

Tackling Structural Discrimination and Institutional Racism in Constitutional Adjudication

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How can structural discrimination and institutional racism cases reach constitutional courts?

Individual complaints

- Through individual discrimination cases that were already adjudicated before courts of lower instances
 - Actions filed due to discrimination
 - Procedures in which parties experienced discrimination

Abstract review of laws

- When/if discrimination is enshrined in law
 - Rare case in contemporary times
 - Higher possibility that these would be indirect discrimination cases



Race and Ethnicity in Constitutional Court Decisions

- **Structural discrimination as a practice:** It is difficult to deal with cases of structural or systemic racial or ethnic discrimination that is not enshrined in the law but exists in practice.
- As currently structural discrimination is no longer very visible in the national laws, with regard to ethnicity or race the constitutional courts mostly deal with cases of either:
 - **minority protection,**
 - **positive (affirmative) action,**
 - **legal status,**

which are all related at to possible structural discrimination or social disadvantages.

Example - Slovenia

- **No decisions** of the constitutional court on structural discrimination on the grounds of race, that would **explicitly** refer to the concept of structural or institutional discrimination
- But there are cases which are **indirectly related** to structural discrimination
- Example: **Political participation of Roma communities**
 - Case no. U-I-416/98 of 22. 3. 2001: The Constitutional Court found a legal void since the law did not define the criteria to determine which municipality should hold elections for Roma representatives in municipal councils
 - Reasons for having Roma representatives in municipal councils are related, inter alia, to issues and challenges of structural discrimination

Example – Germany

- In Germany, the **Federal Constitutional Court** – FCC (*Bundesverfassungsgericht*) which is one of the most influential constitutional courts in the world, has not often dealt with structural discrimination in this strict sense.
- As a matter of constitutional law, the FCC addresses such questions mostly as questions of the **general right to equal treatment**.
- One of the reasons why this is so is the lack of data on ethnicity and race. Germany (and many other countries) is **not collecting this data** (for historical reasons).
- Hence it is not easy or even possible to establish that structural discrimination on the grounds of ethnicity or race exists, let alone drawing such conclusion by the relevant constitutional courts.

Example – Germany

- Hence, constitutional judicial adjudication mostly relates to groups determined by their **legal status**, e.g. asylum seekers, people in different migration statuses.
 - In 2012, the German Constitutional Court ruled that benefits provided under the Asylum Seekers Benefits Act are insufficient to **lead a life in dignity**. It declared particular provisions unconstitutional, as they contradicted the principle of equality, and the welfare state principle of a life in dignity. (1 BvL 10/10 and 1 BvL 2/11, 18 July 2012)
 - In 2022, the Constitutional Court again declared specific provisions of the Asylum Benefit Act as unconstitutional and insufficient to enable individuals to **lead a life in dignity**. (1 BvL 3/21, 19 October 2022)
- **Discussion:** indirect systemic discrimination on the grounds of ethnicity/race, considering the principle of proportionality (legitimate aim, means appropriate, necessary and proportionate)?

Examples related to burka ban

- Related to religion
- But these bans are included in the **legislation** and can be subject to **abstract review** by the constitutional courts
- At the same time, they have a strong ethnic/racial conotation through the concept of **indirect discrimination** – these bans often affect not only religious but also ethnic/racial minorities
- German example:
 - **German Federal Constitutional Court** decided in 2015 that a general headscarf ban is not compatible with the Constitution. A blanket prohibition of hijabs would constitute an intersectional form of gender-based discrimination against headscarf-wearing Muslim women.

Example: France – Laïcité as an obstacle to constitutional protection

- **The French Council of State's position:** „racial and ethnic origins are not objective legislative criteria and conflict with Article 1 of the French Constitution“
- Race and ethnicity are understood to be clashing with the universal republican view of citizenship
- France adopted several **territorial measures** that were detrimental to minorities, not measures based on people's identities, and they have mostly passed constitutional review.
- This approach of the Council of State has been **criticised** as short-sighted and lacking attention to structural discrimination.

Example: France – Lack of Judicial Mandate to Determine Policies

- France: Class action of six civil society groups
- **France's Council of State** on October 11, 2023, acknowledged the existence of discriminatory police checks against Black and Arab men and boys that constitute a “blatant disregard of the prohibition of discriminatory practices.”
- However, the Council of State **decided not to exercise its authority** to order the French state to take the necessary measures to end the practice. It stated that such orders would require a complete redefinition of the police to suppress crime and prevent disruptions to public order. These, however, are not the competencies that the administrative courts would have.
- Hence, the complaints of the civil society groups were rejected.
- Case No. 454836, 11 October 2023

US Experience: Jim Crow laws

- The most typical examples of structural discrimination were the so-called **Jim Crow laws**.
- Those were a **collection of state and local statutes** that legalized racial segregation. “Jim Crow” was a pejorative term for an African American.
- The laws—which existed for about 100 years, from the post-Civil War era until 1968—were meant to **marginalize African Americans** by denying them the right to vote, hold jobs, get an education or other opportunities.
- Those who attempted to defy Jim Crow laws often faced arrest, fines, jail sentences, violence and death.
- The last of the Jim Crow laws were **overturned** in 1965.

Supreme Court of the United States (SCOTUS)

- In 1896, the US Supreme Court issued its decision in *Plessy v. Ferguson* in which Jim Crow laws were **upheld**.
 - In the case SCOTUS laid out its "**separate but equal**" legal doctrine concerning facilities for African Americans. Context: Public education had been segregated since its establishment in most of the South after the Civil War (1861–1865).
- In 1954, segregation of public schools (state-sponsored) was declared unconstitutional by SCOTUS in the landmark case *Brown v. Board of Education of Topeka*.

SCOTUS: Abandoning Affirmative Action

- Recently there was a **shift in constitutionalism** concerning affirmative action in the US.
- On 29 June 2023, SCOTUS issued a decision addressing the legality of race-conscious affirmative action in college admissions programs in ***Students for Fair Admissions v. Harvard and University of North Carolina*** (Nos. 20-1199 & 21-707).
- In a 6–3 ruling, the Court held that Harvard and UNC’s admissions programs, which account for race at various stages in the process, **violate the Equal Protection Clause** of the Fourteenth Amendment to the U.S. Constitution.
- The decision has been criticized for **political bias**.

Judicial Bias in (Highest) Courts

- In decision-making in courts, including the highest courts, judicial bias is an issue. **Political biases** of judges, but also other legally irrelevant characteristics of judges, such as ethnicity and gender, may impact their decision-making.
- As the research demonstrates, characteristics such as race, ethnicity, and gender can sometimes predict judicial decision making in limited kinds of cases. However, the literature also suggests that these characteristics are far less important in shaping or predicting outcomes than is **ideology** (or **partisanship**), which in turn correlates closely with gender, race, and ethnicity.
- Given that the application of the law rarely provides one objectively correct answer, it is no surprise that judges' decisions vary according to their **personal backgrounds** and, more importantly, according to their **ideology**.

Judicial Bias in (Highest) Courts

- SCOTUS judge **Sonia Sotomayor** stated in 2002, before she was elected judge, that she: “would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life”.
- Years later, herself a nominee to the Supreme Court, Sotomayor tried to distance herself from her earlier comments. She announced in her 2009 confirmation hearings: “I do not believe that any racial, ethnic or gender group has an advantage in sound judging. I do believe that every person has an equal opportunity to be a good and wise judge, regardless of their background or life experiences”.
- Studies show she was right. Judges’ backgrounds— including their race, gender, ethnicity, and religion—shape their decision making, due to their „lived experience“.

Representation Matters

- The most important requirement for becoming a judge is **merit**: knowledge, experience, professionalism and integrity.
- However, it is also widely recognized in modern constitutionalism that **composition of the courts matters** and that it has to reflect the diversity and plurality in the society. See, e.g. Venice Commission statements.
- This does not only concern world views and prior work experience of the judges, but also other criteria, such as **ethnic, geographic ad linguistic** aspects.
- Regardless of this, the judges then still have to act **independently in a personal capacity** and not as a representative of a particular group. But bringing in their „lived experiences“ increases the legitimacy of their decision-making.



Thank you for your attention!