

The European Court's Engagement with Systemic Discrimination

ERA Current Reflections on EU Anti-discrimination law

Professor Kristin Henrard, Brussels School of Governance

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Overview

1. Introduction: systemic discrimination
 1. Groups
2. Attention points for international courts (background of systemic discrimination)
3. Different courts – different baselines – selection of groups
 1. ECSR
 2. ECtHR
 3. CJEU
4. Conclusion

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1. Introduction

- **systemic discrimination**
 - Core understanding
 - knock-on effects
 - 'entrenched in social behaviour and organization'
- Two dimensions of the **right to equal treatment**
 1. Effective protection against invidious discrimination
 2. Duties of differential treatment (distinct identity)
- Groups in Europe suffering widespread discrimination

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2. Attention points for (international) courts when **context of sustained prejudice against a group**

- **international courts** have an important role in breaking the cycle
- **First: Importance of acknowledging** – identifying background of systemic discrimination
- **Second: implications for Review!**
 1. Courts need to be sufficiently probing (level of scrutiny)
 2. Implications for the special allocation of the burden or proof:
Lowering threshold for *prima facie* case
 3. Systemic discrimination often mix of indirect and direct discrimination
?hidden direct discrimination
 4. Implications for remedies

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3. Comparative analysis of three Regional European Courts

4.1 European Committee of Social Rights

4.2 CJEU

4.3 European Court of Human Rights

- Different courts – different complaints procedures - different base line
- Group specific?
- Theme/topic specific?

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3.1 European Committee of Social Rights

- **Collective complaints:** per se broader picture and structural problems
- Generous **non discrimination** jurisprudence
- Embrace of **substantive equality**
- **Socio –economic rights** : strong on positive state obligations
 - **EFFECTIVE** enjoyment
 - **tailored to the needs of the particular group**
- **Variety of issues regarding Roma** before ECSR: mostly related to housing and access to health care

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3.1. ECSR ctd

■ Holistic view:

- **considering knock on effects:** problematic housing – no effective access to education – employment - housing and health care
- no effective access to remedies

■ Throughout the jurisprudence:

- *pronounced awareness for the background of systemic discrimination of Roma* and their resulting vulnerable position
- *High level of scrutiny*
 - knock-on effects
 - Exposing interrelation of discrimination in **horizontal and vertical sphere**
 - Critical about high levels of discretion among local authorities

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3.1. ECSR ctd

- **Burden of proof** collective complaint:
Heavy reliance on reports of NGOs and UN treaty bodies etc.
- extensive engagement with *positive state obligations*,
 - Including duties of differential treatment
 - while being keen to **sufficiently tailor these to the Roma's specific needs**
 - **pro-active approach**,
 - also: pro active approach needed to ensure **access to remedies**

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3.2 CJEU

- CJEU keen to develop its non discrimination jurisprudence
 - Common market
- Early on a **sophisticated understanding of discrimination**
 - Indirect discrimination
 - **De facto acknowledging systemic discrimination**
 - Fleshing out group disadvantage AND seeking to address it
- **Procedures:**
 - **Infringement procedures:**
 - ideal for systemic discrimination : situated at the aggregate level, enduring and widespread problems
 - **Preliminary ruling procedure:** guidance for all national courts

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3.2.1 CJEU and Roma: Chez

- *CHEZ case (Nikolova case)*
 - Electricity meters at 7 meters height only in areas predominantly inhabited by Roma
- Keen awareness of context of systemic discrimination of Roma
- broad interpretation of standing requirements: recognition of discrimination by way of collateral damage
- **Fact specific guidance – relevant factors**

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3.2.1 CJEU Chez ctd

- **High level of scrutiny** in preliminary rulings?
 - very detailed guidance to national court
 - CJEU more or less deciding the national case, keeping control
 - akin to high level of scrutiny
- Many questions about dividing line between direct and indirect discrimination
 - Hidden direct discrimination
- EU law: distinction between **direct and indirect discrimination** important
 - Degree of directness of causal link between differentiation and ground/race
 - Court envisages both 'routes' – confirming BLURRY LINE- but...

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3.2.1 CJEU: Chez

- Very detailed guidance: **hidden direct discrimination**
- Attention for underlying prejudice against Roma
- Providing several **factors** pointing towards finding of '**direct discrimination**' (on grounds of race)
 - Only placed in districts where majority are Roma
 - Company's assertion -----stereotype and prejudice
 - No proof of damage -----prejudice
 - Sweeping and lasting nature of measure: prejudice
- **Indirect discrimination:**
 - offensive and stigmatising nature of the practice at issue
 - excessive disadvantage for victims
 - other appropriate measures that are less disadvantageous

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3.2.1 CJEU, Roma, Education: *Commission v Slovakia*

■ Infringement proceedings

- Segregation of Roma children in special schools or special classes
- long line of cases of ECtHR challenging this problem against various eastern European states
 - Ongoing problems
- Commission claims indirect discrimination

■ AG Capeta

- Infringement proceedings indeed to address widespread problems
- Indirect discrimination and goal to combat structural inequalities in societies
- Actually: direct discrimination = segregation in education
- Overall in favour of high scrutiny
 - Direct discrimination!
 - Identifying absolute obligations of result to counter segregation

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3.2.2. CJEU – Muslim minorities

- Employment Equality Directive
- Employers neutrality rules: prohibiting employees the wearing of signs of political; philosophical or religious beliefs
 - Both companies as public authorities
 - Neutrality rules or targeting particular religions? Hidden direct discrimination?
- **Level of scrutiny** started very low (as long as general rules consistently applied)
 - *Commune d'Ans* – broad margin of appreciation
- **Oblivious of Islamophobic background** – also context in which neutrality rules emerged
 - Some increase over time against companies: 'genuine need'
 - Only blatant cases of hidden direct discrimination

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3.2.3 CJEU and migrants generally

- Human rights mainstreaming
 - But common market – EU citizens versus TCN
 - Exclusion clause in 2000 Equality Directives
 - indirect racial discrimination?
 - 'racial or ethnic origin' interpreted as implying 'a certain racial or ethnic origin'
 - Problem: No protection against xenophobic measures
- **Danish Ghetto case**
 - Opening up the notion of racial or ethnic origin
 - AG: Western v non-Western origin as inherently ethnic construct
 - CJEU leaves door open – develops both reasoning towards direct and indirect discrimination
 - Still steering towards direct discrimination

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3.3 European Court of Human Rights

- Discrimination: jurisprudence rather reticent
- Individual complaints: focus on specific case – specific circumstances
 - unease with a group dimension and broader contextual information
 - Long journey towards acceptance indirect discrimination
- **Contextual information** into account – to some extent

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3.3.1 Acknowledging systemic discrimination?

- ▶ ECtHR recognises 'structural vulnerability' of certain groups that face historical disadvantage, social exclusion, prejudice... systemic discrimination
 - ▶ Roma,
 - ▶ Persons with a disability
 - ▶ Persons with a mental disability
 - ▶ asylum seekers...
- ▶ Some other groups that are widely recognised as facing ingrained, deep seated discrimination, **the Court does not acknowledge**
 - ▶ Muslim minorities and Islamophobia
 - ▶ Tendency to ignore Islamophobic background -
 - ▶ Linguistic minorities living in a world in which society is organised in terms of the dominant language
 - ▶ A contrario reasoning
 - ▶ Implications for effective access not acknowledged

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3.3.2 ECtHR and systemic discrimination against Roma: mixed

- ▶ **Promising judgements:**
 - ▶ Roma's equal and effective access to quality education
 - ▶ State duties to redress ongoing effects of past discrimination
 - ▶ Increasing demanding positive obligations to counter segregation
 - ▶ *Forced evictions: procedural safeguards, requirements for alternative accommodation...*
- ▶ **No proper recognition** of background of systemic discrimination
 - ▶ lack of access to appropriate standing places for caravans,
 - ▶ lack of access to housing sanitation: the *Hudorovic* case
 - ▶ discriminatory violence
 - ▶ ...

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3.3.3 ECtHR and religious minorities

- Religion is not recognised as a suspect ground
- Steady line of jurisprudence: **broad margin of appreciation** for states when church-state relations
 - Except when Common European Standard
 - No (explicit) duties of reasonable accommodation
- At times recognising patterns of structural disadvantage
 - Jehovah Witnesses in Russia (pattern of state hostility)
 - Alevi in Turkey: systematic disadvantage to Sunni Islam`
- Critically missing: recognition of Islamophobia in Europe
 - Case law on religious garments: education – public space – public office

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3.3.4 ECtHR and linguistic minorities

- Avoidance of any recognition of structural disadvantage
 - ECHR few linguistic rights: **a contrario**
 - Not in education; communication public administration etc
 - **Broad margin of appreciation**
- Contrary to academia
 - Systemic patterns of linguistic exclusion
 - Structural disadvantage in education – access to employment (also public administration and media)
- Some tentative steps in relation to the medium of instruction

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4. European regional courts and systemic discrimination: status quo and future perspectives

- The **European Committee of Social Rights**: outstanding
 - The collective complaints make it attentive per se for the broader context
 - Also positive for BoP (for indirect discrimination)
 - High level of scrutiny, demanding positive state obligations, holistic approach
- **CJEU** infringement procedures similarly promising
 - Commission should be more careful with its Reasoned Opinion
 - CJEU interpretation to be/remain teleological and evolutive
- CJEU preliminary rulings in relation to cases with systemic discrimination background:
 - Advised to give detailed guidance (high level of scrutiny)
 - Be attentive for hidden direct discrimination: also for Islamophobia and Xenophobia (not only Anti-gypsyism)
- **ECtHR**: mixed account against reluctant baseline (evaluating discrimination)
 - Call for a teleological and evolutive interpretation, aimed at the effectiveness of rights, and substantive equality
 - Also for religious and linguistic minorities
 - Acknowledge Islamophobia!