The use of the categories race and ethnic origin in Swiss anti-discrimination law: theoretical and empirical insights into the relationship between societal structures and law

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1 Introduction

In Article 261^{bis1} of the Swiss Criminal Code (short: SCC) different practices, such as the public incitation of hate or discrimination, are defined as racial discrimination when its directed to "another or a group of persons on the grounds of their race, ethnic origin or religion" [1]. The legal provision thus makes use of the categories *race*, *ethnic origin* and *religion* in order to prohibit racial discrimination. As Liebscher and others (2012, p. 206) indicate categorisation serves as a base in each legislative decision making process. The use of these categories, specifically race and ethnic origin, is however subject to many scientific discussions concerning both research (see for example in Brubaker, 2002; Scherr, 2017) and law (see Baer, 2010; Liebscher, Naguib, Plümecke, & Remus, 2012; Naguib, 2012).

Categories, and more precisely categorisation with respect to race and ethnic origin appear to be a complex but crucial issue when it comes to understanding not only discriminatory practices but also how they're identified (or not) in juridical contexts (Naguib, 2012, pp. 187–188; Scherr, 2017, pp. 43–44). Following the approach of Brubaker, who put forward the idea of studying "how people – and organizations – *do things* with categories" (2002, pp. 169–170; emphasis in the original), the present paper not only considers the use of categories but also aims at highlighting, through the focus on the categories race and ethnicity, the relationship between societal structures and law. The following question serves thus as a starting point to this objective:

How are the categories race and ethnicity used in the assessment of discriminatory practices in court?

In order to answer this question the approach is twofold: In the first part of the paper I will introduce a theoretical framework that discusses both sociological and socio-legal approaches on discrimination, its assessment in court, and the relationship between societal structures and law. The findings from this discussion will then be mobilised in order to analyse two specific cases from Switzerland, in which the Swiss Federal Supreme Court discussed the scope of the above mentioned criminal provision. First, a case in which a police-man has been accused of racial discrimination because he called an Algerian asylum seeker a "Drecksasylant" and "Sauausländer"[2] and second, the case of two members of the Swiss People's Party (short: SVP), that have been convicted of racial discrimination due to a political advertisement that captioned "Kosovaren schlitzen Schweizer auf!"[3]. The analysis of

[1] Swiss Criminal Code of 21 December 1937 (RS 311.0).

[2] Judgement of the Federal Supreme Court 6B_715/2012 of 6 February 2014, A.

[3] Judgement of the Federal Supreme Court 6B_610/2016 of 13 April, 2017, A.

these cases aims at offering empirical insights into the discussion, considering how the Federal Supreme Court has approached the categories inscribed in the above mentioned article 261^{bis1}. In the conclusion the main findings will be summarised, the limitations of the paper presented and possible further fields of research pointed out.

2 From discriminatory practices to their assessment in court: theoretical insights on the use of the categories race and ethnicity

In order to approach the issue of the categories race and ethnicity in the field of discrimination and its assessment in juridical contexts, I will first focus on approaches that discuss the role of categories in the emergence of discriminatory practices, taking into account the underlying societal structures and power relationships. The second sub-chapter will center on how courts make use of these categories in order to identify whether a practice is considered discriminatory or not. To approach this issue, I will mobilise findings from both sociological as well as socio-legal research traditions, namely of the Critical Race Theory and the approach on post-categorical anti-discrimination law[4].

2.1 The social construction of categories in the field of discrimination

Gomolla (2015, p. 195) and Scherr (2015, p. 39-40) describe discrimination as a disadvantage for persons or groups due to their ascription to certain categories, such as race and ethnicity, in the form of an unequal treatment or derogatory remarks. As different authors however note, it seems crucial to understand these categories as social constructs and not as biologist entities. This becomes specifically clear in Brubakers critique on "groupism", where he states that "understanding the reality of race […] does not require us to posit the existence of race" (2002, p. 168). Similarly, discussing the concept of racism, different authors posit how racisms don't depend on the existence of race, its rather racializing processes that lead to the construction and therefore the salience of race (Weiss, 2013, p. 25; Roig, 2017, p. 616; see also Naguib, 2016a, p. 7). In relation to discriminatory practices, Scherr formulates "dass die Existenz von biolgischen ‚Rassen' keine Voraussetzung rassistischer Diskriminierung ist: Ausgangsprunkt rassistischer Diskriminierung ist vielmehr ein Kategoriensystem, das rassistisch definierte Gruppen hervorbringt" (2017, p. 46). With regard to this construction it is thus important to note, that the classification of individuals into racially stratified groups is embedded in the underlying societal structures. Categories, as Scherr notes, are always an "Abbild vorgängiger und gesellschaftsstrukturell verfestigter Ungleichheiten und Machtverhältnisse" (2017, p. 43). To sum up, it is argued that it is not the existence of

[4] German: „postkategoriales Antidiskriminierungsrecht" (see Baer, 2010, p. 18; Liebscher et al. 2012, p. 204).

racially or ethnically bounded groups that cause – or at least are the base of – discriminatory practices, but rather their social construction based on social inequalities and power relationships. As a consequence, discriminatory practices should not be considered an individual phenomenon but rather related to power relationships, discourses, and ideologies (see Scherr 2017, p. 42-43).

With regard to how courts and law treat discrimination, it must further be noted that the perception of what is understood to be discriminatory is too related to historically grown power structures and ideologies (Scherr, 2017, p. 43). The categories that are inscribed in the before mentioned legal prohibition can therefore be considered a result of historical and social negotiation processes. This becomes specifically clear when taking into consideration the argument of Fuchs and Berghahn who see law as the „Resultat konflikthafter gesellschaftlicher Aushandlungsprozesse und Ausdruck von Machtverhältnissen“ (Fuchs & Berghahn, 2012, p. 11). In order to approach the issue of how categories are used in anti-discrimination law in Switzerland, it must therefore be taken into consideration that first, from a sociological perspective, discriminatory practices are considered a result of the classification of persons into socially constructed and hierarchically stratified categories and second, what is perceived to be discriminatory equally appears to be a result of social processes and is too inscribed in societal structures (Fuchs & Berghahn, 2012, p. 11; Scherr, 2017, pp. 39–46; Weiss, 2013, p. 25).

How the categories race and ethnicity are addressed in court, and how they treat the issue of racial discrimination in general is further subject of different sociological and socio-legal discussions that will be presented in the next chapter.

2.2 From the liberal paradigm to a reproduction of differential categories: insights from the Critical Race Theory and the approach on post-categorical anti-discrimination law

In order to analyse how courts make use of these categories and what aspects must be taken into account to understand the legal decision-making process I want to introduce two perspectives: First, I draw on the findings from the Critical Race Theory, focusing on their critique of the liberal paradigm and colour-blindness. In the second subchapter, I will present the socio-legal perspective of the post-categorical anti-discrimination law, discussing how law might essentialise categories and the interrelation between law and societal structures.

2.2.1 The critique on the liberal paradigm and “colour-blindness”

Critical Race Theory (short: CRT) was introduced in the early 1970s in the United States, when a share of legal and sociological scholars engaged in “studying and transform-

ing the relationship among race, racism and power" (Delgado & Stefancic, 2012, pp. 3–4). As Delgado and Stefancic, two founders of the Critical Race Theory state, it is not only a research tradition but equally "a collection of activists and scholars" (ibid., p. 3). Similarly to the approaches on discrimination and racism that have been presented in the last chapter, Delgado and Steffanic note how the base of CRT is the perception of categories like race and ethnicity as "products of social thought and relations" (ibid., p. 8). They, and other scholars related to the CRT research tradition, therefore consider it crucial to understand ethnic origin (or ethnicity itself) and race as analytical and not as trivial categories, emphasising the societal and hierarchical structures in which they're embedded (Delgado & Steffancic 2002, p. 8; Dixson & Rousseau 2005, p. 15; see also Matias, Viesca, Garrison-Wade, Tandon, & Galindo, 2014, p. 299; Stark & Noack, 2017, p. 895).

In their account on how discrimination is approached in legal contexts, different CRT scholars criticise the liberal paradigm, which can be described according to Ladson-Billing as the belief that law and justice "provide equal opportunity for all" (1999, p. 231). In the European context, Roig has pointed this out in a similar way, referring to a "self-constructed image of egalitarian societies" (2017, p. 614). This assumption of equality however, seems to stand opposed to the societal structures that underlie discriminatory practices, as discussed in the last chapter. Assuming 'equal opportunity for all' courts might tend to neglect the societal structures from which discriminatory acts emerged. As already indicated, this critique is central to the approach of CRT scholars and summarised in the term "colour-blindness" (Gotanda, 1995, p. 257; Dixson & Rousseau, 2005, p. 15-17; Freeman, 1995, p. 31). Criticising the claim "Our constitution is color-blind" (1995, p. 257) by studying different legal cases in the US, Gotanda comes up with a distinction of the ways race, as a category, is approached in court. In this context he introduces the concept of "formal-race" (1995, p. 257), namely the treatment of the category race as unconnected to the social and historical dimension of race. Dixson and Rousseau who draw on this distinction, indicate how in a formal-race conception of race and ethnicity, the socially constructed categories are seen as neutral, "reflecting merely 'skin color' or region of ancestral origin" (2005, p. 15). Pertinently Dixson and Rousseau argue that this disconnection to social realities "places severe limitations on the possible remedies for injustice and thereby maintains a system of white privilege" (2005, p. 15). Gotanda therefore criticises the use of race as decoupled from its context, indicating that it is a limited concept in terms of both its analytical and political power (1991, p. 37).

Drawing on these arguments from the CRT research tradition and as an illustration of this critique, Bartel, Liebscher and Remus examine legal cases in Germany, putting in question as did Gotanda (1991; 1995) before the courts ostensible objectivity (Bartel, Liebscher, & Remus, 2017, pp. 370–379). Focusing on "was passiert, wenn People of Colour rassistische

Diskriminierung und Rassismus vor deutschen Gerichten thematisieren" (Bartel et al., 2017, pp. 361), the authors study what pre-concepts and common beliefs are salient in the juridical interpretation of legal texts and cases. Introducing a case in which a man holding Cameroonian citizenship aimed at preventing the event "African village" that took place in a German zoo in 2010, Bartel et al. (2017, pp. 372–374) illustrate how racial and *white*[5] knowledge, stereotypes, and practices come into effect in juridical decision-making processes. In this case, the plaintiff argued that the "African village" is discriminatory, since it reproduces the "Völkerschauen" in which during the time of National Socialism in Germany persons of colour were degraded to objects. Even though the event took place in a zoo and thus might establish a link to the „Völkerschauen", the court argued: "[Es] bestehen bei der hier veranlassten objektiven Betrachtung durch einen unbefangenen Beobachter [...] keine Anhaltspunkte dafür, dass diese diskriminierenden Charakter aufweist" (Verwaltungsgericht Augsburg, 2005, cited in Bartel et al., 2017, p. 373). Bartel et al. point out how the court on the one hand neglected specific experiences of racism and the history of colonialism (2017, p. 372). On the other hand, the court found their interpretation of the event as having a positive character that promotes culture, as objective (2017, p. 374). Drawing on this case, the authors argue that the court reproduces *white* sovereignty of interpretation (2012, p. 372). In other words, perceiving their white experiences and knowledge as objective, the courts proclaimed neutrality is therefore not colour-blind but the opposite: *white*.

What is crucial about the arguments and their illustration in the abovementioned case is that they stress the social context of not only the discriminatory practices they discuss, but more strikingly they indicate how the assessment of racism and discrimination in Courts is equally embedded in societal structures. Before I mobilise these findings with regard to how the Swiss Federal Supreme Court has used the categories race and ethnicity in the two cases, I now want to introduce the approach on a post-categorical anti-discrimination law, since it allows not only deeper insights on the specific context of Europe and Switzerland, it also focuses on the interplay between law and societal structures.

2.2.2 Essentialisation and the reproduction of differential categories

In the German speaking part of Europe, different socio-legal scholars around Baer (2010) have come up with a critique on the inscription of categories in anti-discrimination law that not only takes into account juridical contexts, but also the way law might influence how these categories are perceived in society. In this chapter, I will first discuss essentialisation

[5] The authors indicate that with *white* (in italics) they refer to "politischen Ordnungskategorien [die] für strukturell benachteiligte bzw. privilegierte Positioniertheiten im Machtverhältnis Rassismus [stehen]" (Bartel, Liebscher, & Remus, 2017, p. 367).

through categories as a crucial aspect of this critique (see Baer, 2010, pp. 16–17). In a second step, it will be shown how different scholars discussed the relationship between law and society.

Following Liebscher and others (2012, p. 209), inscribing the categories ethnicity or race in law is considered problematic since it might lead affected persons, lawyers and judges to construct a culturally homogeneous group in order to accuse discriminatory acts. This is illustrated pertinently in their discussion on how the category race and ethnicity (as well as other differential categories, such as gender and sexual orientation) have been used in German courts (2012, p. 208). Drawing on a case in which a job applicant from the former DDR tried to mobilise the German General Equal Treatment Act but was denied since there were no "abgrenzbare 'Ossi'-Ethnie" (Liebscher et al., 2012, p. 204), the authors indicate how categories in anti-discrimination law force affected persons to categorise themselves into races or ethnicities. Further discussing how German courts make use of the category race, Liebscher et al. (2012, p. 208) also find an essentialist attribution of persons into biologist groups without putting into question the existence of human races.

Emphasising these essentialising practices, Baer has come forward with the idea of post-categorical anti-discrimination law (2010, p. 18). In this approach, Baer herself and other authors that took up her findings – like Liebscher and others (2012) or Naguib (2012, 2016b) – not only criticise the essentialisation of persons before court, they further highlight the possible consequences of this practice for the reproduction of discriminatory practices. Discussing the use of group rights in relation to affirmative action and so-called "positive measures" Baer (2010, p. 13) mobilises Brubaker's concept of "groupism" (2002, p. 164; see chapter 2.1) in order to point out a central problem in anti-discrimination law. She argues that since group rights essentialise difference and inequality they are „keine Lösung, sondern ein zentrales Problem von Recht gegen Diskirminierung" (Baer, 2010, p. 13). The crucial point of her account is, as I would argue, that she takes into account the interplay between society and law. Following her and other authors society not only invents categories that are translated into law, law also gives authority and narrative meaning to these categories (Baer, 2010, p. 13, 16; Liebscher et al., 2012, p. 206). The problem about using categories such as race or ethnicity in anti-discrimination law is therefore seen in the above mentioned risk of essentialisation and its practical consequences (Liebscher et al., 2012, p. 213).

Focusing on these practical consequences, Naguib (2012) mobilises Baer's arguments in order to analyse the Swiss anti-discrimination law. In his findings he describes article 261^{bis1} SCC as "weiche gesetzgeberische Essentialismen" (Naguib, 2012, p. 189), since it doesn't openly discriminate but may reproduce and reify the categories that have led to the discrimination in the first place. In order to accuse discrimination without ascribing affected persons to essentialised categories, Naguib (2012, p. 190) argues, courts, lawyers and af-

fected persons would have to point out how the category is embedded in its social and historical context, making visible its social construction. If they fail to do so, or in other words, if they do not use the category as an analytical but as a trivial one, jurisprudence faces the danger that "tradierte rassistische Wissensbestände im Rechtsdiskurs wirkmächtig bleiben und Recht, das mit der Intention gesetzt wurde, rassistische Diskriminierung zu verhindern, selbst rassistische Kategorien stabilisie[rt]" (2012, pp. 190-191).

When taking into account what has been indicated in the beginning of the theoretical discussion, namely that law not only serves to criticise societal structures but might also be a manifestation of these structures (Fuchs & Berghahn, 2012, p. 11), it becomes clear that a focus on the categories race and ethnicity might not only provide interesting insights into the question of how courts approach the issue of discrimination, it may also offer the possibility to study the relationship between societal processes, specifically discrimination, and law (see also Brubaker, 2002 with regard to the analytical merits of focusing on categories). This is why in the next chapter I will introduce and analyse two cases that have been brought to the Federal Supreme Court of Switzerland.

3 Race and ethnicity in the assessment of discrimination before the Swiss Federal Supreme Court

As already described in the introduction, in article 261^{bis1} CSS the Swiss legal system prohibits racial discrimination on grounds of the affected persons race and ethnic origin. In the following three chapters, I will analyse the official judgements of the Swiss Federal Supreme Court (short: FSC) in two legal cases that discuss discrimination in the sense of this article. In order to do so, I will base the analysis on the official judgement of the FSC. Based on these official documents, for each case I will present the situation and then indicate how the court made use of the categories race and ethnicity in order to assess the accused practice[6]. In the third chapter, I will summarize the central aspects of the analysis. It must at this point be noted, that the aim of the analysis of these two cases is not a conclusive depiction of the jurisprudence of the FSC, but rather to offer insights into the argumentation and negotiation of the FSC, allowing to confront and illustrate the findings of the theoretical discussion with empirical examples.

[6] This implies that the description of the discussed situation will too base on the perspective of the FSC. It must therefore be noted, that there might be deviations in relation to other documentations of the cases.

3.1 Case 1: Insult of an Algerian asylum-seeker through a police-man

In the first case, in 2011 a police-man had been accused before the Basel-Stadt Criminal Court of racial discrimination because he called an Algerian asylum seeker he suspected to be a pickpocket a “Sauausländer” and “Drecksasylant”. The Basel-Stadt Criminal Court, as first juridical instance, declared the man guilty. The police-man however filed a complaint, which had been assessed by the Federal Supreme Court[7]. In their consideration the FSC discussed whether the insult should be classified in terms of article 261^{bis1} paragraph 4: "any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity […]”[8].

Following the phrasing in the legal text, the court states that in order to classify the accused act as racially discriminatory, it is necessary that “der Täter den Betroffenen deshalb herabsetzt, weil dieser einer bestimmten Rasse, Ethnie oder Religion angehört”[9]. Other dimensions, such as gender or due to “körperlicher oder geistiger Auffälligkeiten”[10] are not taken into consideration in this specific assessment.

Comparing the expression “Sauausländer” and “Drecksasylant” to expressions such as “schwarze Sau” or “Dreckjugo” the court states that while the latter establish a clear reference to race and ethnicity, such a reference is not apparent with the former. They however point out, that while foreigners and asylum seekers might stand for a variety of ethnicities and races, if used as a synonym for specific races or ethnicities or as an umbrella term for a number of ethnicities or races, it might be considered as discriminatory in the sense of art. 261^{bis1} [11]. Drawing on this argument, the Basel-Stadt Criminal Court has classified the accused insult as racial discrimination[12]. The complainant on the other hand, insists that “foreigner” as well as “asylum seeker” is rather to be perceived a legal status and “keine Sammelbegriffe für mehrere konkrete Rassen oder Ethnien”[13]. Taking this argument into account, the FSC states the following:

> Zwar mag der eine oder andere Zeuge des Geschehens den Eindruck gewonnen haben, dass der Beschwerdeführer den Betroffenen gerade deshalb als ‘Sauausländer’ und ‘Drecksasylant’ beschimpfte, weil dieser dem Anschein nach ein Nordafrikaner ist und damit einer Rasse oder Ethnie angehört, die hierzulande von einem zumindest latenten Rassismus bedroht sein mag.

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[7] Judgement of the Federal Supreme Court 6B_715/2012 of 6 February 2014, A.

[8] Swiss Criminal Code of 21 December 1937 (RS 311.0).

[9] Judgement of the Federal Supreme Court 6B_715/2012 of 6 February 2014, E. 2.2.1.

[10] Ibid.

[11] The exact wording is “zumal in der heutigen Zeit Menschen ganz unterschiedlicher Rassen, Ethnien und Religion Schweizer Bürger sind” (Ibid., E. 2.2.3), which already displays an essentialist view specifically on race.

[12] Ibid., E. 2.3.1.

[13] Ibid., E. 2.3.2.

> Eine solche Interpretation der inkriminierten Äusserungen drängt sich jedoch mangels weiterer dafür sprechender Umstände nicht auf.[14]

The court concludes, that due to a lack of further indications, they'd have to assume that the police-man might as well have insulted the man due to his legal status as foreigner and asylum-seeker, which is not part of the legal provision against racial discrimination. They further argue, that even if the complainant would have insulted the man due to his race, the insult would not be classified in the sense of art. 261^{bis1}, since the terms "Dreck" and "Sau" are considered "blosse Beschimpfungen und nicht als Angriffe auf die Menschenwürde"[15] and therefore such statements are seen "vom unbefangenen durchschnittlichen Dritten als mehr oder weniger primitive fremdenfeindliche Ehrverletzungen, aber nicht als rassistische Angriffe auf die Menschenwürde"[16]. Lastly, that the complainant insulted the man during his work time is seen as "deplatziert und inakzeptabel"[17] but not taken into account for the consideration.

3.2 Case 2: political advertisement

Similarly discussing the scope of application of article 261^{bis1} the Federal Supreme Court assessed a case in which two representatives of the Swiss Peoples Party (short: SVP) have been accused of racial discrimination because they released a political advertisement in relation to the popular initiative 'against mass immigration' in 2011. The advertisement was published both on the internet and in papers and its heading read "Kosovaren schlitzen Schweizer auf!". After both the Regional Court and the High Court of the canton Bern convicted the accused SVP members of racial discrimination on grounds of ethnic origin (although to varying extent), the Federal Supreme Court confirmed the judgement and rejected the complaint of the two party members[18].

Similar to the first case, the FSC discusses whether the affected group, here the Kosovars, can be perceived an ethnicity or a race. Defining ethnicity as "ein Segment der Bevölkerung, das sich selbst als abgegrenzte Gruppe versteht und das vom Rest der Bevölkerung als Gruppe verstanden wird" [19], the FSC argues that while Kosovars could be perceived with regard to the legal status of nationality, it might also refer to ethnic characteristics linked to nationality. Indicating, similarly to the case above, that also a plurality of ethnicities might be

[14] Ibid., E. 2.4.
[15] Judgement of the Federal Supreme Court 6B_715/2012 of 6 February 2014, E. 2.5.2.
[16] Ibid.
[17] Ibid., E. 2.5.3.
[18] Judgement of the Federal Supreme Court 6B_610/2016 of 13 April, 2017, A-F.
[19] Judgement of the Federal Supreme Court 6B_610/2016 of 13 April, 2017, E. 2.3.

summarised under the term ethnicity, Kosovars are therefore considered to be an ethnicity[20]. Referring to a Wikipedia article, the FSC further indicates that with relation to the sense the 'unbiased average reader' would ascribe to the advertisement, they would not make a differentiation between Kosovo-Albanians and Kosovars, which is seen as another argument in favour of Kosovars being an ethnicity and thus subject of article 261^{bis1} [21]. Finally, taking into account the political context of the popular initiative 'against mass immigration' the FSC consideres the expression "Kosovaren schlitzen Schweizer auf!" as a "unsachliches Pauschalurteil, welches sämtliche Ausländer mit kosovarischen Wurzeln schlechtmacht"[22] and therefore convict the accused party members of racial discrimination in the sense of art. 261^{bis1} paragraph 1.

3.3 Three crucial points of the analysis: essentialisation, colour-blindness and discrimination as a societal category

While the aim of the analysis of these cases was not to offer a conclusive account on how the FSC made use of categories in relation to article 261^{bis1}, the two cases nevertheless offer some crucial insights into how courts in general and the FSC in specific treat discriminatory cases. With regard to the theoretical approaches I've discussed earlier in this paper, I want to highlight three points that emerge from the analysis.

First, the cases show a striking focus on the question of whether the affected person or group could be considered an ethnicity or race. In both cases, the crucial question was therefore whether "asylum seeker", "foreigner" or "Kosovars" should be considered an ethnicity or a race. In order to identify discriminatory practices, the court examined the characteristic of the category that the affected group or person have been attributed to. In doing so, they mobilised a definition of ethnicity that understands ethnicity as "abgregrenzte Gruppe" (as seen in case 2), which is comparable to the notion Brubaker criticises under the term "groupism" (2002, p. 168; see also Baer, 2010, p. 13). With regard to the second case, the essentialised construction of the Kosovars as a bounded group, that the "unbiased average reader"[23] considers an ethnicity, served as a reference in order to identify and therefore accuse racial discrimination before court. In other words I would argue, referring to Naguib (2012) and Liebscher et al. (2012), the court has used a similar approach in order to accuse the practice as discriminatory, that most likely caused the discriminatory act in the first place.

[20] Ibid.
[21] Ibid.
[22] Judgement of the Federal Supreme Court 6B_610/2016 of 13 April, 2017, E. 3.3.3.
[23] Judgement of the Federal Supreme Court 6B_610/2016 of 13 April, 2017, E. 2.3.

Second, while the FSC demonstrated a broader conception of ethnicity that takes into account both summarising terms as well as terms that are used synonymous to ethnicity and race, in the first case the terms “foreigners” and “asylum seeker” have been categorized as legal statuses rather than substitutes of race and ethnicity. Although the FSC notes that Algerian asylum seekers, or persons from North Africa in general might experience at least latent racism and that some unidentified persons might have perceived the expression as related to his belonging to a race or ethnicity, the court states, that the evidence was not enough in order to establish a relation to the man’s race and ethnicity. With reference to Gotanda (1991, 1995), Dixson and Rousseau (2005) as well as the case Bartel et al. (2012) have studied (see chapter 2.2.1), I would argue that the court neglected the specific experience of the affected man, that can only be understood with regard to its embeddedness in the societal structures and power relationships, not least, since the situation occurred between an asylum-seeker and a police-man[24]. Rather, it seems the court has followed the perspective of the complainant, which can be interpreted in terms of an ostensible objectivity that in the end, while not taking into account the connectedness of the situation to societal structures, favours not a neutral but rather a *white* (see Bartel et al. 2012) perspective.

Finally, I want to draw on the argument of Scherr (2017, p. 43), who stated that not only the categories race and ethnicity are socially constructed, but also what is perceived to be discriminatory. Again with regard to the second case I would argue, that beyond the use of the categories race and ethnicity in the court, the fact that discrimination on grounds of legal status, such as foreigner or asylum seeker is legally not classified as racial discrimination, is another aspect that should be taken into account, especially when it comes to the relationship between law and societal structures. Therefore, while discrimination on grounds of race and ethnicity are prohibited in the Swiss anti-discrimination law, discrimination on grounds of nationality or legal status does neither seem to be explicitly banned nor enforceable. In relation to how Fuchs and Berghahn (2012) described law as an expression of power relationships, this consideration opens the field of how law might serve to legitimise differential treatment based on legal status.

4 Conclusions

In the present paper the question of how the categories race and ethnicity are used in the assessment of discriminatory practices in court was mobilised in order to not only study this legal decision making process but also to gain insights, through the focus on these categories, on the relationship between societal structures and law. In this concluding chapter, I

[24] For this point I refer to the report from the Committee on the Elimination of Racial Discrimination (short: CERD), in which they raise a concern towards the “use of racial profiling by law enforcement officials” (Committee on the Elimination of Racial Discrimination, 2014, p. 5).

will present the findings from both the theoretical and empirical discussion. The chapter will close with an indication of the limitations of these findings and a reference to further possible fields of research.

In order to understand how the categories race and ethnicity are used in juridical context, I've first highlighted how from a sociological perspective, discriminatory practices are described as a disadvantage resulting from the classification of persons into socially constructed and hierarchically stratified categories (Gomolla, 2015, p. 195; Scherr, 2017, pp. 39–40). Following Brubaker (2002, p. 168), Weiss (2013, p. 25) and Scherr (2017, p. 46) as well as with regard to the findings of the Critical Race Theory (see Delgado & Stefancic, 2012, p. 8) it has been emphasized how race and ethnicity are products of social processes and should therefore be considered as embedded in societal structures and power relationships. In relation to these structures, it has further been noted that what is perceived to be discriminatory, is too a result of societal processes (see Scherr, 2017, p. 43). With regard to how the categories race and ethnicity (or as in CSS: ethnic origin) are used in juridical contexts I first introduced the perspective of the CRT, pointing out the controversy between societal structures of inequality and the liberal paradigm of 'equal opportunity for all' (see Gotanda, 1991; Ladson-Billings, 1999; Dixson & Rousseau, 2005). Indicating how based on this paradigm courts might use race and ethnicity as detached from its historical and social context, it has been argued with Bartel et al. (2017) that they might inscribe a *white* sovereignty of interpretation in jurisprudence. Complementing this perspective with the approach on post-categorical anti-discrimination law, the tendency to essentialisation of race and ethnicity through the inscription of categories in law has been indicated (Baer, 2010; Naguib, 2012; Liebscher et al., 2012). Emphasising the interrelationship between society and law, both research traditions critically examined how courts not only address discriminatory practices through categories, but also how they're embedded in societal structures and might influence each other mutually (see Baer, 2010; Bartel et al., 2017; Dixson & Rousseau, 2005; Gotanda, 1995; Liebscher et al., 2012; Naguib, 2012, 2016b).

Introducing two cases that have been discussed in the Swiss Federal Supreme Court, I drew on the discussed findings in order to analyse how the court made use of the categories race and ethnicity. Referring to both CRT and the approach on post-categorical anti-discrimination law, three aspects have been pointed out: First, similarly to Liebscher et al. (2012), it was argued that the FSC mobilised a perception of race and ethnicity as bounded groups in order to identify whether or not the accused practice was discriminatory in the sense of article 261^{bis1}. Therefore, I have argued, the FSC inscribed an essentialist definition of ethnicity and race in the official judgement. Second, specifically in relation to the case on the insult of the police-man, I have concluded that the FSC analysed the accused situation in a manner that perceives race and ethnicity as detached from its social context. In the words

of Gotanda (1995, p. 257) and Bartel et al. (2017, p. 372) the considerations of the court followed a *white* perspective while the specific experiences of the affected man have been neglected. Finally, taking a step back and drawing on Scherr (2017, p. 43), the fact that insults based on legal statuses, such as foreigner or asylum seeker, are not taken into consideration for racial discrimination, can too be seen as an indication of the power relationships that law and its application are embedded in (see Fuchs & Berghahn, 2012).

As I have argued, drawing on Naguib (2012) and Brubaker (2002), studying how categories are used in the assessment of discriminatory practices in law provides the possibility, due to their embeddedness in societal structures and relationship, to not only offer insights into the legal decision making process but also into the relationship between law and society when it comes to the field of discrimination and anti-discrimination. With regard to the precedent empirical and theoretical discussion I would therefore conclude that on the one hand, the analysis of the two cases has illustrated, how legal decision-making processes are embedded in and influenced through societal structures and power relationships. On the other hand, taking into account the normative authority of law (see Liebscher et al. 2012, p. 206), it has been argued that both the essentialisation of ethnicity and race in court and a neglect of the social and historic context of race and ethnicity, might contribute to a reification and reproduction of the societal structures from which discriminatory practices emerged in the first place (see Baer, 2010; Naguib, 2012; Liebscher et al., 2012). Law might therefore not only serve in order to criticise unequal power relationships and practices that are perceived to be unjust, but also as a legitimation of current hierarchical relations (see Fuchs & Berghahn, 2012). Nevertheless, it must at this point be noted that even though the scope of application of article 261^{bis1} SCC might be limited, the political and social importance of the prohibition of racial discrimination should not be underestimated. To sum up, I would therefore argue that the way society and law interact when it comes to the accusation of discriminatory practices in court illustrates what Fuchs and Berghahn call the janus-faced character of law: “[Recht] als Mittel des Zwangs und der Herrschaft und gleichzeitig als Mittel der Befreiung und Weg zu neuen Handlungsmöglichkeiten” (2012, pp. 11–12). Finally, I would conclude that the present discussion based on how categories are used in the assessment of discriminatory practices does not only provide insights into this decision-making process but also highlights the limitations of law in the accusation of discrimination as a social phenomenon.

Besides this critical conclusion, it seems however necessary to point out the limitations of this papers discussions. First, as described in the introduction, I mainly focused on the categories race and ethnicity. In order to properly understand discriminatory practices, their assessment in court and how categories work in general, it must however be noted that they always work in relation to other categories, such as gender, sexual orientation or physical ability; an argument that has been broadly discussed in approaches on intersectionality (see

Crenshaw, 1991; Lutz, Vivar, & Supik, 2013). Furthermore, it must be indicated, that the analysis of the two cases has only drawn on the official document of the Swiss Federal Supreme Court. In order to understand how the judges came to the cited considerations and decisions, there would be a need to take into account their pre-concepts and background. Furthermore, it seems important to underline that while the court might have some leeway in their decisions, I would argue that their options for actions are equally framed in the latent power relationships that are inscribed in the legal texts.

Although these aspects highlight some crucial limitations of the present paper they at the same time point out a variety of different possible fields of research. Finally, drawing again on Brubaker (2002) and Fuchs and Berghahn (2012) the present theoretical and empirical discussion underlines the multifarious ways with which the study of categories can enlighten both how society and law interact and how ethnicity and race work in our society. What remains crucial in this, as researcher, is to do what actors in juridical context still might have to learn, namely treating categories as analytical and not as trivial categories.

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