Brexit, Discrimination and EU (Legal) Tools

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Abstract

The European Union (EU) is premised upon a project of inclusion: in this regard, it commits itself and its Member States to the acceptance and tolerance of all members of the Union and their citizens and residents. The UK's Brexit saga eclipsed these ambitions, and highlighted an increasingly vivid anti-immigrant atmosphere. Brexit brought to the fore not only acts of discrimination against EU citizens and others seen to be outsiders in the UK, but also emphasised the existence of strong underlying sentiments of discrimination against them. The intensification of such sentiments surrounded the eventual 2016 referendum vote in favour of leaving the EU, and this arguably demonstrates the significance of (failing in) addressing such sentiments. This in turn raises questions relating to the suitability of the EU's choice of tools for addressing discrimination. There has been a mismatch between the tools adopted and the types of discrimination prevalent in the UK. EU legal tools of anti-discrimination and equality focus primarily on tackling visible individual "acts" of discrimination, leaving almost untouched concerns of underlying "sentiments" of discrimination. This is a result not only of weaknesses in the legal tools themselves, but on an over-reliance on them, arguably to the neglect of embracing non-legal initiatives as a means of addressing underlying societal sentiments. While the example of the UK and Brexit is used in this article, discrimination of this nature is a Europe-wide concern.

Introduction

The European Union (EU)[1] is premised upon a project of inclusion: in this regard, it commits itself and its Member States to the acceptance and tolerance of all members of the Union and their citizens and residents. The UK's Brexit saga eclipsed these ambitions, and highlighted an increasingly vivid anti-immigrant atmosphere. Brexit brought to the fore not only *acts* of discrimination against EU citizens and others seen to be outsiders in the UK,[2] but also emphasised the existence of strong underlying *sentiments* of discrimination[3] against them. Intensification of such sentiments surrounded the eventual 2016 referendum

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[1] The term "EU" will be used throughout this article, including to refer to the old European Economic Community (EEC) and European Community (EC).

[2] Various descriptors around who belongs to a society do not have static meaning, but are demarcated contextually, and sometimes even implicitly, to give effect to contemporary sentiments. See discussion in J. Butler, *Notes Toward a Performative Theory of Assembly* (Cambridge, MA/London: Harvard University Press, 2018), pp.24–65.

[3] This notion of underlying sentiments of discrimination can be seen as related to terms such as racism, prejudice, or xenophobia, or thoughts, feelings or sentiments of rejection of others. See further: J. Butler, *Frames of War: When is Life Grievable?* (London/New York: Verso Books, 2009), esp. pp.1–53.

vote in favour of leaving the EU, and this arguably demonstrates the significance of (failing in) addressing such sentiments.

This in turn raises questions relating to the EU's choice of tools for addressing discrimination: there has been a mismatch between the tool adopted and the types of discrimination prevalent in the UK. EU legal tools of anti-discrimination and equality focus primarily on tackling visible individual acts of discrimination and devote less attention to underlying sentiments of discrimination. This is a result not only of weaknesses in the legal tools themselves, but on an over-reliance on them, arguably to the neglect of embracing non-legal initiatives as a means of addressing underlying societal sentiments.[4] Maeso has argued that "legal responses to racism in the European context show that law has been a latecomer in the combat to racial discrimination and its intervention has been rather poor".[5] While she draws attention mainly to the need for case law to engage with "wider political and policy developments that have shaped the *silence* about race and racism in Europe",[6] this article also assesses the limitations of other aspects of EU law, such as its overall function as a remedial tool as opposed to a preventative one; its focus on individual acts of discrimination and remedies to tackle such individual acts; as well as the failure of EU law thus far to flourish into a model for positive action. Most significantly, the article highlights the limitations of law as a tool for addressing sentiments of discrimination.

The article proceeds in the following manner. First, it introduces the UK's membership of the EU and the vivid anti-immigrant focus surrounding Brexit. It argues that the anti-immigrant sentiments and actions surrounding Brexit encompassed both individual acts of discrimination, and underlying societal sentiments of discrimination towards others. Secondly, it digs deeper into the notion of sentiments of discrimination. Thirdly, it critiques the contributions of EU law to addressing this type of discrimination in society. It argues that EU law's weakness is that it focuses primarily on addressing individual acts of discrimination. Fourthly, it examines what "effectiveness" in addressing underlying sentiments of discrimination might entail, and makes the case that non-legal approaches could usefully go some way towards addressing the limitations of the legal tools currently relied upon.

The UK in the EU, Brexit and the rejection of others

This section outlines the UK's relationship with the EU. First, it demonstrates that UK politics and public sentiments on EU membership concerned parliamentary sovereignty and the economy. Secondly, it argues that by the 1990s and in the lead-up to Brexit, the concerns had shifted to national identity in the substantive ethnic sense of what it is to be "British" (ethno-nationalist considerations). This part focuses on recent attitudes towards migrants and demonstrating that the topic of immigration pervaded Brexit and its lead-up.[7] It further argues that anti-immigration sentiments in the Brexit context were of a dual nature: consisting of individual acts of discrimination, and also a general underlying sentiment of discrimination.

1970s and 1980s

Perhaps reflecting its physical separation as an "island" cut off from mainland Europe, the UK has always been seen as a reluctant EU Member State. The UK was not a founding member of the EU and was rejected twice by Charles de Gaulle (1963 and 1967) for EU membership, but opposition to the UK's EU

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[4] Sayce has highlighted the need for an integrated approach to tackling the power dynamics which support discriminatory sentiments. See: L. Sayce, "Beyond Good Intentions: Making Anti-Discrimination Strategies Work" (2003) 18 *Disability and Society* 625, 625–630.

[5] S. Rodríguez Maeso, "'Europe' and the Narrative of the 'True Racist': (Un-)Thinking Anti-Discrimination Law Through Race" (2018) 8 *Onati Socio-Legal Series* 845, 848.

[6] Rodríguez Maeso, "'Europe' and the Narrative of the 'True Racist'" (2018) 8 *Onati Socio-Legal Series* 845, 845.

[7] Rodríguez Maeso, "'Europe' and the Narrative of the 'True Racist'" (2018) 8 *Onati Socio-Legal Series* 845, 852.

membership did not come only from external sources. It was also evident internally in the UK and thus almost as soon as the UK was accepted as a Member State in 1973, an avenue for its swift exit was presented in 1975, in the form of a referendum on continued EU membership. 6 per cent of the British public voted to remain in the EU. However, polls during that time and since then have recorded continuous oscillation of support for the UK's EU membership.[8]

In the 1970s and 1980s, a significant factor motivating the periods of declining support for EU membership was civic in nature[9]: that is that they related to the UK's social institutions—here, parliamentary sovereignty.[10] Now, this did relate to National identity.[11] However, this was only in so far as it concerned the powers of Parliament to remain the ultimate decision-making institution for the UK.[12] The decision of the UK's membership in the EU did not revolve around anti-immigration sentiments,[13] or to put it another way, the decisions politicians and the public sought from a sovereign parliament were not ethno-national in nature: something we see instead in the next phase of the 1990s onwards

1990s onwards

Despite the 1975 vote to remain, over the next four decades, and particularly from the mid-1990s, an ethno-nationalist dimension to the debate on the UK's EU membership arose. Opposition to EU membership remained, grew, and became more institutionalised and organised: James Goldsmith's Eurosceptic "Referendum Movement"[14] in the 1990s eventually inspired a political party devoted to the UK's removal from the EU—the United Kingdom Independence Party (UKIP).[15] Opposition to EU membership also became intertwined with the politics of a range of domestic concerns for the British public, on which rested views concerning who was entitled to access Britain and its resources.

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[8] 65% in favour of leaving the EU in 1979 when Margaret Thatcher came to power; going down to 40% during the time of John Major's negotiation of the Maastricht Treaty, and thereafter being in favour of remain until 1999. See R. Mortimore, "Polling History: 40 Years of British Views on 'in or out' of Europe" (21 June 2016) *The Conversation*, *https://theconversation.com/polling-history-40-years-of-british-views-on-in-or-out-of-europe-61250*. See also: Ipsos Mori, "European Union Membership Trends" (2016), *https://www.ipsos.com/ipsos-mori/en-uk/european-union-membership-trends* [Both accessed 8 July 2019].

[9] J. Wakefield, N. Hopkins et al., "The Impact of Adopting Ethnic or Civic Conceptions of National Belonging for Others' Treatment" (2011) 37 *Personality and Social Psychology Bulletin* 1599, 1600.

[10] A. Mullen, "Spinning Europe: Pro-European Union Propaganda Campaigns in Britain, 1962-1975" (2005) 76 *Political Quarterly* 100, 107. See also R. Shephard, "Leadership, Public Opinion and the Referendum" (1975) 46 *Political Quarterly* 25, 28.

[11] There was also opposition to EU economic policy, rooted in the Labour Party. Having said that, it was Labour that instigated a referendum and Labour that renegotiated a Common Market Package and then backed a "yes" campaign. See A. Williamson, "The Case for Brexit, Lessons from the 1960s and 1970s" (5 May 2015), *History and Policy*, *http://www.historyandpolicy.org/policy-papers/papers/the-case-for-brexit-lessons-from-1960s-and-1970s* [Accessed 8 July 2019]. These concerns were reflected in the terms of the 1975 re-negotiation of the UK's membership of the EU, all of which were economic. See V. Miller, "The 1974–75 UK Renegotiation of EEC Membership and Referendum", *Briefing Paper No.7253* (House of Commons Library, 2015), p.6.

[12] P.M. Gliddon, "The Labour Government and the Battle for Public Opinion in the 1975 Referendum on the European Community" (2017) 31 *Contemporary British History* 91, 97; A. Mullen and B. Burkett, "Spinning Europe: Pro-European Union Propaganda Campaigns in Britain, 1962–1975" (2005) 76 *Political Quarterly* 100, 107.

[13] In the 1960s and 1970s, there were concerns about "black" or "brown" immigration. Thus, immigration per se was an issue, but immigration from "white" Western European countries was not.

[14] N. Carter, M. Evans, K. Alderman and S. Gorham, "Europe, Goldsmith and the Referendum Party" (1998) 51 *Parliamentary Affairs* 470. See also S. O'Grady, "How Britain came to the brink of leaving the European Union" (16 June 2016), *The Independent*, *https://www.independent.co.uk/news/world/europe/how-britain-came-to-the-brink-of-leaving-the-european-union-a7085486.html* [Accessed 8 July 2019].

[15] R. Ford and M. Goodwin, "Understanding UKIP: Identity, Social Change and the Left Behind" (2014) 85 *Political Quarterly* 277; J. Dennison, "Immigration, Issue Ownership and the Rise of UKIP" (2015) 68 *Parliamentary Affairs* 168.

Although issues of parliamentary sovereignty and economic prudency were central aspects of the debates, Henderson et al., in reviewing contemporary public surveys, identified in particular, "those with a strongly or exclusively English sense of their own national identity were the most (overwhelmingly) hostile" towards the EU.[16] This became linked to immigration, and not just (as was the case in the 1975 referendum) to civic national identity in the sense of parliamentary sovereignty only. In fact, by 2014 and 2015, immigration was either the number one biggest worry for the British public or among the top of the list.[17] The importance of the issue in the eyes of the British public was coupled with an increasingly angry population, manifesting increased public hostility towards "foreigners". Political groups like UKIP drew on this to bring to the fore concerns about the number of EU migrants in the UK. The culmination of all of this—as we know—was that in the 2015 UK general elections, the Conservative Party manifesto promised a referendum on the EU, based on a negotiated EU membership package, which would then be put before the public in a vote. The vote, which took place on 23 June 2016, and returned a 52 per cent result in favour of leaving the EU, narrowly beating the 48 per cent of the public voting to remain in the EU. The period leading up to the vote (and thereafter) quickly turned into a toxic anti-immigration environment—with the immigration agenda frequently dominating the Brexit debate. The Brexit context became, in other words, a platform for espousing ethno-nationalist sentiments. While the Brexit debate did not at all times rest on this clear distinction, the argument here is that there could be discerned British public views which distinguished between those who belonged to Britain and those who did not, based on ethno-national considerations.[18]

We saw this in its most visible form as a range of discriminatory *acts* in the UK directed towards immigrants or those perceived to be immigrants. In fact, police figures show that in the 98 days before and after Brexit, there was a 31.6 per cent increase in racist and religious hate crimes.[19] Race hate incidents surged by 23 per cent — from 40,749 to 49,921 — in the 11 months after the EU referendum[20] and hate crimes almost doubled in schools during the Brexit campaign period.[21] Acts across the UK ranged from graffiti, offensive leaflets,[22] to verbal and physical incidents of Islamophobia.[23]

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[16] A. Henderson, C. Jeffrey, R. Lineira, R. Scully, D. Wincott, and R. Wyn Jones, "England, Englishness and Brexit" (2016) 87 *The Political Quarterly* 187.

[17] Ipsos Mori, "Economist/ Ipsos MORI January 2016 Issues index" (2016), *https://www.ipsos.com/ipsos-mori/en-uk/economist-ipsos-mori-january-2016-issues-index* [Accessed 8 July 2019].

[18] This might be seen as playing out findings of social psychology studies which "show that the more individuals endorse ethnic over civic criteria, the more they adopt anti-immigrant attitudes". See Wakefield, Hopkins et al., "The Impact of Adopting Ethnic or civic Conceptions of National Belonging for Others' Treatment" (2011) 37 *Personality and Social Psychology* 1599, 1600. See also S. Shulman, "Challenging the Civic/Ethnic and West/East Dichotomies in the Study of Nationalism" (2002) 35 *Comparative Political Studies* 554, 554–557.

[19] *Metropolitan Police*, "Hate Offences Before and After Brexit" (2016), Metropolitan Police, *https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/disclosure_2016/november_2016/information-rights-unit---statistics-in-regards-to-the-number-of-hate-crimes-committed-from-before-and-after-the-brexit-vote* [Accessed 8 July 2019].

[20] M. Bulman, "Brexit vote sees highest spike in religious and racial hate crimes ever recorded" (7 July 2017), *The Independent*, *https://www.independent.co.uk/news/uk/home-news/racist-hate-crimes-surge-to-record-high-after-brexit-vote-new-figures-reveal-a7829551.html* [Accessed 8 July 2019].

[21] M. Bulman, "Hate crimes almost doubled in schools during Brexit campaign period, figures reveal" (6 May 2017), *The Independent*, *https://www.independent.co.uk/news/uk/home-news/hate-incidents-crimes-schools-89-brexit-campaign-figures-students-pupils-xenophobia-racism-a7720551.html* [Accessed 8 July 2019].

[22] N. Hellen and S. Griffith, "Racist flyers left near school tell Poles: Go home" (26 June 2016), *The Times*, *https://www.thetimes.co.uk/article/racist-flyers-left-near-school-tell-poles-go-home-hvffr7jd3*; J. Micklethwaite, "Police probe racist graffiti smeared on Polish centre after Brexit vote" (26 June 2016), *London Evening Standard*, *https://www.standard.co.uk/news/london/police-probe-racist-graffiti-smeared-on-polish-centre-after-brexit-vote-a3281081.html* [Both accessed 8 July 2019].

[23] Although also towards black people and Jewish people, and those speaking a foreign language. Children were also targeted. See J. Burnett, "Racial Violence and the Brexit State" (2016), p.6, *Institute of Race Relations*, *http:/*

These outwards acts are an indication of discriminatory sentiments in Brexit Britain. However, these sentiments go beyond discriminatory acts. A general underlying environment of rejection of others, rather than an acceptance of others, was prevalent within British society. Thus, tackling overt acts of discrimination only partly addresses the obstacles to the fulfilment of the EU's project of inclusion.

Underlying sentiments of discrimination

The analysis above noted that acts of discrimination ensued across the Brexit context. This section outlines that discrimination went beyond "acts" and pervaded societal attitudes. This is representative of the general state of exclusion in British society concerning the tolerance of others.

Factions of the leave campaign linked Brexit to immigration—or "others"—in at least two forms: first, too much immigration was blamed for a whole host of British problems, and secondly, immigration was raised as a concern in and of itself. In relation to the former, it was argued that immigration into the UK was uncontrolled and caused strains around various issues, such as access to employment, housing, education and the NHS.[24] Employment represented one of the most prominent complaints from the Brexit camp. It was claimed that there had been a growth in foreign workers in the UK, including a significant growth of EU citizens. This was then related negatively to the EU in a twofold manner: that the competition for jobs from EU nationals was seen to result in the unemployment of UK nationals[25] and that a surplus of workers in the market was producing downward pressures on wages.[26] Negative media articles emerged in abundance, including "Millions of EU migrants grab our jobs"[27]; "migrants DO take our jobs"[28]; Nigel Farage (the leader of UKIP at the time) was quoted as saying "Mass EU migration continues, damaging prospects of ordinary British workers".[29] The Brexiteer campaigner Ian Duncan Smith also argued that

/www.irr.org.uk/app/uploads/2016/11/Racial-violence-and-the-Brexit-state-final.pdf. See also Bulman, "Hate crimes almost doubled in schools during Brexit campaign period, figures reveal" (6 May 2017), *The Independent*, *https:/ /www.independent.co.uk/news/uk/home-news/hate-incidents-crimes-schools-89-brexit-campaign-figures-students -pupils-xenophobia-racism-a7720551.html* [Accessed 8 July 2019]; L. Dearden, "Muslim woman dragged along pavement by hijab in London hate crime attack" (16 December 2016), *The Independent*, *https://www.independent.co .uk/news/uk/crime/muslim-hate-crime-london-attack-woman-hijab-headscarf-ripped-off-pushed-injured-chingford -a7479766.html* [All accessed 8 July 2019].

[24] For a discussion, see S. Gietel-Basten, "Why Brexit? The Toxic Mix of Immigration and Austerity" (2016) 42 *Population and Development Review* 673.

[25] M. Wilkinson, "Amber Rudd vows to stop migrants 'taking jobs British people could do' and force companies to reveal number of foreigners they employ" (4 October 2016), *Daily Telegraph*, *https://www.telegraph.co.uk/news /2016/10/04/jeremy-hunt-nhs-doctors-theresa-may-conservative-conference-live*. However, see also "Reality Check: Do EU migrants take jobs from UK-born workers?" (10 May 2016), BBC, *http://www.bbc.co.uk/news/uk-politics-eu -referendum-36261966* [Both accessed 8 July 2019].

[26] J. Kirkup, "Theresa May's immigration speech is dangerous and factually wrong" (6 October 2015), *Daily Telegraph*, *https://www.telegraph.co.uk/news/uknews/immigration/11913927/Theresa-Mays-immigration-speech-is -dangerous-and-factually-wrong.html* [Accessed 8 July 2019].

[27] M. Hall, "MILLIONS of EU migrants grab our jobs: Time for Brexit to FINALLY take control of borders" (18 February 2016), *Daily Express*, *https://www.express.co.uk/news/politics/645052/2m-EU-migrants-grab-jobs-Brexit -take-control-of-our-borders* [Accessed 8 July 2019].

[28] A. Dawar, "Migrants DO take our jobs: Britons losing out to foreign workers, says official study" (9 July 2014), *Daily Express*, *https://www.express.co.uk/news/uk/487645/Migrants-take-British-workers-jobs-says-official-study* [Accessed 8 July 2019].

[29] Hall, "MILLIONS of EU migrants grab our jobs" (18 February 2016), *Daily Express*, *https://www.express.co.uk /news/politics/645052/2m-EU-migrants-grab-jobs-Brexit-take-control-of-our-borders* [Accessed 8 July 2019].

"Brits on low pay — and those out of work — are forced to compete with millions of people from abroad for jobs".[30]

In another example, the UK's housing shortage crisis was also placed on the shoulders of the EU. It was argued that because the UK accepted EU migration, British citizens were unable to obtain homes and the cost of homes was increasing. Migration Watch claimed that the UK would need to build one home every four minutes for the next 25 years just to house future migrants and their children.[31] In education, concerns were raised around shortages of school places and big class sizes, as well as the increasingly diverse language needs in schools. Migration Watch argued that between 2010 and 2020, 1 million extra school places would be needed at a cost of almost £100 billion.[32] Ministers such as Priti Patel, during the Brexit campaign, claimed that uncontrolled migration had resulted in parents missing out on their first choice of school for their children, and that "there is unsustainable pressures on our school system".[33]

There were also accusations that millions of pounds was being sent to European countries abroad as child benefit or tax credit or housing benefit.[34] In addition, it was claimed that EU migrants were "health tourists", as a result of which our NHS was crumbling.[35] The issue of crimes being committed by EU nationals and the perceived inability of the UK to deport criminals were blamed on EU rules protecting the free movement of persons. In 2016, the *Daily Mail* reported that criminal notifications for EU migrants leaped by 40 per cent in five years: now there were 700 every week in the UK, but fewer than 20,000 foreign criminals had been deported.[36]

With these debates, the issue of immigration was linked to pressures on the UK's national systems, and a claim of unfair allocation of resources. What they underlined, therefore, was a distinction between those who were perceived as entitled to those resources and those who were not.

The other way in which immigration—or others—was linked to Euroscepticism was that immigration in and of itself was viewed as a concern for the UK. Typical comments included that "it's all the foreigners, there are too many"[37]; "immigrants get the houses, jobs and we have enough homeless people already to

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[30] A. Travis, "Are EU migrants really taking British jobs and pushing down wages?" (20 May 2016), *The Guardian*, *https://www.theguardian.com/politics/2016/may/20/reality-check-are-eu-migrants-really-taking-british-jobs* [Accessed 8 July 2019].

[31] Migration Watch UK, "Housing" (Migration Watch 2018), *http://migrationwatchuk.org/key-topics/housing* [Accessed 8 July 2019].

[32] Migration Watch UK, "The Impact of Migration on Education" (Migration Watch 2010), *https://www.migrationwatchuk.org/briefing-paper/204* [Accessed 31 January 2019].

[33] P. Patel, "Priti Patel: Uncontrolled migration is putting unsustainable pressures on our public services" (18 April 2018), *Vote Leave Take Control*, *http://www.voteleavetakecontrol.org/_priti_patel_the_shortage_of_primary_school_places_is_yet_another_example_of_how_uncontrolled_migration_is_putting_unsustainable_pressures_on_our_public_services.html* [Accessed 8 July 2019].

[34] E. Raynolds, "Slovakian family imported dozens of 'mothers' to Britain so they could falsely claim £1.2m in benefits", (7 November 2011), *Daily Mail*, *http://www.dailymail.co.uk/news/article-2058522/Benefit-fraud-Slovakian-family-imported-dozens-mothers-Britain-claim-1-2m.html*. N. Gutteridge, "REVEALED: EU migrants pocket MORE tax credits cash and child benefits than BRITISH workers" (24 March 2016), *Daily Express*, *https://www.express.co.uk/news/uk/655145/Brexit-EU-referendum-European-migrants-benefits-tax-credits-British-workers* [Both accessed 8 July 2019].

[35] D. Maddox, "Quit the EU to SAVE our NHS: Top cancer doctor says migrants are bleeding it dry" (9 February 2016), *Daily Express*, *https://www.express.co.uk/news/politics/642236/Expert-warn-EU-membership-damage-cancer-research-collapse-NHS-health* [Accessed 8 July 2019].

[36] I. Drury, "Criminal notifications for EU migrants leap by 40% in five years: now there are 700 every week in the UK but less than 20,000 foreign criminals have been deported" (20 May 2016), *Daily Mail*, *http://www.dailymail.co.uk/news/article-3450323/Criminal-convictions-EU-migrants-leap-40-five-years-700-guilty-week-UK-20-000-foreign-criminals-deported.html* [Accessed 8 July 2019].

[37] A. Asthana, "Immigration and the EU referendum: the angry, frustrated voice of the British public" (20 June 2016), *The Guardian*, *https://www.theguardian.com/uk-news/2016/jun/20/seven-towns-one-story-referendum-voters-say-too-many-foreigners* [Accessed 8 July 2019].

look out for — we can't take any more coming in"; "there's way too many here"[38]; and "there are far too many of them."[39] The former British Prime Minister, David Cameron, was noted as referring to refugees as a "bunch of migrants"[40] or "swarm",[41] while Nigel Farage (the then UKIP leader) suggested that he would be concerned if "a group of Romanian men" moved next to him.[42] The vote leave campaign claimed that without leaving the EU, immigration would continue to be out of control.[43] It claimed that nearly 2 million people came to the UK from the EU in the last 10 years, and the public were asked to "imagine what it will be like in future decades when new, poorer countries join".[44] The arrival of Syrian (and other) refugees on the EU's borders only exacerbated these feelings. It was claimed that too many refugees were entering the UK as a direct result of the UK's EU membership, and typical propaganda was a UKIP poster showing a queue of refugees with the title "Breaking point" and the slogan "we must break free of the EU and take back our borders".[45] The UKIP leader was shown pictured on the poster. These sentiments indicate that it was not only the pressures on resource allocation that concerned some segments of the British population, but that the fact of immigration itself was seen as unwanted.

That views such as these recounted above were prevalent is supported by surveys and study results on the attitudes of the UK population during Brexit. In addition to the survey results discussed earlier, for instance, a study measuring attitudes of prejudice demonstrated the link between prejudice and the Brexit vote.[46] This analysis is supported further by post-Brexit polls. John Curtice, in analysing post-Brexit surveys, highlighted that 73 per cent of those worried about immigration had voted leave, and that "only

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[38] A. Lazeri, "Southampton locals swamped by 25k influx say 'too many people'" (12 April 2014), *The Sun*, *https://www.thesun.co.uk/archives/news/738664/southampton-locals-swamped-by-25k-influx-say-too-many-people/* [Accessed 8 July 2019].

[39] K. de Freystas-Tamura, "As More Immigrants Arrive, Some Britons Want to Show them and E.U. the Door" (14 March 2016), *New York Times*, *https://www.nytimes.com/2016/03/15/world/europe/boston-england-immigrants-brexit.html* [Accessed 8 July 2019].

[40] R. Mason and F. Parraudi, "Cameron's 'bunch of migrants' jibe is callous and dehumanising, say MPs" (27 January 2016) *The Guardian*, *https://www.theguardian.com/politics/2016/jan/27/david-cameron-bunch-of-migrants-jibe-pmqs-callous-dehumanising* [Accessed 8 July 2019].

[41] *BBC*, "David Cameron criticised over migrant 'swarm' language" (30 July 2015), BBC, *http://www.bbc.co.uk/news/uk-politics-33716501* [Accessed 8 July 2019].

[42] "Nigel Farage attacked over Romanians 'slur'" (18 May 2014), *BBC News*, *http://www.bbc.co.uk/news/uk-27459923* [Accessed 8 July 2019]. See also M. Prynne, "Ukip politician defends comments about sending all immigrants back home" (8 December 2013), *The Telegraph*, *https://www.telegraph.co.uk/news/politics/ukip/10503755/Ukip-politician-defends-comments-about-sending-all-immigrants-back-home.html* [Both accessed 8 July 2019].

[43] "Why Vote Leave" (2016), *Vote Leave Take Control*, *http://www.voteleavetakecontrol.org/why_vote_leave.html* [Accessed 8 July 2019].

[44] "Why Vote Leave" (2016), *Vote Leave Take Control*, *http://www.voteleavetakecontrol.org/why_vote_leave.html* [Accessed 8 July 2019].

[45] S. Gietel-Basten, "Why Brexit? The Toxic Mix of Immigration and Austerity" (2016) 42 *Population and Development Review* 673, 676; H. Stewart and R. Mason, "Nigel Farage's anti-migrant poster reported to police" (16 June 2016), *The Guardian*, *https://www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants* [Accessed 8 July 2019].

[46] I. Johnston, "Anti-immigrant prejudice major factor in deciding vote, study finds" (22 June 2017), *The Independent*, *http://www.independent.co.uk/news/uk/politics/brexit-racism-immigrant-prejudice-major-factor-leave-vote-win-study-a7801676.html* [Accessed 8 July 2019]. Shortly before the referendum, researchers on this study recruited 417 people who were planning to vote and asked them a series of questions about their views. A psychological measure known as a "feeling thermometer" was used to assess how cold or warm they felt towards immigrants. Support for Brexit correlated more closely with dislike of foreigners than several other factors. Prejudice was found to have a correlation score with voting Leave of 0.51 (on a 0–1 scale, with 0 meaning no relationship and 1 meaning that the two factors matched exactly). This was a bigger factor than holding politically conservative views (0.43), having negative contact with immigrants (0.43) and being older (0.15). See R. Meleady, C. Seger and M. Vermue, "Examining the Role of Positive and Negative Intergroup Contact and Anti-immigrant Prejudice in Brexit" (2017) 56 *British Journal of Social Psychology* 799.

items associated with people's sense of national identity and cultural outlook were significantly associated with vote choice".[47]

The preceding discussion supports the proposition that discrimination can take the form of *sentiments* towards others and, for the purposes of this article, can be distinguished from the other primary form of discrimination seen in the Brexit context—that of individual *acts* of discrimination.[48]

While explicit expressions of hatred and violence do fall within, for instance, definitions offered of racism,[49] or ethnic prejudice,[50] racism is also talked of in terms of "habits of thought, conscious or unconscious feelings of aversion".[51] Likewise, ethnic prejudice is something that can simply be felt—it need not show itself as an express act.[52] This form of discrimination has also been described as "macro-level racism", which is "'institutional and cultural" in form, "diffuse, anonymous and intangible'", and operating at a "societal level rather than at an individual level".[53] It is this second form of prejudice that is termed *sentiments of discrimination* in this article as a way of bringing to light the underlying feelings and ideas within society, many of which do not manifest in visible acts prohibited by legal instruments.

That such sentiments exist in the UK in relation to Brexit is not, however, a novel finding for the UK. These sentiments can be seen as an expression of underlying intolerance of immigrants and those others seen as outsiders in Britain in other contexts, as well as over a longer historical period.[54] Laleh Khalili comments that there has been,

> "a long-festering xenophobia at the heart of British society. Britain's insularity has been punctured throughout its history in moments where the need for migrant labour has triumphed the Little Englander aversion toward foreigners."[55]

The UK Government's "Race Disparity Audit" of October 2017 showed that inequality is entrenched in Britain across the public sector (even where individual acts of discrimination cannot be pinpointed), with Asian anblack persons and households in comparatively significant disadvantaged positions to their white counterparts.[56] The Islamic veiling controversy in the UK is another significant example, with the debate

[47] National Centre for Social Research, "Vote to Leave the EU, Litmus Test or Lightning Rod?" (2017) 34 *British Social Attitudes* 1, 2. See also H. Cowie, "Does Diversity in Society Inevitably Lead to a Rise in Xenophobia among Children and Young People?" (2017) 9 *International Journal of Emotional Education* 90.

[48] Rodríguez Maeso, "'Europe' and the Narrative of the 'True Racist'" (2018) 8 *Onati Socio-Legal Series* 845, esp. 858–859.

[49] Farhad Dalal, *Race, Colour and the Process of Racialization: New Perspectives from Group Analysis, Psychoanalysis and Sociology* (Abingdon: Routledge, 2002) cited in T. Jefferson, "What is Racism? Othering, Prejudice and Hate-motivated Violence" (2015) 4 *International Journal of Crime, Justice and Social Democracy* 120, 120.

[50] G. Allport, *The Nature of Prejudice*, 25th anniversary edn (Reading, MA: Addison-Wesley, 1979) cited in Jefferson, "What is Racism?" (2015) 4 *International Journal for Crime, Justice and Social Democracy* 120, 120–121.

[51] Dalal, *Race, Colour and the Process of Racialization* (2002), pp.120–121.

[52] Allport, *The Nature of Prejudice* (1979), pp.120–122.

[53] D. Mellor, "Contemporary Racism in Australia: The Experiences of Aborigines" (2003) 29 *Personality and Social Psychology Bulletin* 474, 481, cited in F. Allison, "A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians through an Access to Justice Lens" (2014) 17 *Australian Indigenous Law Review* 1, 7.

[54] For in-depth discussions see: P. Panayi, *Immigration, Ethnicity, and Racism in Britain 1815–1945* (Manchester: Manchester University Press, 1994); P. Panayi, *An immigration History of Britain: Multicultural Racism since 1800'* (New York: Longman, 2010); T. Modood, *Multicultural Politics: Racism, Ethnicity, and Muslims in Britain'* (Minneapolis: University of Minnesota Press 2005); P. Braham, A. Rattansi and R. Skellington eds), *Racism and Antiracism: Inequalities, Opportunities and Policies* (London: Open University Press, 1993).

[55] L. Khalili, "After Brexit: Reckoning with Britain's Racism and Xenophobia" (2017) 5 *International English Language Quarterly* 253, 253.

[56] Cabinet Office, "Race Disparity Audit Summary Findings from the Ethnicity Facts and Figures Website" (2018), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686071/Revised_RDA_report_March_2018.pdf* [Accessed 8 July 2019].

being "reduced in the British Media to a threatening set of symbols of difference and otherness", or "a symbol of barbarism and subservience".[57]

Given the depth and longevity of the various ways in which ethnic groups have been disadvantaged in the UK, Kehinde Andrews describes the UK as having "endemic systematic racism".[58] He argues that racism is coded into the DNA of the nation. In the Brexit context, such sentiments found a voice in the Brexit discourse and narrative.[59] By pressing a "politicization of Englishness", the Brexit leave campaign drew on sentiments and attitudes of discrimination to win its case,[60] building on "long-standing racialized structures of feeling about immigration and national belonging".[61] The result of such underlying sentiments of discrimination—here, the decision to leave the EU—indicates the significance of (not) addressing this form of discrimination.[62]

The contribution of EU law to addressing underlying sentiments of discrimination

The analysis so far has recounted the anti-immigrant atmosphere surrounding the UK's 2016 Brexit vote. This is in stark opposition to the EU's ambitions for an inclusive, united Europe.[63] In fact, when considering the example of Brexit, it can be argued that it appears that this EU legal framework for an inclusive society did not produce correlative results: it did not prevent exclusionary and discriminatory sentiments towards those seen as outsiders. This section suggests that the EU's ambitions for an inclusive Europe have not been adequately translated into the tools necessary to address underlying sentiments of discrimination in society.

The main tool developed by the EU for addressing discrimination has been its legal framework on anti-discrimination. This tool has two dominant features: first, it targets *individual* acts of discrimination and, secondly, it offers remedies which target acts on an *individual* basis. These in turn form the basis of the two main criticisms of the EU's anti-discrimination model, of relevance to this article.[64]

The type of (discriminatory) act targeted is individualistic

Both the Race Directive (addressing race and ethnic discrimination) and the EU Employment Directive (addressing religious discrimination), prohibit acts of discrimination, predominantly on an individual basis. They cover acts which are committed by individuals, or which are manifested in identifiable

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[57] M. Williamson and G. Khiabany, "UK: the Veil and the Politics of Racism" (2010) 52 *Institute of Race Relations* 85, 85, 87.

[58] K. Andrews, "Racism is still alive and well, 50 years after the UK's Race Relations Act" (8 December 2015), *The Guardian, https://www.theguardian.com/commentisfree/2015/dec/08/50-anniversary-race-relations-act-uk -prejudice-racism* [Accessed 8 July 2019].

[59] S. Virdee and B. McGeever, "Racism, Crisis, Brexit" (2017) 41 *Ethnic and Racial Studies* 1802.

[60] Virdee and McGeever, "Racism, Crisis, Brexit" (2017) 41 *Ethnic and Racial Studies* 1802.

[61] Virdee and McGeever, "Racism, Crisis, Brexit" (2017) 41 *Ethnic and Racial Studies* 1802.

[62] This argument does not seek to discount other factors for the Brexit vote. It seeks rather more discreetly to indicate that an underlying societal sentiment of discrimination was one factor of the Brexit vote context.

[63] Preambular provisions in the TEU and the EU Charter of Fundamental Rights speak to the creation of an "ever closer Union" among the peoples of Europe, which in line with art.2 TEU is the vision for the EU, premised on foundations of pluralism, non-discrimination and tolerance. The EU's free movement and citizenship frameworks seek to drive forward, in no uncertain terms, the EU's vision for unity in Europe.

[64] However, cataloguing all of the issues with the EU's continued focus on law as the primary tool for tackling discrimination is beyond the scope of this article. For a more comprehensive overview see: A. Ward, "The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang" (2018) 20 *Cambridge Yearbook of European Legal Studies* 32; E. Howard, "EU Anti-Discrimination Law: Has the CJEU Stopped Moving Forward?" (2018) 18 *International Journal of Discrimination and the Law* 60; P. Quinn, "The Problem of Stigmatizing Expressions: The Limits of Anti-Discrimination Approaches" (2017) 17 *International Journal of Discrimination and the Law* 23.

"instances", and which, it can be shown, have affected an identifiable individual. We can take the example of the Race Directive as illustrative.[65] Article 2 prohibits various acts relating to discrimination, such as direct discrimination, indirect discrimination, harassment and instruction to discriminate against persons. These acts are committed by individuals against other individuals. Under art.2(2)(a), direct discrimination is defined as where "one person is treated less favourably" than another is, and under art.2(3), harassment is taken to be discrimination,

> "when an unwanted conduct relating to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person, or creating an intimidating, hostile, degrading, humiliating or offensive environment."

Likewise, an instruction to discriminate under art.2(4) is explained to amount to discrimination. In addition, under the EU's Framework Decision on combating racism and xenophobia,[66] Member States are instructed to prohibit certain forms of racism and xenophobia using criminal law. This includes publicly inciting violence or hatred against a group or a person, as well as other conduct (art.1) and aiding and abetting such conduct (art.2). Article 4 requires Member States to take into account racist and xenophobic motivations—and this can be seen to touch upon beliefs; however, it is linked to an act, namely the conduct in arts 1 and 2.

The criticism of defining discrimination in terms of individual acts, such as the above, is that it is narrow and fails to capture the kind of underlying societal sentiments of discrimination seen in the Brexit context. Others have written at length on the flaws of human rights mechanisms to combat racism. Silvia Rodriguez Maeso claims that racial anti-discrimination law—of which EU law is a fair representation—has been "committed to anti-racialism",[67] in that, as Goldberg argues, it "seeks to end racial reference, …[doing] no more than erasing the evidence of racisms rather than addressing their structures, deeds and effects".[68] This can be seen to be the case across the EU Directives above. A 2012 report of the EU's Fundamental Rights Agency acknowledges this point in relation to the Race Directive. It argues that the "Directive was not seen as suitable because while it could be used to punish individual incidents, it could not redress discrimination against entire groups",[69] and is therefore deemed as insufficient as it "attempts to regulate prejudicial attitude by punishing discriminatory behaviour".[70] This criticism can be applied also to EU policy:

> "[T]he integration discourse that is currently prevalent in the policy framework of the European Union (EU) … renders racism as a *possibility*, and reduces its significance to *overt* and *intentional* 'racist acts'."[71]

While the Race Directive aims to address racism in Europe, there is in fact an absence of an express prohibition on racism, and this also poses problems for the effectiveness of EU law. Preamble 6 of the

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[65] Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22. This analysis, for the large part, extends also to the Framework Directive: Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[66] Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L328/55.

[67] Maeso, "'Europe' and the Narrative of the 'True Racist'" (2018) 8 *Onati Socio-Legal Series* 845, 848.

[68] D. Goldberg, *Are We All Postracial Yet? (Debating Race)* (Cambridge and Malden: Polity Press, 2015), pp.162–163.

[69] European Union Agency for Fundamental Rights, "The Racial Equality Directive: Applications and Challenges" (Publications Office of the European Union, 2012).

[70] European Union Agency for Fundamental Rights, "The Racial Equality Directive: Applications and Challenges" (2012).

[71] S. Rodriguez Maeso and M. Araujo, "The (Im)plausibility of Racism in Europe: Policy Frameworks on Discrimination and Integration" (2017) 51 *Patterns of Prejudice* 26, 29.

Directive makes clear that any reference to race in the Directive is not intended to imply an acceptance of the existence of separate human races. Aside from that reference, racism itself is not defined. This may have resulted from the fears during the negotiation of the Race Directive of the potential of EU Member States appearing to accept theories of separate races.[72] However, this does no more than "shape the silence about race and racism in Europe"[73]—a silence which presents racism as a deviation from European society, and reinforces the impression that "racism is nowadays perpetrated by a few lunatic individuals, delusional neo-Nazis and/or declared anti-Semites",[74] rather than acknowledging its embeddedness within European society.[75] Coomber explains that it is difficult for the law to legislate on a vague concept such as racist belief, and that this explains why race instruments focus on prohibiting a discriminatory act, instead of the belief. While there is sympathy for the difficulty, it does mean that discriminatory beliefs remain un-addressed.

There are elements of EU law which arguably go beyond targeting individual acts of discrimination only. Under art.2(2)(b), *indirect discrimination* is "where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons". This provides some scope for addressing discrimination beyond an individual act, given that it can relate to measures which create a situation of discrimination, and this "takes account of the disparate impact that equal treatment can have on certain groups".[76] As such, it can be deemed to be a form of substantive equality as it "aims to compensate for the social disadvantages suffered by certain groups".[77] However, the issue with indirect discrimination under EU law, is that it does no more than provide equality of opportunity and therefore only does the bare minimum towards addressing widespread inequalities.[78] Indirect discrimination can be justified under art.2(2)(b)(i) if a legitimate aim can be shown and the Court has, in the case of the headscarf ban cases, given states a wide margin of appreciation. In *Achbita*,[79] an employer imposed a neutral rule prohibiting the wearing of visible signs of political, philosophical or religious beliefs. It is well known that a rule which is neutral may nonetheless "involve unequal treatment and unequal finishing points because it is not concerned with the end result".[80] This is illustrated by the fact that the rule applied by the employer in *Achbita* indirectly discriminated against employees wearing headscarves or turbans. However, the court permitted the rule to be justified as the neutrality principle was considered a legitimate aim. For this reason, "neutrality can be an easy cover-up for prejudice",[81] and this is furthermore supported by the fact that the CJEU, throughout the case of *Achbita*, failed to make

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[72] A. Tyson, "The Negotiation of the European Community Directive on Racial Discrimination" (2001) 3 *European Journal of Migration and Law* 199, 201. States such as Austria and Hungary have removed the word "race" from domestic law and replaced it with "ethnic affiliation": H. Garcia, *Clash or Complement of Cultures?: Peace and Productivity in the New Global Reality* (US: Hamilton Books, 2017), p.17.

[73] Rodríguez Maeso, "'Europe' and the Narrative of the 'True Racist'" (2018) 8 *Onati Socio-Legal Series* 845, 845.

[74] M. Möschel, "Race in Mainland European Legal Analysis: Towards a European Critical Race Theory" (2011) 34 *Ethnic and Racial Studies* 1648, cited in Rodríguez Maeso, "'Europe' and the Narrative of the 'True Racist'" (2018) 8 *Onati Socio-Legal Series* 845, 850.

[75] Rodríguez Maeso, "'Europe' and the Narrative of the 'True Racist'" (2018) 8 *Onati Socio-Legal Series* 845, 850.

[76] E. Howard, "The EU Race Directive: Time for a Change?" (2007) 8 *International Journal of Discrimination and the Law* 237, 248.

[77] E. Howard, "The European Year of Equal Opportunities for All — 2007: Is the EU Moving Away from a Formal Idea of Equality?" (2008) 14 E.L.J. 168, 171.

[78] As opposed to "equality of outcomes" which would guarantee an outcome or impact.

[79] *Achbita v G4S Secure Solutions NV* (C-157/15) [2017] EU:C:2017:203; [2017] 3 C.M.L.R. 21; *Bougnaoui v Micropole SA* (C-188/15) [2015] EU:C:2017:204; [2017] 3 C.M.L.R. 22.

[80] Howard, "The European Year of Equal Opportunities for All — 2007" (2008) 14 E.L.J. 168, 171.

[81] E. Brems, "European Court of Justice Allows Bans on Religious Dress in the Workplace" (26 March 2017), *IACL, https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace* [Accessed 8 July 2019].

any reference to "the Europe-wide context of Islamophobia".[82] Approaches such as the one taken in this case are unable to tackle the deep sentiments of discrimination prevalent in society, as seen across Brexit.

The overall approach of targeting individual acts—as found largely in EU law, and as discussed in this section—is unlikely to make significant inroads into an environment, as in the UK, which has, for decades, harboured discriminatory sentiments towards "others" and where the legal structure has prevented that from being addressed head on. Kehinde Andrews has expressed the view that, although, in the UK,

> "there's been some progress since 1965 … focusing on individual prejudice has avoided tackling endemic systematic racism, leaving significant inequalities."[83] He goes on to state that "if we are serious about addressing systematic racism then we need to stop focusing on the prejudice of individuals."[84]

The type of action/remedy mandated is individualistic

As well as the predominant target of European law being individual acts of discrimination, the actions and remedies that are designed to tackle the prohibited acts are also of an "individualistic" nature.

The primary mechanism for seeking a remedy in the Race Directive is litigation. In other words, an individual who has faced discrimination is given the option to resolve the matter before a court of law.[85] Such a complaints based model for addressing societal challenges—including issues of discrimination—can be criticised. First, they are limited in the issues they can address[86]: "courts generally decide only the legal questions that parties bring to them."[87] Secondly, they require widespread deeply rooted issues to be reduced to individual acts. Thus, "rights litigation undermines collective action by atomizing collective grievances into individual problems and narrow grievances to only legally actionable claims".[88] This is problematic, because individuals or groups might not directly commit racist crimes, but "encourage them within public opinions by discriminatory ideologies which are infiltrating larger and larger segments of the population".[89]

Litigation and the need to report discrimination means that there is a need to source evidence of discrimination before action can be taken. This has elsewhere been labelled "evidence-based policy-making".[90] However, evidence of direct discrimination is usually difficult to come by, and there

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[82] E. Brems, "European Court of Justice Allows Bans on Religious Dress in the Workplace" (26 March 2017), *IACL*.

[83] K. Andrews, above fn.59.

[84] K. Andrews, above fn.59.

[85] Or through administrative or conciliation procedures where appropriate: art.7, and through organisations and the national equality bodies having the competence to assist individuals: arts 7(2) and 13.

[86] See generally S. Lahuerta and A. Zbyszewska, "Taking Stock of 20 Years of EU Equality Law and Policymaking and Looking Ahead" (2018) 18 *International Journal of Discrimination and the Law* 55; M. Bell, "Adapting Work to the Worker: The Evolving EU Legal Framework on Accommodating Worker Diversity" (2018) 18 *International Journal of Discrimination and the Law* 124.

[87] C. Albiston and G. Leachman, "Law as an Instrument of Social Change" (2015) 13 *International Encyclopedia of Social and Behavioral Science* 542, 545.

[88] Albiston and Leachman, "Law as an Instrument of Social Change" (2015) 13 *International Encyclopedia of Social and Behavioral Science* 542, 545.

[89] EUMC, *Looking Reality in the Face: The Situation regarding Racism and Xenophobia in the European Community: Annual Report 1998, Part II* (Vienna: EUMC 1999), *https://fra.europa.eu/sites/default/files/ fra_uploads/1944-AR _1998_part2-en.pdf*> [Accessed 31 January 2019], referenced in Rodriguez Maeso and Araujo, "The (Im)plausibility of Racism in Europe: Policy Frameworks on Discrimination and Integration" (2017) 51 *Patterns of Prejudice* 26, 27.

[90] Rodriguez Maeso and Araujo, "The (Im)plausibility of Racism in Europe: Policy Frameworks on Discrimination and Integration" (2017) 51 *Patterns of Prejudice* 26, 35; S. Rodriguez Maeso and M. Araujo, "The Politics of (Anti-)racism: Academic Research and Policy Discourse in Europe" in W.D. Hund and A. Lentin (eds), *Racism and Sociology: Racism Analysis Yearbook 5* (Berlin/London/Wien: Lit-Verlag, 2014), pp.213–217.

are low reporting figures and litigation is a difficult avenue to pursue, because of its time-consuming and costly nature,[91] or because, as demonstrated by the case of *Firma Feryn*,[92] individuals will not always be able to bring litigation action. In this case, given the abstract nature of the discrimination (a declaration by an employer that it will not recruit employees of a certain ethnic or racial origin), the case could not be brought by an individual (as no individual complainant could be identified) and was instead brought by a body for equal opportunities. Thus, the EU should require that legal standing be extended to national equality bodies and other organisations.[93] Finally, the remedies courts suggest are also limited as judicial sanctions cannot usually suggest radical societal reforms, beyond the confines of the case presented. As such:

> "Rights litigation can even be counterproductive because it legitimates a legal system that masks inequality by seeming to provide a remedy while producing little substantive change."[94]

This point is also tied to the fact that a third concern with litigation is that sanctions (usually financial compensation) are remedial, not preventative. Thus, a state may be required to apply law in a different manner in future scenarios, or, provide compensation to affected individuals. With respect to the EU Race Directive, sanctions are further still to be decided by the Member States (and are not suggested by the EU).[95]

It is not only litigation that suffers from the inadequacy of offering only remedial (and not preventative) sanctions. Thus, in terms of the Framework Decision, Member States are instructed to ensure that conduct is punishable by effective, proportionate and dissuasive criminal penalties (art.3) and in the case of those committing acts under art.1 (i.e. not aiding and abetting) that that punishment is imprisonment of between one and three years (art.3). It may also include other measures such as removal of public benefits or aid, disqualification from commercial activities, placing under judicial supervision, or a judicial winding up order (art.6). All such measures are remedial, and not preventative.

Effectiveness

As analysed above, the relevant EU laws have been of limited value in addressing societal discrimination. They focus on individual behavioural change (by targeting individual instances of discrimination) but are not effective in producing changes in societal attitudes and sentiments. As acknowledged by the UK Home Office in 2016, it is crucial to note that "more effective action is required to challenge attitudes and beliefs".[96]

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[91] European Union Agency for Fundamental Rights, "The Racial Equality Directive: application and challenge" (2011).

[92] *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* (C-54/07) EU:C:2008:397; [2008] 3 C.M.L.R. 22.

[93] M. Bell, "ENAR, Extending EU Anti-Discrimination Law: Report of an ENAR Ad Hoc Expert Group on Anti-Discrimination Law" (European Network Against Racism, 2008).

[94] Albiston and Leachman, "Law as an Instrument of Social Change" (2015) 13 *International Encyclopedia of Social and Behavioral Science* 542, 545.

[95] Council Directive 2000/43 Implementing the Principles of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin [2000] OJ A15.

[96] *Home Office*, "Action Against Hate: The Government's plan for tackling hate crime" (July 2016), Home Office, *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553619/action-against-hate-easy-read-160916.pdf* [Accessed 8 July 2019].

Does effectiveness of tools to address discrimination mean an impact on social sentiments?

Effectiveness requires that law achieves its specific goal through the quality of its legislative drafting (e.g. banning discrimination in the workplace), but additionally that this achieves the law's overall desire (reducing discrimination in society). This is encapsulated most instructively by Mousmouti:

> "[E]ffectiveness … has two dimensions: … the extent to which legislation is conducive to the desired regulatory effects (can a law achieve the desired result?) … [and] … the extent to which the attitudes and behaviours of target populations correspond to those prescribed by the legislation (has a law achieved the desired results?)."[97]

Thus, in relation to this latter point, Mousmouti includes changes in attitudes. Such a result goes beyond the measurement of the acts prohibited by the legislation and looks to its underlying goals.

In this sense, law is defined broadly: it is not just the legislation, but also the means and institutions of its implementation,[98] and beyond the institutions, it also includes customary practices, recognising that law is an agent of social change because law influences culture (but at the same time culture determines/mediates law's social impact).[99] Therefore, behaving in a certain way "even when no legally enforceable formal right exists" is an important test for the effectiveness and impact of law,[100] and, as "a law cannot compel action" and is instead an instrument of "persuasion",[101] society conforms to law because it is persuaded to conform, and so law must have persuasive qualities. To put it differently, these points pertain to the question of whether law achieves its intentions or underlying objectives, rather than whether it narrowly achieves the legal obligations within it. As a result, social impact should be understood broadly: it concerns not only positive litigation outcomes (or material benefits),[102] but also a broader shift in social sentiments. To be clear then, the effectiveness of law should be measured with reference to its impact on societal sentiments as much as it is with reference to the number of individual acts of discrimination recorded (and addressed).

Effectiveness of EU tools for addressing sentiments of discrimination

Can law be made to better achieve its underlying goals, as described above? One method would be to improve the quality of legal mechanisms themselves. Suggestions include, for example, improving provision for, and the effectiveness of, collective/representative action litigation, and ensuring that structural discrimination is addressed.[103] There should be strengthened provision for positive action measures, measures which target indirect discrimination, a greater reliance on statistics and, of course, litigation should not be the dominant focal point of a non-discrimination model. There should be a recognition that "financial compensation is not always the most appropriate remedy", and that sometimes an interim order

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[97] M. Mousmouti, "Effectiveness as an Aid to Legislative Drafting" (2014) 2 *The Loophole: Journal of the Commonwealth Association of Legislative Counsel* 15.

[98] Albiston and Leachman, "Law as an Instrument of Social Change" (2015) 13 *International Encyclopedia of Social and Behavioral Science* 542, 545–546.

[99] N. Mezey, "Out of the Ordinary: law, Power, Culture and the Commonplace" (2001) 26 *Law and Social Inquiry* 145; A. Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (London: Routledge 1993).

[100] Albiston and Leachman, "Law as an Instrument of Social Change" (2015) 13 *International Encyclopedia of Social and Behavioral Science* 542, 543.

[101] A. Allot, "The Effectiveness of Laws" (1981) 15 *Valparaiso Law Review* 229, 235.

[102] Albiston and Leachman, "Law as an Instrument of Social Change" (2015) 13 *International Encyclopedia of Social and Behavioral Science* 542, 543–544.

[103] R. Townshend-Smith, "Reform of United Kingdom Discrimination Law: Philosophy, Principle or Pragmatism?" (2001) 5 *International Journal of Discrimination and the Law* 39, 52.

is necessary.[104] The EU's Race Directive does provide for some measures which go beyond the level of individual acts of discrimination, and thus beyond a purely complaints-based model. These include promoting social dialogue to ensure equal treatment through, for example, monitoring workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practice. This provision—art.11—aims to ensure that workplaces as a whole tackle anti-discrimination. Further, under art.12, Member States are to hold dialogues with relevant NGOs and, under art.13, national equality bodies are to conduct independent surveys on discrimination and publish reports and recommendations. In addition, Member States are to abolish laws which are contrary to the principle of equal treatment.[105] EU law also provides that collective action can be taken[106] and that equality objectives are to be mainstreamed across EU law.[107] While these are encouraging provisions and may help towards creating a fairer environment for those who are in discriminatory situations, none of these actions directly tackles underlying sentiments of discrimination. Most can raise awareness of, or address, structural or institutionalised discrimination,[108] which are inherent in practices, processes or procedures, but they still do not tackle societal sentiments directly. This understanding of the limitations of (EU) law as a tool for effectively addressing discriminatory sentiments raises the question of whether law alone can be sufficient in producing the types of changes needed at the level of societal sentiments. If, as outlined above, law must have persuasive qualities to encourage broader shifts in social sentiments, a legitimate question is whether, in the specific case of *influencing reductions in societal sentiments of discrimination*, legal mechanisms are best suited to the task. Indeed, scholarship makes clear that non-legal initiatives may also be needed to support the achievement of the desired effect, as they can be more specifically dedicated to the task. Sayce has argued that law alone is not enough. Drawing on the example of the Americans with Disabilities Act, she has shown that law cannot effectively challenge underlying discriminatory sentiments if it is not accompanied by discursive strategies to combat social attitudes.[109] Indeed, as Smart has argued in the context of feminist reforms, "it is important to think of non-legal strategies and to discourage the resort to law as if it holds the key to unlock women's oppression".[110] This is because law is often both a product of, and capable of reproducing existing power relations.[111] Back in the EU context, Zoe James and David Smith have shown the inadequacy of EU law as a tool for tackling discrimination against the Roma Community, arguing that the inclusion strategies employed by EU law are ill equipped to aid Roma inclusion within Member States. In arguing this, they place particular emphasis on the inability of the EU to make states prioritise (in a genuine way) the realisation of EU anti-discrimination measures.[112]

There are a number of ideas rooted in, for instance, sociology and psychology about effective means of addressing societal sentiments of discrimination. This article does not attempt to explore the scope of

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[104] Bell, "ENAR, Extending EU Anti-Discrimination Law: Report of an ENAR Ad Hoc Expert Group on Anti-Discrimination Law" (2008), p.16, *http://cms.horus.be/files/99935/MediaArchive/pdf/Extending%20EU%20Anti -Discrimination%20Law%20final.pdf* [Accessed 8 July 2019].

[105] Council Directive 2000/43 Implementing the Principles of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin [2000] OJ 19/07/2000 P, A14.

[106] Council Directive 2000/43 Implementing the Principles of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin [2000] OJ 19/07/2000 P, A7(2).

[107] Article 10 TFEU. See further: European Commission, "European Commission Compendium of Practices on Non-discrimination/Equality mainstreaming" (Luxembourg: European Commission, 2011).

[108] That is discrimination, which inherently results from the (historical) ways in which society or institutions are organised. See further, L. Farkas, "Collective Actions under European Anti-discrimination Law" (2014) 19 *European Anti-Discrimination Law Review* 25.

[109] Sayce, "Beyond Good Intentions" (2003) 18 *Disability and Society* 625, 631–633.

[110] C. Smart, *Feminism and The Power of Law* (Abingdon: Routledge, 1989), p.5.

[111] Smart, *Feminism and The Power of Law* (1989), p.5.

[112] Z. James and D. Smith, "Roam Inclusion Post Brexit: A Challenge to Existing Rhetoric" (2017) 16 *Safer Communities* 186, 189.

such approaches, but to highlight their possibilities. They might include examples such are the inter-group contact theory or the education theory. The former[113] advances the idea that contact between different ethnic, race and religious groups reduces negative attitudes and promotes inclusivity. This is a policy-based and practical measure, and is especially effective where it is based on principles of perspective-taking or empathy-induction.[114] In addition, education initiatives are also argued to help reduce discrimination and prejudice, because they focus on exposure to information about other groups to challenge the way people think about them.[115] In this category, "cooperative learning and the use of curriculum which embeds positive measures of intergroup contact"[116] are promising. Education initiatives "assumes that contact alone is not sufficient, and that people need to re-educate themselves to move on from old assumptions and to change attitudes".[117] For instance, tackling the root cause of racism through youth activities, as opposed to enforcing punishments for racist behaviour,[118] or simply presenting information which seems distant and superficial and therefore of little relevance.[119] Alongside this, as MacEwen has recognised the use of positive discrimination policies over the short term can help to level the social playing-field and assist stigmatised social groups in feeling included, and can work to undermine discriminatory sentiments.[120]

There are some aspects of EU efforts towards anti-discrimination which are found in non-legal initiatives. These might be in the form of policy measures or financial support programmes. However, these initiatives focus largely on integrating minorities into the labour market,[121] collating and distributing data and research on disadvantaged groups,[122] financing social integration,[123] holding high level working groups[124] or platforms,[125] or developing codes of conduct or best practice.[126] Whilst there may be one or two examples

[113] Allport, *The Nature of Prejudice* (1979) cited in M. McBride, "What works to reduce prejudice and discrimination?—A review of the evidence" (Edinburgh: Scottish Government, 2015).

[114] Allport, *The Nature of Prejudice* (1979), cited in McBride, "What works to reduce prejudice and discrimination?" (2015), p.5.

[115] Allport, *The Nature of Prejudice* (1979), cited in McBride, "What works to reduce prejudice and discrimination?" (2015), p.4.

[116] Allport, *The Nature of Prejudice* (1979), cited in McBride, "What works to reduce prejudice and discrimination?" (2015), p.5.

[117] Allport, *The Nature of Prejudice* (1979), cited in McBride, "What works to reduce prejudice and discrimination" (2015), p.14.

[118] I. Law, "Tackling what Lies beneath the Surface: The Racism Reduction Agenda and Global, EU and UK Approaches to Tackling Racist Hostility" (2008) 11 *Housing, Care and Support* 13, esp, at 16.

[119] McBride, "What works to reduce prejudice and discrimination?" (2015) p.14.

[120] M. MacEwen, "A New Framework for Tackling Institutional Racism in Scottish Housing Rights" (2002) 5 *International Journal of Discrimination and the Law* 207, 224.

[121] The European Employment Strategy or the European Social fund. See for example: European Commission, "Inclusive Societies: Funding Opportunities in The Area of Building Inclusive Societies", *https://ec.europa.eu/info /policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-funding-tackle-racism -and-xenophobia/inclusive-societies_en* [Accessed 8 July 2019].

[122] The EU's Agency on Fundamental Rights.

[123] E.g. the Asylum, Migration and Integration Fund. See European Commission, "Asylum, Migration and Integration Fund" (2014), *https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration -integration-fund_en* [Accessed 8 July 2019].

[124] European Commission, "A EU High Level Group on Combatting Racism, Xenophobia and Other Forms of Intolerance" (2018), *https://ec.europa.eu/newsroom/just/item-detail.cfm?&item_id=51025* [Accessed 8 July 2019].

[125] European Commission, "The European Platform for Roma Inclusion" (2018), *https://ec.europa.eu/info/policies /justice-and-fundamental-rights/combatting-discrimination/roma-and-eu/european-platform-roma-inclusion_en*; European Commission, "The EU Platform of Diversity Charters", *https://ec.europa.eu/info/policies/justice-and -fundamental-rights/combatting-discrimination/tackling-discrimination/diversity-management/eu-platform-diversity -charters_en* [Both accessed 8 July 2019].

[126] E.g. in relation to online hate speech, see European Commission, "The Code of conduct on countering illegal hate speech online", *https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination /racism-and-xenophobia/countering-illegal-hate-speech-online_en* [Accessed 8 July 2019].

of more effective initiatives,[127] the EU has yet to offer a dedicated focus on programmes aimed more specifically at challenging the sentiments of discrimination that arise in society[128]: initiatives that theories such as the inter-group or education theory, or positive action theory, described earlier might advocate. Such initiatives might be possible under Article 19 TFEU. Although para 1 of Article 19 would require unanimity in the case of measures designed to harmonise Member State actions in this area, para 2—with its less burdensome requirement of qualified majority vote—could also be relied upon to provide incentive measures for the Member States to take better initiatives in this area. There may be questions around whether it is the place of the EU—in subsidiarity terms—to offer the necessary actions to meet the goals of reducing sentiments of discrimination in EU Member States. However, there is no doubt that discriminatory sentiments are a Europe-wide concern[129] and have been on the increase for a number of years, and that these have affected EU goals, primarily (but not limited to) the rights of EU citizens and EU third country nationals to practice their free movement and resident rights free from racism and racial discrimination in EU Member States. Brexit is just one example of this. Others include the renewed discriminatory sentiments against the Roma minority in Italy and France, which peaked in 2006 and 2007, as well as the rights of refugees to seek asylum in the EU without facing racism or racial discrimination, as part of the infamous EU migration crisis.

Conclusion

This article has indicated that Brexit has brought to the fore an important distinction in the forms of discrimination that persist in (British) society. The first is discrimination that results in *acts of discrimination*, such as hate crimes, which were not uncommon in the lead-up to and aftermath of the UK's referendum vote concerning EU membership. The second is the strong sense of an underlying *sentiment of discrimination* that swept British society across the Brexit period, which although less overt, nevertheless was a real driver behind the Brexit leave vote. The article argued that EU law is focused primarily on addressing the first form of discrimination and pays scant attention to the latter form. Thus, there are serious weaknesses in the *legal* tools adopted by the EU to further its mission for an inclusive European Union. Indeed, it could be argued that there has been an over-reliance on these legal tools, to the neglect of the EU making a more concerted effort towards developing non-legal initiatives for tackling discrimination in European societies. What form such non-legal tools might take is open to exploration and debate, but what is a fundamental point of this article is that reliance on law as a tool for anti-discrimination is insufficient to address the type of underlying societal sentiments of discrimination seen across the Brexit context in the UK (and more widely across the rest of Europe).

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[127] For example, the Commission states that some initiatives in Erasmus+ focus on targeting groups and possible biases: see European Commission, "Combating Anti-Muslim Hatred", *https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/combating-anti-muslim-hatred_en#relatedlinks* [Accessed 8 July 2019].

[128] In the Fundamental Rights and Citizenship Programme 2007–2013, "only a handful" of projects addressed the objective of interfaith and multicultural dialogue.

[129] See generally: H. Kriesi and T.S. Pappas (eds), *European Populism in the Shadow of the Great Recession* (Colchester: ECPR Press, 2015); Z.Y. Gündüz, "The European Union at 50—Xenophobia, Islamophobia and the Rise of the Radical Right" (2010) 30 *Journal of Muslim Minority Affairs* 35, 35–47. The EU's external relations, as epitomised by its Schengen visa lists, has been termed a "global apartheid": see H. van Houtum, "Human Blacklisting: The Global Apartheid of the EU's External Border Regime" (2010) 28 *Environment and planning D: Society & space* 957; L. Story Johnson, "The Integration of the European Union and the Changing Cultural Space of Europe: Xenophobia and Webs of Significance" (2012) 25 *International Journal for the Semiotics of Law* 211; D. Witteveen, "The Rise of Mainstream Nationalism and Xenophobia in Dutch Politics" (2017) 20 *Journal of Labor and Society* 373.