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The Terms of Ethnoracial Equality

The Swedish Courts' Reading of Ethnic Affiliation, Race and Culture

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Published in:
Social & Legal Studies

DOI:
[10.1177/0964663917722827](https://doi.org/10.1177/0964663917722827)

2018

Document Version:
Peer reviewed version (aka post-print)

[Link to publication](#)

Citation for published version (APA):

Brännström, L. (2018). The Terms of Ethnoracial Equality: The Swedish Courts' Reading of Ethnic Affiliation, Race and Culture. *Social & Legal Studies*, 27(5), 616-635. <https://doi.org/10.1177/0964663917722827>

Total number of authors:
1

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The Terms of Ethnoracial Equality: Swedish Courts' Reading of Ethnic Affiliation, Race, and Culture, Accepted version

Leila Brännström (Lund University) *Social and Legal Studies* vol. 27 (5) pp. 616–635, 2018.

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DOI: 10.1177/0964663917722827

Like many other European countries questions concerning ethnoracial¹ co-habitation and justice take center stage in Swedish social and political discussions today. The background is not only the major changes in the ethnoracial make-up of the Swedish population that have taken place in the past few decades but also the strong patterns of socioeconomic inequality along ethnoracial lines. Although the image of Sweden as an ethnoracially relatively homogeneous country lingers on in and outside the country, in 2016 more than 30%² of the inhabitants of the country were either born abroad or had a parent who was. Like most other continental European states, Sweden does not compile official statistics on people's ethnic origin, race or color, but available information on the inhabitants', and their parents', places of birth suggests that the country has, proportionally speaking, one of Western Europe's largest minorities of people of non-

¹ Although 'race' and 'ethnicity' evoke different connotations, they overlap and have in the European context of the last century both worked through legible markers to differentiate and stratify groups of people of purportedly 'common origin' (cf. Hall 2000). I will therefore not differentiate between the two, but instead use the term 'ethnoracial' (when not reiterating the language of others).

² Based on figures available in the database of Statistics Sweden www.statistikdatabasen.scb.se/pxweb/sv/ssd/?rxid=805ac5c6-cd49-46cf-9273-410845556ed9 (accessed 28 March 2017).

Western origin.³ At the same time, in Sweden, being poor, lacking employment or occupying unskilled and low-paying jobs and living in run-down and de facto segregated areas strongly correlates to originating from outside the West.⁴

Against this backdrop it appears important to explore and analyze prevalent ideas about what can and cannot constitute condemnable ethnoracial injustice and, at a more basic level, when an act or a situation entails an ethnoracial aspect at all. Such investigations can be carried out in many different arenas, but the judiciary appears as a particularly interesting site to study because the courts reproduce ideas that are not only influential but also officially sanctioned. A study of the judiciary along the lines just mentioned is precisely the aim of this article. The objective, more specifically, is to map the ways in which Swedish courts, during the more than two decades that it has been possible to bring cases of alleged ethnic discrimination to them, have read ‘ethnic affiliation’ (*etnisk tillhörighet*) – defined as ‘national or ethnic origin, skin color or other similar

³ In 2013, 70% of the foreign-born Swedish population was born in Africa, Asia, and South America or in Europe outside of the EU25, mostly in Southeast Europe (Statistics Sweden 2014). Many factors lie behind the emergence of this considerable minority of non-Western origin, but the most important one, quantitatively speaking, is the ‘generous’ (compared to other Western states) refugee policy and the relatively liberal family reunification regulation that was in place in Sweden until 2015 (see e.g. Eurostat 2013; Toshkov and de Haan 2013). After a dramatic rise in the number of asylum seekers in the fall of 2015, the Swedish government decided to adjust the country’s asylum regulation and family reunification policy to the EU minimum level.

⁴ To exemplify: in 2013 the unemployment rate among the native-born in Sweden was around 6% whereas that of the foreign-born was around 16% (Statistics Sweden, 2014). The labor market situation of immigrants from the EU25 was similar to the native-born, while the unemployment rates of those born outside the EU25 were dramatically higher, especially for those born in Africa (33%) and Asia (22.5%). The gap in the labor market situation between those with a background outside the West and the rest is even larger than these figures indicate because the rates of gainful employment among native-born persons with one or two parents born abroad was during the period 1997–2008 consistently one or a few percentage points lower than for those with both parents born in Sweden (Statistics Sweden, 2010: 244).

circumstance’ in the current discrimination act – and have decided whether a statement or an act is related to it. To borrow Michel Foucault’s words, the investigation will ‘make visible precisely what is visible’ (Foucault in Orford, 2012: 617) by making the patterns and the underlying assumptions in the reasoning of the courts legible and put into relief.

The set of rulings that constitute the empirical basis of this article consists of all the decisions on cases of alleged ethnic discrimination made by Swedish courts ever since the first juridically enforceable ban on ethnic discrimination was introduced in Sweden in 1994 (through act 1994:134 later replaced by act 1999:130) and until the end of 2015.⁵ The Swedish Labor Court (hereafter SLC) has been the ultimate arbiter of all disputes concerning ethnic discrimination in working life since the beginning. Ethnic discrimination came within the jurisdiction of the general courts when act 2001:1286 was adopted in 2001, prohibiting, among other things, ethnic discrimination of students in Higher Education. The scope of the prohibition on ethnic discrimination was extended to areas such as health care, the provision of social services and the supply of goods, services and housing in 2003 (act 2003:307) and to schools in 2006 (act 2006:67). The current ‘umbrella’ discrimination act (2008:567) came into force on January 1, 2009, replacing seven acts, including the four that previously had prohibited ethnic discrimination in different areas of social life.

⁵ That is all cases relating to the civil law ban on ethnic discrimination. Apart from this ban, discrimination due to ethnic or national origin, race or skin color is also prohibited by a criminal law provision in Sweden. The cases relating to that provision are not included here.

However, before presenting the rulings of Swedish courts more in detail and proceed to the analysis of them, this article will first draw attention to some of the intricacies that surround the notions of ‘ethnic origin’ and ‘race’ and account for the discussions about them that have taken place in the Swedish legislative context. These notions and discussions will also be placed within a wider European context.

‘Race’ and ‘ethnic origin’ in the Swedish context and in European perspective

In April 2012, the SLC delivered its verdict in the dispute between the Building Workers’ Union and the construction company IPL (judgment no. 2012:27). The dispute concerned the alleged ethnic discrimination of B.O., a welder of Nigerian descent, who had previously been employed by IPL. One incident, among several, that according to the Union constituted ethnic discrimination was a conversation that had taken place between B.O. and a consultant that performed supervisory functions in the company. B.O. had recorded the conversation which disclosed the consultant saying: ‘you look like a slow-motion movie when you’re walking around here’ and ‘maybe it’s because you are black, but I think it depends on a cultural thing ... not because of your color (English in the original)’. The SLC argued that the first statement is not discriminatory at all because it only criticizes B.O. for working or moving slowly. The beginning of the second sentence, the court acknowledged, comes across as ‘inappropriate’ (*olämpligt*), but does not constitute ethnic discrimination because it ends with an unambiguous clarification that the skin color of B.O. was not an issue.

One of the questions that the court’s judgment of this incident raises is why a discriminatory act would not constitute ethnic discrimination if it is related to someone’s (assumed) cultural affiliation. Does ‘ethnic affiliation’ and its constitutive

elements (national or ethnic origin, skin color and other similar circumstances) not include cultural affiliation?

The terms ‘race’ (*ras*) and ‘ethnic origin’ (*etnisk ursprung*) were defined in Swedish law in 1970 when two criminal law provisions were adopted in order to bring domestic law into line with the obligations imposed by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which was to be ratified the year after. In the government bill⁶ proposing the provisions ‘race’ was defined as:

such groups of the human species that are usually included in anthropological classifications of races, including ‘sub-races’ such as the ‘alpine race’. These are based on differences in certain hereditary physical attributes such as pigmentation and the facial shape.’⁷ (Government Bill, 1970:87: 37–38)

Conversely, a group of the same ‘ethnic origin’ was defined as ‘a group of people, the members of which share a relatively homogeneous cultural pattern’ (Government Bill, 1970:87: 37–38). ‘Italians’ and ‘Yugoslavs’ were mentioned as examples of ethnic groups, while ‘the Sami people’ were cast as an ethnic group as well as a group marked by skin color (Government Bill, 1970:87: 37–38).

⁶ In the process preceding the adoption of a legal act in Sweden several documents (preparatory works) are produced which the courts and lawyers subsequently consult when interpreting the law. Government bills are the most authoritative kind of preparatory work.

⁷ All translations from Swedish government bills and court rulings are mine.

While the 1970 definition of ethnic origin has been referred to without any reservations in latter legislative processes (see e.g. Government Bill, 1993/94: 44), the ‘scientific falseness’ of ‘race’ has usually been emphasized when the term has been discussed in such processes after the mid-1970s (see e.g. Government Bill, 1975/76:209: 157). However, even if the Swedish parliament, government and a number of public inquiries have repeatedly underlined that the human species cannot be clearly divided on the basis of hereditary physical attributes, the meaning ascribed to the term ‘race’ is in line with the 1970s definition: ‘race’ refers to the (erroneous) idea that people can be divided into groups based on their heritable physical traits (cf. e.g. Official Report of the Swedish Government, 2003: 39: 187–221).

The Swedish legislator’s understanding of ‘race’ and ‘ethnic origin’ are quite in line with the ones embraced by the European Court of Human Rights (ECtHR), the Court of Justice of the EU (CJEU) and other international tribunals: ‘race’ is associated with divisions on the basis of biological and physical factors while ‘ethnicity’ is associated with divisions based on cultural, religious or linguistic commonalities and differences. Thus, in 2005 the ECtHR suggested that:

Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds’ (*Timishev v. Russia*, para. 55).

The International Criminal Tribunal for Rwanda defined the notions in 1998 in a similar way: ‘An ethnic group is generally defined as a group whose members share a common language or culture’ and ‘[t]he conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors’ (Trial Judgment, *The Prosecutor v. Akayesu*, paras. 513 and 514). In one of the two only rulings on the interpretation of the substantive provisions of the Racial Equality Directive ((2000/43/EC) hereafter RED), the CJEU defined ‘ethnic origin’ as ‘the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds’ (*CHEZ Razpredelene Bulgaria AD v. Komisia za zashtita ot discriminatsia*, para. 46).

Whereas ‘ethnic affiliation’ had been defined as ‘national or ethnic origin, *race* or skin color’ (my emphasis) in previous Swedish discrimination acts,⁸ ‘race’ was replaced with ‘other similar circumstance’ when the current discrimination act was adopted in 2008.⁹ The latter expression covers ‘for instance perceptions that people can be divided into races’ (Government Bill, 2007/08:95: 119–120). Echoing the criticism of the notion of ‘race’ mentioned above, the justification for the substitution was that there is no scientific basis for dividing human beings into separate races and that using the term

⁸ Except for act 2001:1286, from which ‘race’ had been left out already in 2001.

⁹ Originally, the definition of ethnic affiliation included ‘confession’ too. ‘Confession’ was taken out of the definition when ‘religion or belief’ became an independent ground for discrimination through act 2003:308, which implemented EU Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

‘race’ in statutes risks stirring up prejudice and lending legitimacy to unscientific beliefs (Government Bill, 2007/08:95: 119–120). These were also the arguments that had been used when the Swedish Parliament recommended the government in 1998 to erase the term ‘race’ from all legal texts (Constitutional Committee Report, 1997/98: KU29). Worrying about whether that would be compatible with the honoring of Sweden’s international legal obligations, the government never made a final decision about the recommendation. Nonetheless, following the recommendation ‘race’ was left out of a number of legal acts, among them the current discrimination act.¹⁰

Sweden is not the only place in Europe where the erasure of ‘race’ from legal texts has been pursued. Similar academic and legislative proposals, resting on similar arguments, have been considered in France and Germany (Möschel, 2011: 1651). In Austria, ‘race’ has been replaced with ethnic affiliation (*Ethnische Zugehörigkeit*) in the Federal equal treatment act (Möschel, 2011:1651), while not only ‘race’, but also ‘skin color’ was discarded from the Finnish Instrument of Government already in the mid-1990s and replaced with ‘descent’ (Official Government Report, 2001:39: 219–220). At the

¹⁰ For a complete list of the effects of the parliamentary recommendation to discard ‘race’ from Swedish law, see the report of the (third!) government appointed inquiry committee dealing with the use of the term ‘race’ in legal acts (Official Government Report, 2015:103: 145–149). The committee proposed that in the remaining cases in which the law uses ‘race’ to refer to a ‘real’ distinction, ‘race’ should be replaced with ‘ethnicity’ or ‘skin color or any other similar circumstance attributable to an/the individual’ (Official Government Report, 2015:103: 35–36). Differently, when ‘race’ is used in law to describe the (unreal) beliefs and ideologies of a wrongdoer, the word should be replaced with the expression ‘conception of race’ (Official Government Report, 2015:103: 34–35). The proposal of the committee was a compromise between the government’s instructions to find ways of deleting the term without problematic legal consequences and the criticism raised by scholars, activists and organizations such as the National Association of Afro-Swedes, arguing that the removal of the word ‘race’ will conceal that racism is a problem in Sweden (Official Government Report, 2015:103: 34).

European level, both the European Commission on Racism and Intolerance (2002) and the EU institutions (see e.g. the preamble to the RED) have manifested unease about the use of the terms ‘race’ and ‘racial origin’. To sum up, the Swedish project of abolishing ‘race’ is in line with a broader Continental European¹¹ tendency of responding to racism by tabooing racial categorization and by replacing the word ‘race’ with other, ‘softer’, terms in public discourse and legal texts (Goldberg, 2009; Möschel, 2007, 2011).

More generally, the scholars who have mapped and analyzed how racisms are expressed and responded to across Continental Europe –such as David Theo Goldberg (2009:151–198), Fatima El Tayeb (2011), Gloria Wekker (2016) and the contributors to the field of European critical legal race theory¹² – suggest that notwithstanding the differences between countries, there is a shared sense that ‘race is not a European concern’ (Goldberg, 2009: 162). At the same time, as Goldberg argues, the effects of ‘raceless racism’ are tangible everywhere in ‘the relative lack of educational and employment opportunities, the residential segregations, the public media denigrations, the police profilings, the public handwringings, the informal insults that circulate so readily’ (2009: 162). These patterns are, however, generically spoken of as ‘a class or cultural, religious or immigrant problem’ (2009: 186).

The urge to avoid and suppress the notion of ‘race’ has been explained by reference to the complicity of Continental Europe in the Holocaust (see e.g. Goldberg, 2009: 154–

¹¹ On the difference between Continental Europe and the UK and Ireland in this regard, see Möschel, 2011:1651.

¹² About the (emerging) field of European Critical Race Studies, see Möschel, 2011:1659. For a few other contributions to the field, see Barskanmaz, 2008, Carlson, 2011, Grigolo et al., 2011 and Möschel, 2007.

163; Suk, 2007; Möschel, 2011). The Western response to the racial atrocities of the Nazi regime was characterized by an over-concentration on refuting the biological knowledge of race and on rejecting biologically grounded classifications of people (Skinner, 2007; Hesse, 2004). As a consequence the suppression of racial categories and frames of thought that are reminiscent of scientific racism or/and Nazi racial ideology has been the mainstay of Continental European efforts to overcome racism ever since the end of WWII. It should therefore not come as a surprise that until very recently the chief legal response to racism in Continental Europe was the penalization of individual acts of ‘expressive’ racism or ‘overt’ forms of racial discrimination motivated by racial ideology. Most Continental European states started addressing covert and indirect forms of discrimination with the adoption of the EU RED in 2000, which, not incidentally, was a response to the rise of the far-right in Austria and else where reawakening the specter of Nazism (Solanke, 2009; Geddes and Guiraudon, 2004). Although Sweden’s complicity in the Holocaust was indirect and relatively marginal, the Swedish understanding of racism, and responses to it, after the Second World War closely follows the Continental European pattern (see e.g. Brännström, 2016).

Given that the expression ‘other similar circumstance’ in the current discrimination act was introduced to replace ‘race’ and was supposed to include ‘the perception that people can be divided into races’, it would be close at hand to assume that the expression refers to divisions among human beings on the basis of physical characteristics, whereas ‘ethnic origin’ would be about cultural and linguistic commonalities and divisions. However, as we have seen in the case concerning B.O., things might not be that straightforward and the reasons for that could very well be

connected with the Continental European tendency to do reduce racism, or ethnoracially related injustice, to actions motivated or mediated by ideas about biologically grounded classifications of people. The article will return to this case at the very end.

The decisions of Swedish courts regarding ethnic discrimination: three observations

Between January 1, 1994, when the first legally enforceable ban on ethnic discrimination in working life entered into force, and December 31, 2015, the SLC has reported 28 decisions concerning ethnic discrimination. Between March 1, 2002, when the first act prohibiting ethnic discrimination outside of working life entered into force, and December 31, 2015, the general courts delivered 30 decisions in cases concerning alleged ethnic discrimination.¹³ The set of rulings that constitute the empirical basis of this article thus consists of 58 decisions *in toto*, made by various Swedish courts, between January 1, 1994 and December 31, 2015.¹⁴

¹³ The Supreme Court of Sweden made 3 of the decisions, while the six courts of appeal made 9 of them. The remaining 18 decisions were made by district courts. Since no databases contain all the rulings of the courts of appeal and the district courts during the period in question, I have, beside consulting the major handbook on Swedish discrimination law (Fransson and Stüber 2015), searched two full-text databases containing Swedish legal material including a wide selection of unpublished decisions from the courts of appeal and the district courts (*Infotorg Juridik* and *Zeteo*) and one full-text database containing all the issues of nationwide and local Swedish newspapers since 1981 (*Mediearkivet*). While it appears unlikely that I should have overlooked any relevant cases decided by the courts of appeal, it cannot be ruled out that there could be one or two more rulings from the district courts than the 18 that I found.

¹⁴ When decisions on a particular dispute have been made by several instances, only the decision of the highest instance has been included in the dataset and analyzed. In two cases (Göteborg District Court T 4658-05 and Lidköping District Court T 1596-96) a settlement was reached in courts of appeal. Because the decisions of the courts of appeals in these two cases only endorse the settlements, the rulings of the district courts have instead been included in the dataset.

Many of these 58 rulings do not include any considerations on whether the allegedly discriminatory act is related to ethnic affiliation or not. This is, for example, because the court establishes that the allegedly discriminatory act is not disadvantageous at all to the plaintiff (e.g. Nacka District Court T 1705–08; SLC 2005:3); because the plaintiff fails to produce enough evidence to make probable that the discriminatory act did take place (e.g. SLC 2005:14; SLC 2009:27); because the alleged discriminator is found not to represent the employer (SLC 2007:16 and 45), or because the time limit for bringing a claim had passed before the claim was lodged (SLC 2004:8; Kalmar District Court T 328-12). In the following, there is an overrepresentation of the cases in which discrimination has been established, and the reason is quite simply that the link between the act and ethnic affiliation is always, either explicitly or tacitly, addressed in these cases.

Analyzing what the courts have said about ‘ethnic affiliation’ in these cases, the conclusions that they have reached, and the circumstances that they have ignored or deemed as irrelevant, three observations have been made: Swedish courts a) treat ethnic affiliation as an authentic and stable personal attribute of each and every individual and not as the product of specific discourses generating and sustaining ‘us’ and ‘them’; b) understand this personal attribute to be a matter of body types and bloodlines solely, and c) relate a discriminatory act with ‘ethnic affiliation’ only if discrimination was related to someone’s visual appearance or accompanied by ‘incriminating words’.

a) A stable and authentic personal attribute

The courts approach ‘ethnic affiliation’ as a personal attribute of the person claiming to have been exposed to discrimination. Two cases can illustrate this and the problems that

this entails. In the first, two men with very common Muslim/Arabic names ordered money transfer with Western Union (Stockholm District Court T 9176-08). The transfer was temporarily blocked because the names of the two men matched names on the sanction list attached to the so-called EU Terrorist Regulation (Council Regulation (EC) No 881/2002). An absolute majority of the names on the list are Arabic/Muslim. The defendant party asserted that it is legally required to control all names against the 'black list'. The Stockholm District court accepted this but argued that Western Union should have construed its control mechanism differently to reduce the risk of identity confusion: the people on the 'black list' are not only indicated with names but also with their dates and places of birth, and the company could easily have included two additional variables in its routine checks to avoid mix-ups.

The court established that the control mechanism devised by Western Union was indirectly discriminatory because it exposed the group of people carrying Arabic/Muslim names – a group of people whose members have a particular ethnic affiliation – to a disproportionate risk of identity confusion. To support its conclusion regarding the ethnic character of the group in question, the court relied on statements in the preparatory work to the ban of ethnic discrimination which explicitly mentioned 'immigrants' and 'foreign-born people' as groups that could be subjected to ethnic discrimination (cf. Government Bill, 2002/03:65: 92, 94). Taking this as saying that 'immigrants' and 'foreign-born people' can constitute groups with the same ethnic affiliation, the court inferred that 'an ethnic group of people (*en etnisk folkgrupp*)' can be distinguished using 'rather vague criteria (*ganska diffusa skiljelinjer*)'. Thus, the court declared that those carrying Arabic/Muslim names share the same ethnic

affiliation because they originate almost exclusively from countries whose cultures and traditions are marked by the Arab/Muslim historical expansion, that is above all the Middle East and North Africa.¹⁵

In the second case, a real estate company justified its differential rent rate for refugees and non-refugees by suggesting that the former tend to cause greater damages and wear and tear to apartments (Göta Court of Appeal T 1666-09). The Göta Court of Appeal argued that belonging to the category of refugees, like belonging to that of immigrants, is indirectly related to a person's ethnic affiliation. This was supported by the curious argument that 'refugee' is 'an umbrella term for several different groups, each of which consists of persons with the same ethnic affiliation', and therefore being a refugee is related to the ethnic affiliation of a person.¹⁶ The fact that professional dancers and lawyers are also groups with subgroups consisting of persons with the same ethnic affiliation clearly shows that this argument is not convincing. The court had trouble establishing a tenable link between refugeehood and ethnic discrimination because it was looking for a way to anchor 'ethnic affiliation' in the discriminated person, when in actual fact, it is the particular way in which ethnoracial violence, exclusion, and devaluation works, at a specific time and in a specific place, which exposes the refugee, the immigrant or the foreigner to discrimination of various kinds.

¹⁵ The court also suggested that those carrying Arabic/Muslim names have a particular religious affiliation even if everyone carrying the names in question is not necessarily a Muslim.

¹⁶ The fact is that the government bill that first established that 'immigrants' can be subjected to ethnic discrimination did not argue that 'immigrants' have the same ethnic affiliation, but that they constitute a group because they do *not* have the same national origin as the members of the majority population in Sweden (Government Bill, 1993/94:101:44).

In the same way, those carrying Arabic/Muslim names do not constitute an ethnic group of any kind. Indonesian Muslims, Christian Arabs and Swedish-Iranian atheists can all carry such names. What the group members actually do have in common is an amplified exposure to surveillance, exclusion, and violence, which is sustained, among others, by states and governments themselves. The court judging this case intuitively grasped that it was dealing with a group that was exposed to discrimination because of the ways in which threats to ‘our way of life’ are constructed. However, being stuck with the idea that ethnic discrimination is somehow induced by the ethnic affiliation of the sufferers of discrimination, it could not transform its intuition into an argument.

In a recent ruling, the CJEU emphasized that the ban on ethnic discrimination in the RED applies ‘not to a particular *category of person* but by reference to the [protected] *grounds*’ (*CHEZ Razpredelene Bulgaria AD v. Komisia za zashtita ot discriminatsia* para. 56, emphasis added). This puts into relief the reason why those who are mistakenly believed to belong to a particular group or those whose lives are entangled with that of the members of that group can also suffer ethnic discrimination (by perception and by association respectively). In fact, although never articulated explicitly, by recognizing discrimination by perception as a form of ethnic discrimination, the Swedish legislator has also indicated that the ban on ethnic discrimination applies by reference to protected grounds, rather than to particular categories of persons (see Government Bill, 1997/98:177:59 and Government Bill, 2002/03:65: 91). In spite of this, the construction of the ban still gives the impression that appearances or lines of descent, as such, somehow trigger unfavorable treatment.

Had the ban put the spotlight on the actions and frames of thought that generate the grounds of discrimination, the impression would have been different.

As already mentioned, the term 'race' was removed from the current Swedish discrimination act to communicate that 'race' is really only a 'conception of race'. What the Swedish legislator has not considered is to extend this line of reasoning to the other elements of ethnic affiliation, or, more radically, to change the overall make-up of the prohibition, to make clear that it is not differences per se that cause discrimination, but practices that produce and reproduce certain groups as less valuable, as unfit for incorporation, etc.

Hannah Arendt might have been right in her objection (Arendt, 1951/1973: xv) to Jean Paul Sartre's contention that 'it is the anti-Semite who *makes* the Jew' (Sartre, 1946/1995: 69). The actual existence of group consciousness among minorities on the basis of physical appearance, descent, religion, language, behavior or shared experiences ought, however, to be irrelevant from the point of view of discrimination law. From this particular perspective, practices that engender exclusion, subordination and devaluation should be seen as 'brute facts', while 'ethnic origin', 'race', or 'other similar circumstance' should be treated as merely 'derivative term[s]' (cf. Mitchell, 2012: 19, 32). The point of prohibiting ethnoracial discrimination should after all be to counteract practices that engender and sustain inequality, not to identify the actual group affiliation of those exposed to such practices. Such identification might however have a role in other legal contexts, for example in minority law.

b) Body types and bloodlines

Swedish courts always approach ‘ethnic affiliation’ en bloc and never try to specify whether they are dealing with discrimination related to ethnic origin, national origin, race, skin color or any other similar circumstance. As previously mentioned, the Swedish legislator as well as international courts and tribunals associate ‘race’ with divisions among human beings on the basis of some stereotypical physical differences, and ‘ethnicity’, or ‘ethnic affiliation’, with divisions based on cultural, religious or linguistic commonalities and differences. Swedish courts, though, always interpret ethnic affiliation as something ultimately anchored in biological facts, not in social and cultural ones. In their decisions, ethnic affiliation is ‘race’ in the philosopher Paul Taylor’s sense: ‘generic meanings assigned to human bodies and bloodlines’ (Taylor, 2013: 15). Yet, neither the courts nor the parties to the disputes do ever actually use the term ‘race’.¹⁷ Instead they speak of ‘dark skin’ and ‘non-Swedish appearance’ if discrimination has allegedly occurred on the basis of visual impressions, and of ‘ethnic affiliation’, ‘ethnic origin’ or even ‘culture’ in all other cases.

The fact that ‘ethnic affiliation’, ‘ethnic origin’ and ‘culture’ refer to biological factors is overtly clear in a case concerning the alleged discrimination of a job applicant whose bloodline and body type were at odds with her social and cultural affiliation. In this case, the court once mentioned that the plaintiff, who was born in India but had been adopted by Swedish parents at the age of three months and moved to Sweden, was of Indian descent, but otherwise only spoke of her ethnic affiliation (SLC 2003:58). The

¹⁷ In cases decided before January 1, 2009, the term appears, however, whenever the text of the law is cited.

plaintiff party once mentioned that the allegedly discriminated person was ‘dark-skinned’, but apart from that presented her difference as related to her ‘ethnic origin’, just like the respondent party. One of the incidents discussed in the case was a conversation between the employer and the job applicant in which the former, according to the latter, had said: ‘Sweden is a multicultural country, but we have to think about our customers’. Neither the parties, nor the court reacted to the idea that the employment of a person who had grown up in a Swedish family and who had lived practically all her life in Sweden would raise questions about cultural difference. Reference to cultural diversity seemed to be understood on all sides as a stand-in for the differences related to bloodlines and body types.

Swedish courts find respondents guilty of ethnic discrimination if it can be proved that they have projected generic meanings to a particular body type or bloodline (or validated someone else’s assignment of such projections): a doctor suggests in an authorized medical certificate to the Social Insurance Office that Turks (Stockholm District Court T 25395-06) and Greeks (Stockholm District Court T 16183-06) exaggerate their medical conditions in order to exploit the health insurance system; the Social Welfare Board of Uppsala reports a family originating from Somalia to the Police, suggesting that the parents planned the genital mutilation of their daughter just because they had planned a journey to Kenya for her together with some relatives (Uppsala District Court T 4350-07); upon seeing a prospective renter who belongs to the Roma people, a landlord changes his mind and declines to rent him an apartment as agreed on the phone, motivating this with reference to the possible reactions of other tenants (Västra Sverige Court of Appeal T 3501-08) and so on.

The courts never consider or discuss the possibility that someone might be discriminated against because she *actually* comports herself in ways that are perceived by the majority population as less valuable, respectable or desirable. They seem to assume that social and cultural comportment, as well as the evaluation of such comportment, is something unrelated to ethnic affiliation. The only cases in which something other than body types and bloodlines has been seen as indicative of a person's ethnic affiliation are the two cases in which *indirect* ethnic affiliation was established. In the first, already mentioned, case involving Western Union, personal names were indirectly associated with ethnic affiliation, while in the second, the ability to speak as a native speaker was seen as indirectly related to ethnic affiliation (SLC 2002:128).¹⁸

There is a category of cases in which what we might call – for want of a better term – cultural differences appear to be related to the decision not to employ a job applicant. In these cases the employers argue that the recruitment decision was made on the basis of the personal suitability of the applicant for the position. Comparisons of personal suitability are performed if the SLC deems that the educational background and the work experience of the plaintiff and the person chosen by the employer are by and large equivalent. In such comparisons factors such as whether former colleagues have ‘liked’ the applicant or perceived her as reliable and easy to cooperate with (SLC 2009:87); or

¹⁸ In this second case, a market research company conducting telephone interviews argued that their employees must speak clear and correct Swedish and had therefore terminated a recruitment process due to the applicant's slight accent.

whether the applicant gave the impression not to be ‘responsive’ and ‘nice’ (SLC 2009:87); or whether the applicant seemed ‘service-minded’ and had good ‘ability to communicate’ (SLC 2008:47); or whether the applicant came across as a ‘team player’ or as ‘authoritarian’ in approach (SLC 2009:16), are presented as relevant criteria for the recruitment decision. The SLC never considers the possibility that the question of whom people like, or their impressions of ‘niceness’ or ‘team spirit’, might be inflected by preconceptions that have to do with ethnic affiliation. And, the SLC approaches the standards and perceptions of professionalism, competence, reliability, and socially and emotionally desirable behavior that are prevalent in Sweden as completely detached from and unrelated to the culture of the majority population.

Because ‘ethnic affiliation’ is associated with body types and bloodlines, discrimination law does not have much to offer against the devaluation of, not certain bodies, but certain ‘ways of existing’, to use an expression of Frantz Fanon’s (Fanon, 1988: 32). Some social scientists have suggested that reactions to deviations from dominant social codes of conduct are extraordinarily negative in Swedish society due to a variety of historical reasons (Daun, 2005; Johansson Heinö, 2012). Be it as it may, apart from the eccentricities of Swedish majority culture, it is difficult to overlook the lingering power of what Barnor Hesse speaks of as the colonial project of *governmental racialization*, that is the project of improving and developing the ‘quality’ of the colonized population so as to approximate Western ways of being (Hesse, 2007: 656–657; see also Balibar, 1991: 24). This project established Western ways of acting, thinking and experiencing as universal standards of achievement, and non-Western ways as improper and underdeveloped. Cherished ways of existing are in Sweden strongly associated with the

cultural and behavioral norms of European, and in particular Northwestern European, majority populations. The prevalent understanding of ethnic affiliation within discrimination law discourse, which suggests that ‘beneath their skins, immigrants are not different from the ethnically unmarked’, empties the ethnoracial other of any particularity: s/he is the Same, only less competent, less professional, less amiable, less cooperative, etc. (Sayyid, 2004: 151).

c) Appearances and incriminating words

Whether or not the courts associate an act with ethnic affiliation is very much dependent on if ‘incriminating words’ have been uttered. Robert Post has argued that in the context of U.S. constitutional jurisprudence, courts review laws that openly employ racial and gender classifications more stringently compared to laws that are neutral on the face (Post, 2001:51). The latter, he maintains, receive no more than cursory consideration. Post suggests that the impulse to suppress explicit racial and gender classifications is nourished by the way in which the dominant conception of antidiscrimination law in the U.S. fathoms the purpose of the prohibitions: to make people *blind* to the categories of gender and race in designate areas of social life (Post, 2001: 18–21).

Arguably, the dominant conception of ethnic discrimination law in Sweden, perhaps like its French counterpart (Suk, 2007), goes one step further and aims at dissolving ‘ethnic affiliation’, and not only metaphorically. Be it as it may, a tendency similar to the one Post identified can be seen in present-day Swedish adjudication on discrimination law. In 14 out of the 21 cases in which direct ethnic discrimination has been established by Swedish courts, incriminating words were said: the personnel of a hotel justified their negative treatment of a woman saying that the hotel had previously

had ‘problems with Romanies stealing’ (Göta Court of Appeal T 3065-09); a cook instructed a waitress not to serve a family because ‘Gypsies had complained about his food’ (Stockholm District Court T 7268-10); a manager regularly called an employee originating from the former Soviet Union (and her co-worker) ‘Eastern girls’ and ‘girls from the East’ (SLC 2011:13); a bus driver yelled ‘go home to your Taliban country’ at a woman of Syrian origin who had accidentally pressed the stop button (Svea Court of Appeal no. T 9569-129); and so on.¹⁹

If unfavorable treatment was not supplemented by incriminating words, Swedish courts tended to easily accept that what happened had no relation to ethnic affiliation (which does not mean that ethnic discrimination is established every time ‘incriminating words’ are uttered, cf. e.g. SLC 2009: 4). There are only three cases in which the courts did establish direct ethnic discrimination without any incriminating words having been said. In all three cases, very strong indications suggested that discrimination was triggered by the physical appearance of the plaintiffs. Two of the cases were carefully staged by law students dividing themselves neatly into ‘Swedish-’ and ‘foreign-looking’ groups and videotaping subsequent attempts, one after the other, to enter nightclubs (The Supreme Court T2224-07 and Svea Court of Appeal. T 836-08). The third case was not staged, but there were many indications supporting the allegations of the plaintiffs: the restaurant was empty; there was no guest list; ‘Swedish-looking’ friends of the plaintiffs had been let into the restaurant; the guards outside the restaurant had given elusive

¹⁹ The fact that the defendants in a majority of these cases had admitted that they had made the statement in question suggests that they had not properly understood what is legally permitted to say without consequences or that they were unable to practice self-restraint.

reasons as to why they had acted in the ways they had, etc. (Svea Court of Appeal T 256-08).

It does, however, not follow from the above that the courts establish that ethnic discrimination has occurred every time indications suggest that unfavorable treatment was related to someone's appearance. In one case, for example, guards had detained and body-searched a man with 'dark skin color' in a store. The court established that the guards had acted without reasonable motivation, but went on to say that it could not be ruled out that someone 'looking more Swedish' could also have been detained without any reason (Stockholm District Court T14513-08). In another case a shopkeeper closed his furrier shop for lunch just as four women dressed in traditional Romani attire were about to enter. The court argued that even if most shopkeepers would probably postpone their lunch plans to receive customers, it could not be ruled out that this particular shopkeeper would have left for lunch even if non-Roma customers had approached the store (Göta Court of Appeal T3330-09).

To sum up, if the alleged discriminator does not verbally connect the unfavorable treatment with ethnic affiliation and if strong evidence linking unfavorable treatment with a person's appearance is missing it seems highly unlikely that Swedish courts will consider the possibility of such a link. Also, it seems almost impossible to provide evidence of ethnic discrimination that is strong enough in situations other than those in which standardized behavior is prescribed, e.g. that customers are normally to be admitted to and served in restaurants. The consequence of this state of affairs is that the Swedish ban on direct ethnic discrimination, in effect, suppresses only two phenomena,

namely unambiguous, well witnessed cases of discrimination due to appearance in certain areas of social life and unfavorable treatment that is verbally related to ethnic affiliation. Apart from reproducing the idea that ethnoracial concerns play a very marginal role in contemporary Sweden, the second ‘function’ of the ban is problematic also because it prohibits *any* explicit reference to ethnic affiliation. David Theo Goldberg’s differentiation between *anti-racialism* and *anti-racism* is helpful for fleshing out the nature of this problem.

Anti-racialism, Goldberg suggests, is the ambition to do away with racial categories and categorizing, with generalizing assumptions about groups, and even with the very concept of race (and we might add ethnic affiliation and all its elements) (2009:10, 19). Anti-racialism, Goldberg stresses, does not necessarily entail anti-racism in the sense of struggling against differential economic and social access and possibilities along ethnoracial lines (2009: 19). There is, he admits, undeniably a connection between fighting racialism and fighting racism, but anti-racialism, operating without anti-racist commitments, can erase the very vocabulary that is necessary to make ethnoracial inequality visible (2009: 21–22).

In line with anti-racialism, Swedish discrimination law prohibits action that explicitly refers to ethnic affiliation, regardless of why the reference is made. This outlaws the possibility of adopting, under any circumstances, ethnoracially conscious strategies for addressing inequality. The government bill proposing the current Discrimination Act

dismissed the inclusion of an exception to the ban to allow such strategies.²⁰ The bill emphasized that protection against discrimination in general is a human right, that the purpose of the law is to guarantee everyone's right to equal treatment, and that formal equal treatment should not be abandoned for the benefit of 'statistical justice' or 'collective justice' which would entail 'compromising the rights of some' in order to promote 'opportunities for others' (Government Bill 2007/08:95: 79). In addition, and in reference specifically to exceptions from equal treatment relating to ethnic affiliation, the bill also stressed that the effective application of such an exception would require registering people's ethnic origins, which is not acceptable (Government Bill 2007/08:95: 169–171).²¹ The Supreme Court of Sweden, on its part, had already in 2006 established that digressions from the equal treatment principle with a view to promote ethnic equality, must be restrictively interpreted even if they have an unambiguous basis in law, because equal treatment is a human rights principle (The Supreme Court, case no. T400-06).

²⁰ All EU directives prohibiting discrimination explicitly allow exceptions from the equal treatment principle if the aim is to compensate for patterns of disadvantage related to protected grounds. However, in a series of rulings from 1995 onwards, the CJEU has subjected deviation from formal equal treatment to a number of additional requirements, which has had a 'chilling effect' on the use of positive action because it has opened up wide possibilities to challenge their legality in court (O'Cinneide, 2006). Thus, the EU does not disable the Swedish legislator from introducing an exception to the ban on ethnic discrimination, even if the interpretation of the scope of the exception might end up being so restrictive as to make the exception useless in practice.

²¹ The already existing possibility to make an exception from formal equal treatment to promote gender equality (within the narrow confines of EU law) was, however, kept with the argument that the issue is not controversial and that it is easy to know people's sex (Government Bill, 2007/08:95: 168).

Concluding reflections

To the extent that the Swedish ban on ethnic discrimination has attracted scholarly attention, it has been centered on its ineffectiveness (see e.g. Banakar, 2004) and on the difficulty of winning cases of alleged ethnic discrimination in court (Schömer, 2014). The latter fact has in part been explained by reference to the inherent limitations of the legal system in addressing discrimination in general (see e.g. Hepple and Szyszczak, 1992). In processing disputes, law tends to exclude ‘all but the overtly observable features of behaviour’ (Banakar, 1998: 69) and to pretend that the parties have been, and are, equal in terms of capabilities and resources (for an illustration see e.g. SLC 2009: 4, also discussed in Carlson, 2011: 47). These limitations make it tremendously difficult to prove discrimination, in particular on the labor market where interactions are played out in deeply asymmetrical settings, usually without any neutral witnesses present. The difficulties of winning cases of ethnic discrimination have also been explained with reference to the reluctance of the functionaries of the legal system to deal with ‘racism as racism and with ethnic discrimination as ethnic discrimination’ (Banakar, 1998: 88). This unwillingness, which for example manifests itself in the tendency of the courts to find the respondents, as well as their claims about their ethnoracially unrelated motives for action, trustworthy (for illustrative examples see SLC 2006: 60 and 2009: 11), is according to Banakar fueled by a collective desire to preserve and legitimize the majority culture’s unquestionable right to dominate all areas of life (Banakar, 1998; see also Carlson, 2011). The result of the mapping that has been presented in this article suggests that the Swedish courts’ narrow reading of ‘ethnic affiliation’ and their cursory testing of whether something is related to ‘ethnic affiliation’ is also part of the explanation.

The aim of this article was however not to clarify why it is difficult to win cases of alleged ethnic discrimination in court, but to reconstruct how the judiciary understands ‘ethnic affiliation’ and what their particular reading of ‘ethnic affiliation’ communicates to audiences within and beyond the legal profession. The conclusion in this regard is that the courts communicate that ‘ethnic affiliation’ has no social context; it is an individual’s personal attribute relating to her body type and her bloodline. This understanding supports an interpretation of the function of discrimination law as the protection of *the individual* from ever having her ‘innate personal attributes’ openly considered relevant in the public sphere and on the market.²² In effect, this function will protect status quo by casting politically motivated inferences aiming to change existing patterns of distribution as possible violations of human rights.

Further, the courts communicate that if the alleged discriminator does not verbally relate her acts to ethnic affiliation, then there is no link, unless it is well documented that the acts were triggered by the appearances of those subjected to negative treatment. This communicates that a) interactions on the market and in the public sphere rarely have an ethnoracial dimension, and b) a person’s behavior and experiences and the valuation of people’s characters and abilities are ethnoracially neutral matters. The insistence of the courts that matters of the ‘soul’ are untainted by ethnic affiliation is probably, at least to some extent, a reaction to an idea that is widespread outside juridical and other

²² For discussions on other ways in which discrimination law discourse generates a limited vision of equality and an impoverished understanding of injustice, see e.g. Brown, 2000; Somek, 2011.

officially sanctioned contexts, namely that the ethnoracial other is saturated by her ethnic affiliation and everything she does and says is an expression of her ‘culture’. The courts push back the cultural stereotyping of the other by universalizing the dominant majority culture and by the repressive inclusion of the cultural other into it.

One finding of this study is that Swedish courts understand ‘ethnic affiliation’ as ‘race’, i.e. as a question of bloodlines and body types. This is not surprising if one takes into account that, historically, the notion of ‘ethnic groups’ came into wide circulation as a way of speaking of races, without being associated with Nazism and racial science (cf. Hesse, 2004). ‘Ethnicity’ could, as Stuart Hall has suggested, stand for the recognition of the fact ‘that we all speak from a particular place, out of a particular history, out of a particular culture’ (Hall, 1996: 447–448). But as he points out, in the dominant political and legal discourses of the last decades ‘ethnicity’ has been deployed primarily as a means of softening the realities of racism while at the same time tying people to their ‘blood’.

Returning to the incident played out between B.O. and the consultant that was recounted earlier, the statement, which connected the (alleged) behavior of B.O. with a culture that the consultant associated to his skin color and his bloodline, it is clearly a case of what Balibar labels ‘new racism’ (Balibar, 1991) and at odds with the anti-racist commitment of discrimination law. It is likely that another court, on a different day, would have judged this particular incident differently. However, given the patterns that we have seen, it does not appear as a coincidence that the SLC overlooked the discriminatory character of a statement that alluded only indirectly, via ‘culture’, to

body types and bloodlines. It is to be doubted that a contemporary court would make such a 'mistake' if behavior had been explained directly with reference to human biology.

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