

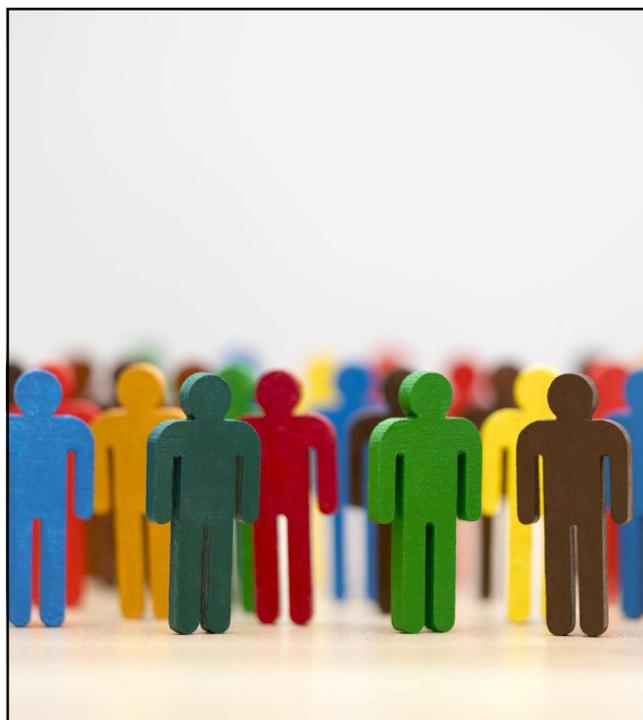
## CJEU CASE LAW ON DANISH GHETTO LAWS- A CASE STUDY OF EU ANTIDISCRIMINATION LAW

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### STRUCTURE OF TALK

- I. Context: Danish laws on public housing, **“the Ghetto” law legislation**
- II. **Key legal issues** referred to the CJEU
- III. EU constitutional law issues on EU competence to **regulate public housing legislation**
- IV. The meaning of **‘ethnic origin’** and **‘ethnicity’** within the meaning of EU anti-discrimination law
- V. The Danish legislation and Western-non Western criterion is **based on ethnic origin**
- VI. The Danish legislation constitutes **direct discrimination**
- VII. **Reflections**

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## CONTEXT- THE DANISH PLANS ON PUBLIC HOUSING

- Prior to the case, the Danish Government had drawn up a strategy entitled ‘Ét Danmark uden parallelsamfund – Ingen ghettoer i 2030’ (‘A Denmark without parallel societies – No ghettos 2030’), which emphasised the desire for a cohesive Denmark ‘**without parallel societies**’ among people with a non-Western background
- ‘the central challenge in [parallel societies] is **the lack of integration** of immigrants and their descendants from non-Western countries’
- The central dispute is concerned with certain specific Danish rules on **public housing** that have been introduced in 2018 and 2021 **to address the issue of ‘cohesion’ and the rise of parallel societies**

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## CONTEXT II- THE DEVELOPMENT PLANS GIVING RISE TO THE LITIGATION

- The Danish laws require the public housing associations owning such areas to draw up a **development plan** setting out how the proportion of public housing units in the transformation areas is to be reduced to **40% by 1 January 2030**
- This may include the sale of properties to private developers, demolition, or conversion of family housing into housing for young people- In such cases, the leases of the previous tenants **must be terminated**
- Tenants who found themselves in such a situation in two transformations areas — the Schackenborgvænge estate in Slagelse, and Mjølnerparken estate in Copenhagen — were challenging the **legality of development plans adopted on the basis of the Danish legislation**



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## REFERRING COURT'S QUESTIONS

Must the term “**ethnic origin**” in Article 2(2)(a) and (b) of the EU Race or Ethnic Origin Directive be interpreted as meaning that that term, there must be a **reduction in the proportion of social family housing in “transformation areas”**, and where it is a condition for **categorisation as a transformation area** that more than 50% of residents in a housing area are “**immigrants and their descendants from non-Western countries**” – covers a group of persons defined as “immigrants and their descendants from non-Western countries”?

If so, must Article 2(2)(a) and (b) of the Directive be interpreted as meaning that the scheme described in the case constitutes **direct or indirect discrimination**?

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## OPINION BY THE ADVOCATE GENERAL- KEY POINTS

The Race or Ethnic Origin Directive applies only if a distinction between Western and non-Western immigrants **and their descendants can be understood to be based on the criterion of ‘ethnic origin’** - AG refer to that distinction as the ‘Western/non-Western criterion’

He proposes to the Court that the Western/non-Western criterion indeed falls within the concept of ‘**ethnic origin**’

All this leads to the conclusion that the discrimination that results therefrom is **direct discrimination**

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## DOES THE LAW ON PUBLIC HOUSING ENTAIL ACCESS TO AND SUPPLY OF GOODS AND SERVICES INCLUDING HOUSING WITHIN THE MEANING OF ARTICLE 3(1) OF THE RACE AND ETHNIC ORIGIN DIRECTIVE?

- I. AG argues that Danish public housing is a **service**, based on legislative history of directive and a reading of the Danish rules, and thus captured by **Article 3(1)(h) of the Race or Ethnic Origin Directive**
- II. The associations are **not-for-profit organisations** whose aim is to offer affordable housing to the inhabitants of Denmark (there is **no income limit for entry** and anyone over 15 years of age can register (for a fee) on waiting lists)
- III. The **rent of housing is lower than the market price**, as it is solely meant to cover the costs of the operation of the housing units with the addition of provisions for maintenance

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## CAN THE DIRECTIVE REGULATE PUBLIC HOUSING IN THIS WAY FROM AN EU CONSTITUTIONAL LAW PERSPECTIVE?

- Since the present case concerns national legislation on public housing – a policy area that the Treaties **do not confer to the regulatory competence of the EU**– the question referred raises a more general, constitutional issue of whether the Race or Ethnic Origin Directive is applicable to such a policy **without encroaching on national competences**
- EU law does limits, to a certain extent, the choices available to Member States when developing their public housing policies – in particular, they **cannot adopt public housing policies that discriminate on the basis of ethnic origin**
- In imposing such a limit, the EU does not, however, acquire competence **over public housing, that is to say, it cannot replace or impose certain types of housing policy on Member State**



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## DEFINITION OF ETHNIC ORIGIN

- The use of the term '**ethnic origin**' in the EU Race or Ethnic Origin Directive should be read together **with the term 'race', as referring to a social construct** – a perception in a given society of the existence of a group that is recognisable as different on the basis of certain **socio-cultural characteristics, such as language, literature, music, customs or similar**
- As this Directive strives to put into effect one of the **fundamental values of the European Union, the principle of equality**, as enshrined in Article 2 TEU the notion of 'ethnic origin' should be given a **broad interpretation**

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## PREVIOUS CASE LAW OF THE COURT ON THE DEFINITION OF ETHNIC ORIGIN



*CHEZ*: the concept of 'ethnicity' groups persons on **the basis of several common characteristics**, some of which are **prohibited grounds of discrimination** in themselves (religion, and in certain circumstances, nationality) whilst others are not (language, cultural and traditional origins and backgrounds)



In *Jyske Finans*, the Court confirmed that the list of characteristics of ethnicity that appears in *CHEZ* is not exhaustive- It considered that the **country of birth might also be one of the criteria to determine a person's ethnicity**, even if that characteristic was not mentioned in *CHEZ*



However, at the same time, the Court considered in *Jyske Finans* that the ethnicity of a person cannot be determined on the basis of a single criterion but is based on a whole **number of factors, some subjective and others objective**

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## THE HOMOGENEITY OF A GROUP TREATED LESS FAVOURABLY- FERYN

In *Feryn*, neither the Court nor any of the parties had raised the question of whether the **group** that was **treated less favourably** – the ‘*allochtonen*’ – could be understood as a group based on **ethnic origin**

As in the situation in the Danish Ghetto law case, the ‘*allochtonen*’ were not an **ethnically homogeneous group**- rather, the employer’s statement discriminated **against all ‘foreigners’**, as opposed to autochthons or to a group of people perceived not to be foreigners

Thus, tacitly, the Court accepted that the Race or Ethnic Origin Directive also applies when the group discriminated against is not a homogenous ethnic group, **but the less favourable treatment is nevertheless based on the criterion of ‘ethnic origin**

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## THE ‘WESTERN/NON- WESTERN’ CRITERI ON USED BY THE DANISH LEGISLATION IS BASED ON ETHNIC ORIGIN

- In the Danish Ghetto case, ‘immigrants and their descendants from non-Western countries’ are placed in a **different group from immigrants and their descendants from Western countries** on the basis of several factors that point to the fact that the perceived ethnic origin was a reason for distinguishing between the two: **nationality, place of birth and descent**
- A person belongs to the former group if his or her nationality or the nationality of their parent(s) is **not Danish or from a Western country**, if their place of birth is **not Denmark or a Western country**, and if their descent, demonstrated by the place of birth of their parent(s), is **not Danish or a Western country**
- Therefore, as the criterion on the basis of which the Danish law distinguishes between ‘Western’ and ‘non-Western’ is that of ‘ethnic origin’, the Race or Ethnic Origin Directive is **applicable**

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## DIRECT ETHNIC DISCRIMINATION

- To establish **direct ethnic discrimination**, it is necessary to establish that a person (or a group of persons) is treated **less favourably** than another person (or group of persons) **based on** the criterion of ethnic origin
- Direct discrimination on two grounds in the Danish Ghetto case: The first and obvious manifestation of adverse treatment is **the unilateral termination of leases** in public housing units **or a possibility thereof**
- The second, less visible manifestation of adverse treatment is the **stigmatisation of an ethnic group**

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## ALTERNATIVE SOLUTION: INDIRECT ETHNIC DISCRIMINATION

- AG suggests that the influence of the Law on Public Housing on the **termination of the leases** should at least be interpreted as **indirect discrimination**
- Under Danish law, development plans, which in some cases led to the unilateral termination of leases, are to be established **only in the areas in which more than 50%** of the inhabitants are 'immigrants and their descendants from non-Western countries'
- **Simple mathematics applied** to such a situation suggests that there is a better chance that the **lease of a 'non-Westerner' will be terminated than the lease of a 'Westerner'** because it is known in advance that there are more 'non-Westerners' than 'Westerners' living in the neighbourhood

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# JUSTIFICATION FOR INDIRECT ETHNIC DISCRIMINATION



Danish government argues that measures in neighbourhoods in which the majority of the population are 'non-Westerners' are taken in order to enable **their better integration into Danish society**- Changing the structure of the neighbourhood is understood as **enhancing such integration**



AG is sceptical that the Danish public housing legislation can be justified by the **aim of enabling integration** of the 'immigrants and their descendants from non-Western countries'

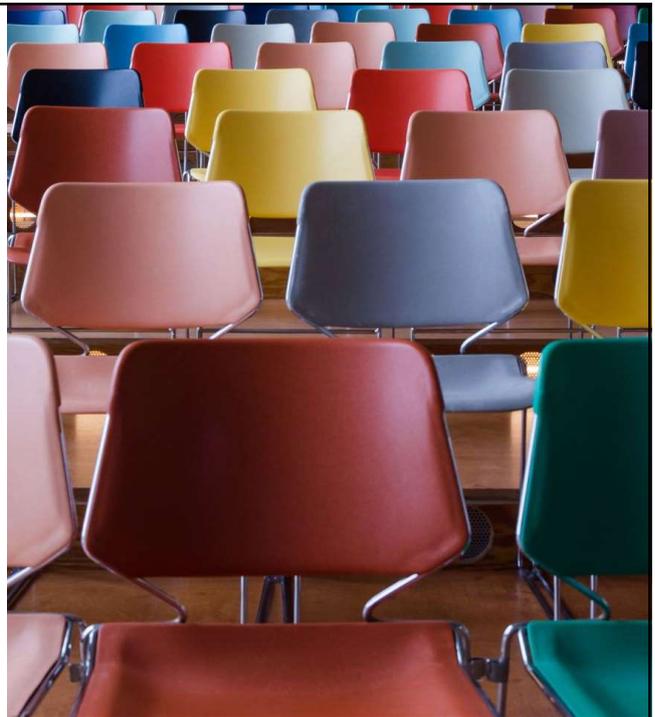


He did not find it convincing that the influence of the 'Western/non-Western' criterion used by the Law on Public Housing on the termination of leases can be construed as **representing a neutral rule**

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## REFLECTIONS

- There are compelling legal reasons to expect that the **CJEU will follow the opinion by the Advocate General**
- The CJEU is likely to find **direct discrimination (the western-nonwestern criterion)** and at least indirect discrimination
- There is **no apparent convincing justification** proposed by the Danish government to defend the scheme



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