The European silence on race: from *Timishev* to *Jyske Finans*

Lilla Farkas, EUI, supervisor: professor Claire Kilpatrick

Outline

✤ From the question of definition to the question of silence

✤ Key puzzles concerning the definition of racial or ethnic origin

✤ Minority responses to race as a label

✤ Ethnicity as substitute for race

✤ Cognitive dissonance: fighting (the victims of) racism

✤ European intent doctrine: no direct racial discrimination

From the definition of race through silence to the denial of racism

Advocate General Wahl's opinion in *Jyske Finans*

31. … in order to prevent and combat racism, it is **necessary to define the concept of 'race' itself** [which] has become increasingly unacceptable … Accordingly … **racial origin has** perhaps **ceded its pre-eminence in favour of the less overt** and tangible concept … of **ethnic origin** which … is a form of racial discrimination.

33. **[do] ethnic origins exist at all**?

The question in context

✤ law

  ✤ Mark Bell: 'supercategory' should be ethnicity

  ✤ Erica Howard: (in)direct religious discrimination should fall under RED

  ✤ Lahuerta: synergies and distinctions between racial or ethnic origin and nationality (*Kamberaj*)

  ✤ intersectionality: not yet argued under RED, but admissible (*Meister*)

✤ social science:

  ✤ race is a social construct (racialisation), race not = ethnicity, forms of racism

  ✤ silence on race

✤ political science: Islamophobia = racialisation (Modood, Parekh)

Key puzzles

✦ terminological profusion

  ✦ ethnic origin is not an organic European concept

✦ RED: is racial or ethnic origin a single category?

✦ a substantive or process based definition?

  ✦ composite (ICERD Article 1) and transversal category (temporal and spatial)

  ✦ constitutive elements protected separately: minority language, religion

  ✦ **constructionist analysis** responds to ascriptions

  ✦ what role for identity?

Profusion of terms

1. European minority rights regime: religion, language, national origin, race

2. UN

  ✦ ICERD Article 1: **any distinction based on race, colour, descent OR national or ethnic origin**

  ✦ ICCPR Articles 26 (equality: national or social origin) and 27 (ethnic minority rights: religious, linguistic, national)

3. European law

  ✦ Article 14 ECHR: race, colour, religion, national or social origin, association w a nat'l minority

  ✦ EC Treaty Article 12: EU nationality

  ✦ FCNM - Advisory Committee: also religion, nationality and migrant status

  ✦ RED: racial or ethnic origin

  ✦ EU Charter: also national origin, religion and colour

Minority responses to race as a label

✦ UK: BME, racial label adopted by minorities

✦ continental Europe: in general, racial label resisted

✦ groups fight for group-specific recognition of injury: Romaphobia, Islamophobia, Afrophobia, etc.

✦ the Roma- labelled by experts and European institutions?

  ✦ not recognized as a minority prior to 1995 (FCNM)

  ✦ diverse, **racialised** groups

  ✦ only group distinctly defined by ECtHR as ethnic:

Ethnicity as a substitute of race:
Timishev v Russia

• profiling: based on ascriptions & stereotyping

• ethnic discrimination is a form of racial discrimination (56.)

• reference to Article 1 ICERD to distinguish b/w race and ethnicity -reifies race, while providing a rich definition of ethnic origin (para. 55.)

• FCNM: Chechens are a national minority - not mentioned

• is self-identification relevant for ADL? 'actual or perceived ethnicity'

• **membership in** an ethnic or national minority - minority rights in ECHR

• construction of race not examined: ISLAMOPHOBIA

Ethnicity as a substitute: *Feryn*

- anti-Moroccan/immigrant speech act and hiring practices

- AG opinion: direct discrimination based on ethnic origin

- no definition of the ground in judgment

- CJEU: direct discrimination on the basis of racial or ethnic origin

- construction of race is not examined: xenophobia, Islamophobia

Ethnicity as a substitute: *CHEZ*

- reference to ICERD Art 1 (para. 73.)

- referring court: 'common Roma ethnic origin'

- … the **concept of ethnicity**, which has its origin in the idea of societal groups marked in particular by

  1. common nationality,

  2. religious faith,

  3. language,

  4. cultural and traditional origins and backgrounds, applies to the Roma community. (para. 46.)

Ethnicity as a substitute: *CHEZ II.*

✤ Roma district: 'neighbourhood lived in by a disproportionately high number of Roma'

✤ racial stereotype at hand: Roma criminality (as a genetic trait)

✤ collective nature of discrimination: 'together with'

Ethnicity as a substitute: *Biao v Denmark*

- applicant: Muslim of African origin seeking family reunification
- ground: 'ethnically not Danish' - comparators are ethnic Danish citizens
- highly politicised both at national and international level

- tight vote in chamber & remarkable joint dissent (Sajó et al.)
- *Grand Chamber:* indirect discrimination based on ethnic origin
- dissenting opinions: Albuquerque v 'moderates'

- no constructionist analysis: Islamophobia (marriage patterns: arranged, brides from Muslim families in Africa)

Throwing the baby out with the bathwater? *Jyske Finans*

✤ The applicant is Ismar Huskic

  ✤ born in Yugoslavia (now Bosnia and Herzegovina)

  ✤ moved to Denmark in 1993

✤ AG: law is `to provide guidance on the **relationship** b/w discrimination on grounds of ethnic origin, nationality and place of birth`

✤ Fighting racism: "1. What does a person's place of birth say about that person's ethnic origin? 2. Surprisingly little. 3. In truth, to hold that there is an inalienable bond between a person's place of birth and his being of a particular ethnic origin serves, in the final analysis, only to maintain certain **ill-begotten stereotypes**."

Rescuing the baby: JF II.

✤ defining race 'has become increasingly unacceptable in modern societies', therefore not a lawyer's task

✤ a 'proxy' of race alone is not sufficient to argue direct discrimination under RED (para. 39.)

✤ Denmark's argument "based on the **illusion** that place of birth, nationality and ethnicity go hand in hand … must be rejected" on the basis of textual analysis (para. 54.).

✤ the practical effect of the practice at issue does not suffice to establish direct discrimination (para. 55.),

✤ *c*onclusion*:* indirect discrimination under RED can be established as justification defense appears insufficient

The European intent doctrine

✤ substituting race with ethnicity, not examining racialisation: all judgments

✤ un-seeing racial intent: *Timishev, Biao, CHEZ indirect*

✤ addressing motive, rather than intent: *Feryn, CHEZ*

✤ finding indirect discrimination when direct discrimination is concealed: *Biao*

✤ severing the composite ground and finding indirect discrimination: AG in *Jyske Finans* (proxies or constitutive elements 'must not be conflated', para. 39.), also *Orsus & al v Croatia (minority language)*

Concealed direct discrimination

✤ Type 1: regardless of intent, homogenous group

   ✤ *Nikoloudi* & *Maruko*: when **only one, homogenous group** suffers less favorable treatment, direct discrimination must be established

✤ Type 2: intent

   ✤ *CHEZ*: targeting only Roma districts, but catching non-Roma as well

   ✤ *Biao*: targeting Muslims and doctoring the rule not to apply to ethnic Danes

   ✤ *Achbita* and *Bougnaoui*: targeting Muslims but catching Sikhs, etc.

Finding indirect discrimination denies protection to 'collateral victims'

✤ *CHEZ* direct discrimination part: Nikolova should be protected, as victim of racial stereotype 'together with' the Roma

✤ *Biao*: no, collateral victims should not be protected, because indirect racial discrimination

✤ *hijab cases*: as long as indirect discrimination against Muslim women, Sikhs are not protected