

# ‘Discrimination on grounds of race: focus on xenophobia and Islamophobia’

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# Outline

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- ❖ Define or not to define, that is the question ...
- ❖ Race, racism, racial or ethnic origin, national origin
- ❖ The types and objects of racism: xenophobia - “the foreigners”, anti-semitism - “the Jews”, Afrophobia - “the Blacks”, Romaphobia - “the Gypsies”, Islamophobia - “the Muslims”
- ❖ Minority responses to race as a label
- ❖ Racial or ethnic origin as a “category of practice”: from self-identification to presumption



# Define or not to define ...

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- ❖ Racial Equality Directive

- ❖ (5) The European Parliament has adopted a number of Resolutions on the fight against racism in the European Union.
- ❖ (6) **The European Union rejects theories which attempt to determine the existence of separate human races.** The use of the term "racial origin" in this Directive does not imply an acceptance of such theories.
- ❖ (7) ... the Commission to come forward as soon as possible with proposals ... as regards the fight against racism and xenophobia.
- ❖ prohibiting discrimination 'on the grounds of racial or ethnic origin'
- ❖ EU Charter: race, ethnic origin, etc.
- ❖ Framework decision on combating racism and xenophobia by means of criminal law: religion included, ethno-religious minorities protected against violent racism



# Define or not to define ...

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- *Feryn*: persons of Moroccan origin protected, but not defined
- *CHEZ*: Roma as an ethnic group protected and defined
- *Jyske Finans*: foreigners as a group of ethnic non-Danish citizens not protected, because they are defined as a group of diverse ethnic origins
- ???: how to define European Muslims who are treated less favourably based on anti-Muslim stereotypes, rather than on the basis of their religious belief?



# Define or not to define ... Scholars

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## ❖ 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*)
- ❖ intersectional discrimination (Schiek et al): not yet argued under RED, but see (*Meister*)

## ❖ social science:

- ❖ race is a social construct (racialisation),
- ❖ many, group-specific forms of racism, interlinked phenomena, such as xenophobia and nationalism
- ❖ political science: Islamophobia is similar to anti-semitism (Modood, Parekh)



# Key puzzles

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- ❖ no clear definition of racism
- ❖ group specific, rather than a single form of racism: xenophobia, nationalism, anti-semitism, Islamophobia, Romaphobia and Afrophobia racism?
- ❖ with few exceptions, groups reject the racial label in Europe?
- ❖ is racial or ethnic origin a single category?
- ❖ what role for identity?
- ❖ what role for stereotypes, presumptions, assumption and associations?



# Minority approaches

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- ❖ UK: BME, racial label adopted by minorities
- ❖ continental Europe: in general, racial label rejected
- ❖ fight for group-specific recognition of stereotype and injury: anti-semitism, Romaphobia, Islamophobia, Afrophobia, etc.
- ❖ the group “foreigners” does not exist, yet it does exist as a social construct
- ❖ groups refuse negative labels and embrace positive ones, e.g. Muslims self-identify on the grounds of religion, but suffer from racial stereotyping and racism



# The ground in *Feryn*

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- **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**
- the social construction of the protected ground is not examined: xenophobia, Islamophobia



# The ground in *CHEZ*

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- reference to ICERD Art 1 (para. 73.)
- referring court: 'common Roma ethnic origin'
- CJEU: ... 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.)



# The ground in *Biao v Denmark*

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- 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'
- the ground as social construct: Islamophobia (targeting arranged marriages involving Muslim brides from Africa)



# Failing to recognise xenophobia: *Jyske Finans I.*

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- ❖ Ismar Huskic was born in Yugoslavia (now Bosnia and Herzegovina) and 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.**”



# Failing to recognise xenophobia: *Jyske Finans II*.

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- ❖ defining race 'has become increasingly unacceptable in modern societies', therefore not a lawyer's task: "... 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. (para. 31.) **do] ethnic origins exist at all?"** (para. 33.)
- ❖ 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" (para. 54.),
- ❖ AG conclusion: indirect discrimination under RED can be established as justification defense appears insufficient



# Failing to recognise xenophobia: *Jyske Finans III*.

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CJEU did not find discrimination in any form:

- '[...] a person's country of birth cannot, in itself, justify a general presumption that that person is a member of a given ethnic group such as to establish the existence of a direct or inextricable link between those two concepts' (para. 20.)
- Racial or ethnic origin was simply not at play, therefore it is not needed to assess the necessity and proportionality of the profiling practice at hand.
- In order to establish less favourable treatment, all the effected non-Danish ethnic origins must be specified, i.e. rather than treated as a single group (ethnic non-Danes, "the foreigners"), groups based on countries of origin must be compiled and compared to ethnic Danes one by one. (paras 31-35.)



# Racial or ethnic origin as a “category of practice”

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Consider race as a ‘category of practice’! (Loveman)

- (1) do not confound categories with groups,
- (2) do not reify race and
- (3) do not maintain an unwarranted analytical distinction between race and ethnicity.

Understand race, ethnicity and nationalism by leaving aside the group-based categories of race, ethnicity and nation and consider the dynamic process of race-making. Take the same approach to European Muslims of immigrant background! (Brubaker)

How is race or ethnic origin “practiced”?

- **Self-identification,**
- **Assumption/presumption,**
- **Association**