhetorically conflates different kinds of stigmatizations in legitimizing social exclusion: cultural and religious difference, soil as well as blood, without forgetting racial difference. It works as “background noise” (Grillo and Pratt 2002), indirectly fuelling the widespread resistance to granting citizenship to migrants and their children.

As Thomson and Crul (2007, p. 1038-1039) admit, citizenship is an important tool of inclusion, endowing migrants and their children with rights equal to their peers. Yet, “where more restrictive laws on citizenship exist, however, a discourse of exclusion is facilitated”. The Italian citizenship law of 1992 made it easier for descendants of Italian emigrants to regain citizenship but also much more difficult for immigrants to apply for naturalization. The law was also more restrictive with the second generation, stipulating that children born of foreign parents in Italy assume their parents’ nationality and that they can request Italian citizenship when they are eighteen years old only if they have resided in Italy continuously. This means that the children of migrants born in Italy do not automatically get Italian citizenship but must apply for it and pass through a complicated bureaucratic process. However, the most precarious condition is that of young people who came to Italy when they were children or even when they had already entered adolescence, who, in addition to experiencing problems of exclusion and language acquisition, find out that they are “foreigners” once they reach adulthood. The desire to change this state of affairs is

the motivation for the creation of many second-generation associations which I will discuss in the following section.

Second generation associations and the challenge of representation

Many studies on migrant organisations focus on the receiving states, their policies and the political opportunity structure (cf. Schrover and Vermeulen, 2005), sometimes running the risk of neglecting individual agency. To avoid this pitfall, we focus on the ways in which youth of migrant background respond to, adapt to, or circumvent laws as well as integration policies, and how their organisations and participation affect the meanings and practices of citizenship.

Bologna's economy has been historically characterized by the success of highly specialized small and medium-sized enterprises. Global restructuring processes and a very severe demographic decline of the local population are important processes affecting the city as well as the region (Salih and Riccio, 2010). Migrants are mainly employed in small manufacturing industries, in the production of handicrafts, and in the metallurgical and mechanical industries. Although the majority are unskilled labourers (mechanics or labourers in small and medium-sized firms), one can also find an increasing number of skilled migrants working below their skill level.

In 2007, the Commune of Bologna had approximately 376,000 inhabitants of which approximately 35,000 were foreigners including 5,047 Romanians, 4,068 Filipinos, 3,477 Bangladeshis, 3,014 Moroccans, 2,302 Albanians, 2,220 Moldavians, 2,198 Chinese, 2,175 Ukrainians, followed by residents coming from Pakistan, Sri Lanka, Senegal, and Eritrea. Foreigners less than 24 years old numbered approximately 11,000, whereas minors born in Italy and belonging to a family of migrant origin numbered around 5,000. The most numerous minors were: Filipinos (694); Chinese (592); Moroccans (573); Bangladeshis (540); Serbs (330); Romanians (297) and Albanians (220) (Osservatorio demografico comune di Bologna, 2008).

Most of the associations in the city of Bologna were founded in the mid 1990s when the left-wing local administration started to promote a "multicultural integration policy" (Caponio, 2005). In the 1990s, many of these associations were perceived by various migrants as an imposition by the local government rather than as the outcome of spontaneous mobilization (Però, 2002). On the other hand, local authorities provided facilities to support migrant associational activities. This was important because one of the main problems encountered by migrants' associations is access to public contracts and funding. After an encompassing comparative study of local policies and migrant associations, Tiziana Caponio concluded that

"The inexperience and structural weakness of immigrants' associations explains the distrust of public institutions, and in turn this distrust has the effect of keeping immigrants' associations even more inexperienced and structurally weak. Breaking this vicious circle does not appear to be an easy task" (Caponio, 2005, p. 948).

However, these comments refer to the first experiences of migrant organisations, whereas in the last decade there has been a tremendous diversification of associations. Multiple organizational actors started to play an important role both in the interface with Italian institutions and in maintaining transnational connections with the

homeland (Riccio, 2008), including foreign families', women' and ethnically mixed associations as well as what are normally called second-generation associations.

These associations of youth with an immigrant background are very dynamic and enterprising and carry important political weight. While their parents tended to struggle for recognition through involvement in social activities based on Italian associational structures, as well as through networking with the economic and institutional complex within specific localities, members of the second generation tend to tackle the hot issue of citizenship directly and to cross local and sometimes national boundaries. This kind of strategy proves to be crucial for youth who were schooled and socialized in Italian society, but face barriers to social mobility and limited citizenship rights. These "new Italians", as they often define themselves, try to strengthen their social position. Their struggle for recognition revolves around representation, both in the political and in the symbolic sense of the word. They contest and critique the common sense representation, which labels them forever as migrants, in order to enhance their access to social resources, political representation, and participation. They rely actively on the use of new media, such as the Internet, to achieve this purpose. As we shall see, they include both national and local associations, the latter of which focus their activities at the municipal or provincial level. Occasionally some local associations develop into nationwide organizations and some national associations develop local branches in different cities and towns.

Founded in 2001, the first and oldest national association is the *Giovani Musulmani d'Italia* (GMI) association. It now has hundreds of members and several local branches in different cities and villages in Italy. The main goal of the organization is to become a point of reference for young Muslims born and/or raised in Italy who want to be the protagonists of their own lives and in society in general (Frisina, 2008). The association maintains good relations with the media and uses its website to circulate information³. The organization itself operates simultaneously at local, national and transnational levels. Residing in a specific local context may assume particular importance for it is the arena where people's voices and concerns can be heard and translated into new demands of participatory citizenship. However, along with the local context, second generation Muslims often emphasise the importance of transnational public spheres as a major arena toward which to direct their efforts, discarding as obsolete the idea of the national arena as the main or the only political and discursive arena where cultural and identity politics should be played out (Salih, 2004). Indeed, the nation-state is increasingly understood by second generation Muslims as operating through an exclusionary process which not only denies them access to citizenship but also fails to acknowledge their complex identities. The state persists in crystallising Muslims as permanent and essential "others" or it offers them assimilation to the national community through a logic which restricts Muslim politics and identities to the private sphere (Salih and Riccio, 2010; cf. Levitt and Waters, 2002).

The most popular organisation in Italy, which is particularly active in the cultural and political realm, is the G2 Second Generations Network. Established in 2005, it is

³ www.giovanimusulmani.it.

a national network of young Italians of immigrant background. Thanks to its website⁴, it provides members with space for discussion and confrontation as well as videos on issues such as citizenship rights, identity construction and everyday discrimination (Colombo *et al.*, 2009). Another well-connected national association called AssoCina was founded in 2005 by children of Chinese migrants⁵. It aims to represent young Chinese-Italians, provide a bridge between their parents and Italian society and contest the dominant stereotypical representation of the Chinese in Italy. As an association leader stated in a public event:

“We want to provide counter information. This is why we have created the web site, not only to create a place to meet each other. There is a section called “news” where members can write their own articles with the goal of responding to stereotypical ideas about the Chinese, such as that of the Chinese cooking dogs in their restaurants or that of the Chinese who never die. We also have articles on citizenship and simpler stories, all told without all the distortions of the mainstream news”.

An activist in the local branch in Bologna of the same association further exemplifies:

“We are editing a new video on the electoral participation of naturalised citizens... It is an electorate that the media normally do not consider and that people ignore... We offer the possibility to let ourselves be known to an interested Italian audience... to let our everyday life be known, for example, through a simple act of active citizenship such as participation in political elections”.

Deconstructing and reconstructing the public image of Chinese youth means facilitating a process of “normalisation” of the presence of the second generation in the public sphere, especially at the local level.

These three national associations represent what Brettel (2008) has recently called “netizens” to evoke social actors able to empower their everyday struggle to realise citizenship by navigating cyberspace. However, one registers a need for “re-territorialisation” (Appadurai, 1996) among these larger associations which create several local branches in different cities. Sometimes the trajectory can be the opposite, going from local to national and transnational. For instance, Crossing, a local laboratory, is an association from Bologna also concerned with the problem of representation which later developed a national online television site: CrossingTV⁶. It is a web-based cosmopolitan web television station originating with an ethnically mixed association whose goal is to fight “ethnic labelling and the stereotypical rhetoric of Italian media”. The aim to actively create counter-hegemonic representation is clear:

“CrossingTV was born to answer to an important need. In the media delirium in which white, black and yellow youth are involved, often in an instrumental and exploitative way, it is important to create a space which is pure, cannot be labelled and, more relevantly, does not label” (Member of CrossingTV).

⁴ www.secondegenerazioni.it.

⁵ www.associna.com.

⁶ www.crossingtv.it.

“I do not want you to think of crime and decay when you hear my foreign name. I do not want you to think of me being on the boats in the middle of the sea when you hear that I am Albanian...”

Like *Associna* and *Crossing*, other associations also try to combine outward communication aimed at challenging stereotypical representations, with internal reflections on cultural essentialism and on the need to recognise more complex forms of identifications which offer room for reconciliation of their family experiences with everyday life in Italian society. In this regard, the *Giovani Musulmani d'Italia* constitutes a crucial example.

“We were established to say that you can be comfortably Italian and Muslim. It is not a problem, nor a contradiction; they are not contrasting identities”.

All these associations look for recognition of youth's multiple and situational identities. Instead of playing on a strategic essentialism where cultural boundaries are reified for political purposes of emancipation, they prefer to invoke a cosmopolitan self-representation. They publicly question an essentialist rhetoric of autochthony, which refers intermittently to blood and to soil. Perhaps because of the context, which seems particularly racist, they carefully strive to avoid various forms of culturalism. In this respect, their approach seems different from the one adopted by the Swiss *Secondo Movimento* (Wessendorf, 2008, p. 196):

“In their discourse, which emphasised economic success and cultural belonging to Switzerland, they essentialised “the second generation” as successfully integrated members of Swiss society. This discourse was coloured by a culturalist stance, celebrating cultural diversity and marketing a cosmopolitan “secondo life-style” as an integral part of “being Swiss”, while at the same time emphasising the cultural similarities to the Swiss as legitimisation to access to Swiss citizenship. On the one hand, this discourse helped to deconstruct the essentialist images of the violent, vandalising and jobless *secondo*. On the other, it did not represent those *secondos* who are structurally less successful and who are repeatedly under attack of right-wing populists”.

In contrast, the priority for the Italian associations remains the fight against discrimination and the commitment to an ethnically mixed and cosmopolitan composition of the associations able to go beyond race and culture (cf. Aparicio, 2007). For instance, *Next Generation*, a two year old association, created in the town of Imola in the province of Bologna, managed to unite young members of different national origin including Italians. However, such cosmopolitan projects may fail in their implementation. *Arcimondo*, a two year old local Bologna association, established with the help of *Arci* (an Italian cultural association of the Left), to fight discrimination, explicitly strove for a mixed and balanced membership, but nevertheless ended up with an overwhelming majority of Moroccan members. This was partially due to the fact that recruitment proceeded through the personal networks of the leaders who are themselves of Moroccan background.

Another peculiar characteristic of these experiences is that members of the local second generation associations are more interested in realising a practiced citizenship

in everyday social life than on paper. They think that discrimination and social marginalisation are the crucial issues:

“Yes, I am a foreigner, this is a fact. If they give me citizenship, that’s a bureaucratic thing. I am still a foreigner. If I walk in the street, I am always a Moroccan, no kidding. Even if you show the red passport of Italian citizens you are still a Moroccan. Under Italian law you are a full citizen, but for the Italian people you remain a foreigner” (M., Arcimondo).

While the question of citizenship was the motivation for the birth of many of these national associations, especially the G2 network, the local branches and the local associations seem to favour a broader objective:

“Among us we talk more about the meaning of citizenship, not about the bureaucratic piece of paper. I know that’s important too, but the priority remains your recognition... The campaign for the change of citizenship law is important, don’t get me wrong. But if and when this will be granted, what will you do? Do you cease the associational life? I think the second generation should go beyond formal citizenship and work on the sense of belonging to a territory and on the meaning of participating in life” (member of GMI).

Clearly, citizenship is not merely about legal status because formal citizenship may not coincide with active and equal participation. For instance Portes and Rumbaut (2001) have shown that, whatever one’s legal status, educational attainment or economic advancement in the US labour market and society can become measures of a sort of second-class citizenship (cf. Kasinitz *et al.*, 2008). In other words, as Bloemraad and colleagues explained (2008, p. 162), participation and activities that

“make people an integral part of their local communities and institutions can be understood as a form of participatory citizenship that allows immigrants to make citizenship-like claims on the state and others, even in the absence of legal citizenship status, and perhaps even in the absence of legal residence”.

The main objectives of second generation associations are the struggle against discrimination and the enhancement of equal opportunities for social mobility for youth of immigrant background. Clearly, the experience of these associations is somehow different from that of their parents, whom these youth often accuse of being unable to understand the main characteristics of Italian society on the one hand, and, on the other, of begging for just a bit of space and recognition. Members of the second generation feel Italian and want to be more assertive, making their priorities “loud and clear” (Zinn, 2008).

However, they too experience various problems of participation, mobilisation and networking with the institutional complex shaping local contexts. For instance, there have been some public funds targeting the second generation in recent years, but most of the people we have interviewed displayed a certain degree of suspicion and ambivalence. On the one hand the majority feel the need to shape a stronger organisational identity:

“Before diving in we need to reach a better understanding of who we really are. We need to strengthen our structure and our credibility at the local level” (member of GMI).

“We are not ready yet. We need a better organisation with more members; we cannot be only a small group of people” (member of Arcimondo).

On the other hand, the fear of being instrumentalised and exploited is a common refrain among these youth associations:

“The first steps are to let ourselves be known and gain a bit of visibility... The issue about the second generation is becoming fashionable and we do not want to be used. We need to learn to relate to the different institutions” (Leader of Arcimondo).

“I do not like it when the personnel of the municipality has already organised everything and only then call us to participate. If you have done everything, what do you need me for? I say no, thank you! Either you call me at the beginning and you take me as a serious interlocutor or you only want to use me to play big with your potential electorate” (Member GMI, Arcimondo).

“We do not want to be instrumentalised. We want to play an active part not just help them to achieve merits for some question” (Member Associna).

“We do not want them to do things ‘in our name’. We are sick and tired of being beneficiaries of local policies and we want to be partners” (Member of Next Generation).

An additional significant problem faced by these associations is the lack of capacity to ensure participation of members in common activities. Consequently, they run the risk of not reaching the financial autonomy which would ensure their role as partners instead of beneficiaries. It is a complex and vicious cycle.

Another problem is characterised by just how “representative” an association’s leader can afford to be. As with the Secondo Movement in Switzerland (Wessendorf, 2008), the leadership consists of politically aware, well-educated youth of immigrant background, mainly students, who engage in local cultural and social politics. This feature translates into problems of trust towards the leaders and recruitment of members. According to some activists the worst problem is the fact that most of the young workers of migrant background do not have time to participate in the associations’ activities. Furthermore the difficulties of everyday life (resident permits, work relations, salaries, rent, etc.) make the issues debated within the associations seem insignificant. These are problems typical of associational life in general, not only of the second generation, as a member of Arcimondo explains:

“In all associations one finds ‘intellectuals’, people with a better educational standard than those who go to work early and often confront serious problems, at work or with permits... They do not see associational participation as worth the effort”.

However, at high school or university one develops different expectations of social mobility and, consequently, is better disposed to contest diffuse discrimination. This elite may constitute “a vanguard” able to create a strategic place within Italian public space which can reveal itself crucial for youth of immigrant background more generally (Colombo, 2007). We are dealing with a very recent phenomenon and most of the young persons we have worked with have shown sharp awareness of all these problems and a readiness to engage. They are thus endowed with a promising critical and sophisticated reflexivity.

Concluding reflections

The second generation members of associations discussed here are interested in engaging in the society they have grown up in which is no longer perceived as a “host” but as their own. They feel Italian and they do not seek to be “accepted” by Italian society but to be considered full members and granted equal opportunities for social mobility. Their objective of participation in social life has been translated into an idea of “practiced” citizenship.

Marshall stressed the need to take socio-economic inclusion into account as a background facilitating actually existing citizenship. He defined citizenship as a “status bestowed on those who are full members of the community” (Marshall, 1950, p. 14) which includes civil, political and social rights and obligations. However, the community Marshall implicitly referred to was, un-problematically, the ‘nation’, conceived as a homogeneous cultural entity. Various scholars argue instead that a central question in the present debates about citizenship is the extent to which “difference” can provide grounds for discrimination amongst citizens; whether, rather than all citizens being bearers of equal rights, their ability to exercise their full rights is affected by discrepancies in gender, culture and ethnicity.

Furthermore, as we have seen, citizenship does not concern merely the legal dimension; but, active participation in society is also often required in order to give substance to an otherwise formal status. The experience of various members and leaders of second generation associations taught us about the need to go beyond the formal dimension of citizenship and consider also the everyday practiced dimensions of citizenship. Some of these witnesses connect well with an emergent tendency in anthropology of broadening analytically the conception of citizenship to include its participatory dimension, which depends also on practices and discourses of social everyday inclusion (Holston and Appadurai, 1999; Ong, 2003; Reed-Danahay and Brettell, 2008).

Institutional discourses tend to reify complex and ambivalent social and cultural processes affected by negotiation between individuals and groups. Such negotiation is influenced in multiple ways by the representation (symbolic as well as political) of migrants and their descendants. In this regard, the second generation associations’ aim of fostering a more cosmopolitan understanding of “being Italian” becomes indirectly relevant for the realisation of citizenship rights. The ongoing socio-political trajectory of these associations leads us to think of citizenship as a negotiated and contested process of everyday inclusionary and exclusionary practices.

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Abbreviations

AFSJ	Area of Freedom Security and Justice
AN	<i>Assemblée Nationale</i>
CBS	Statistics Netherlands
CCAEB/ RVDAGEB	<i>Conseil des Communautés Africaines en Belgique et en Europe/ Raad van de Afrikaanse Gemeenschappen in België en in Europa</i>
CECLR	<i>Centre pour l'égalité des chances et la lutte contre le racisme</i>
CEFR	Common European Framework of Reference for Languages
DRC	Democratic Republic of Congo
EC	European Community
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECR	European Court Reports
EEC	European Economic Community
ECT	Treaty establishing the European Community
ERRC	European Roma Rights Center
ESSTRT	European Security: High Level Study on Threats Responses and Relevant Technologies
ESTA	Electronic System for Travel Authorisation
EU	European Union
Eur. Comm. H.R.	European Commission of Human Rights
Eur. Ct. H.R.	European Court of Human Rights
EURODAC	European Dactyloscopy
EUROSUR	European External Border Surveillance System
FEANF	<i>Fédération des Etudiants d'Afrique Noire en France</i>
FIS	Frontex Information System

FRA	European Union Agency for Fundamental Rights
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders
GMI	<i>Giovani Musulmani d'Italia</i>
HALDE	<i>Haute autorité de lutte contre les discriminations</i>
ILO	International Labour Organization
MEP	Member of European Parliament
NAACP	National Association for the Advancement of Coloured People
NATO	North Atlantic Treaty Organization
NBUF	National Black United Front
PASR	Preparatory Action Security Research
PNR	Passenger Name Record
RVDAGE/VL	<i>Raad van de Afrikaanse Gemeenschappen in Europa/Vlaanderen</i>
SIS	Schengen Information System
TCN	Third country national
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TK	<i>Tweede Kamer</i>
UNIA	United Negro Improvement Association
UAV	Unmanned Aerial Vehicles
UFA/AWL	<i>Union des Femmes Africaines/African Women's League</i>
US	United States of America
VIS	Visa Information System

Biographical Notes

Alejandra ALARCON-HENRIQUEZ is a PhD candidate in Social Psychology at the *Université Libre de Bruxelles*.

Assaad AZZI is professor in Social Psychology at the *Université Libre de Bruxelles*.

Didier BIGO is Professor at the Department of War Studies, King's College London and Research Professor at Sciences-Po Paris.

Philippe BONDITTI is Assistant Professor in International Relations at IRI-PUC Rio de Janeiro.

Saskia BONJOUR is post-doctoral research fellow at the *Université Libre de Bruxelles (GERME)*.

Emmanuelle BRIBOSIA is Professor of Law at the *Université Libre de Bruxelles (ULB)* and Director of the Legal Department of the Institute for European Studies.

Didier FASSIN is the James Wolfensohn Professor of Social Science at the Institute for Advanced Study of Princeton and Director of Studies at the Ecole des Hautes Etudes en Sciences Sociales in Paris.

Nicole GREGOIRE is a PhD candidate in Anthropology at the *Université Libre de Bruxelles*.

Kees GROENENDIJK is emeritus Professor of Sociology of Law at the University of Nijmegen (the Netherlands).

Chloé HUBLET is a PhD candidate at the Institute for European Studies of the *Université Libre de Bruxelles* (IEE-ULB).

Dirk JACOBS is Professor of Sociology at the *Université Libre de Bruxelles* (ULB) and visiting professor at the Urban Studies Priority Research Programme of the University of Amsterdam.

Julien JEANDESBOZ is PhD candidate in International Relations at Sciences Po Paris and Junior Researcher in INEX (FP7 Integrated Programme).

Yves PASCOUAT is doctor in public law and researcher at the Institute of European Studies (IEE) of the *Université Libre de Bruxelles*.

Pierre PETIT is Director of the *Laboratoire d'anthropologie des mondes contemporains* (LAMC) and Associate Professor in Anthropology at the *Université Libre de Bruxelles*.

Francesco RAGAZZI is Assistant Professor in International Relations at Leiden University and Associate Researcher in INEX (FP7 Integrated Programme).

Andrea REA is Professor of Sociology at the *Université Libre de Bruxelles* (ULB) and Director of the Department of Sociology of the ULB.

Bruno RICCIO is senior researcher at the Department of Education of the University of Bologna.

Julie RINGELHEIM is researcher at the Belgian National Fund for Scientific Research (FNRS) and Lecturer at Louvain University (UCL).

Isabelle RORIVE is Professor at the Law School of the *Université Libre de Bruxelles* (ULB) and Senior Fellow at the Perelman Centre for Legal Philosophy.

Maykel VERKUYTEN is Professor at the Department of General Social Sciences in the Faculty of Social Sciences of Utrecht University and Research Director of ERCOMER.

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