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BREAKING THE INVISIBLE CAGE: LIMITS OF LAW IN STRUCTURAL DISCRIMINATION

di Milica V. Matijević e Ana M. Zdravković

Abstract: *The paper aims to map elements for a legal definition of structural discrimination as a complex form of discrimination with far-reaching implications across various societal domains. By drawing on sociological theories, it elucidates the relationship between structural inequalities and entrenched social processes and argues that structural discrimination arises from historically established social structures that perpetuate disadvantage for certain groups. The analysis investigates whether the concept of indirect discrimination is an appropriate answer to this challenge. Finally, it seeks to clarify the relationship between structural discrimination and substantive equality, ultimately contributing to a more nuanced understanding of how far we can go in using legal tools to combat discrimination and achieve a greater level of societal equality.*

Abstract: *L'articolo mira a mappare gli elementi per una definizione legale di discriminazione strutturale come forma complessa di discriminazione con implicazioni di vasta portata in vari ambiti sociali. Basandosi su teorie sociologiche, l'articolo chiarisce la relazione tra disuguaglianze strutturali e processi sociali radicati e sostiene che la discriminazione strutturale deriva da strutture sociali storicamente stabilite che perpetuano lo svantaggio per determinati gruppi. L'analisi si concentra sul quesito se il concetto di discriminazione indiretta sia una risposta appropriata a questa sfida. Infine, la ricerca ambisce a chiarire la relazione tra discriminazione strutturale e uguaglianza sostanziale, contribuendo in ultima analisi a una comprensione più sfumata sui limiti dell'uso di strumenti legali per combattere la discriminazione e per raggiungere un livello maggiore di uguaglianza sociale.*

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SUMMARY: 1. Introduction. – 2. The notion of structural discrimination. – 2.1. Social structures, structural inequalities, and structural injustice. – 2.2. Structural discrimination and the history of oppression. – 3. The elements of a legal definition of structural discrimination. – 4. Indirect discrimination as a response to structural injustice. – 5. Conclusion.

1. Introduction

Between 1996 and 1999, a group of eighteen Czech nationals of Roma origin were enrolled in “special schools”, which were designated for children with learning disabilities who were unable to attend regular primary schools¹. The decision to enrol a child in a “special school” is made by the head teacher based on intelligence tests mandated by law, with the parents or legal guardians’ consent, which was provided in this case². Prior to a change in Czech legislation in 2000, students in “special schools” were not permitted to pursue secondary education beyond vocational training³. What is more, the “special schools” also followed a special, inferior curriculum that was supposed to be adapted to the intellectual capacity of such students⁴. The group challenged this practice, arguing that they were not adequately informed about the consequences of the placement, which led to them receiving an inadequate education, as well as that the placement system for “special schools” was discriminatory, resulting in *de facto* segregation of schools based on race, since mostly Roma students were assigned to “special schools”, whereas the majority of pupils attended “ordinary schools”⁵. In the decision delivered in 2007, the European Court of Human Rights (hereinafter: ECtHR) found that there has been a violation of applicants’ rights, namely the prohibition of discrimination in conjunction with the right to education, because the educational system for Roma children lacked provisions to ensure safeguards for their unique needs as a disadvantaged group⁶. This resulted in their placement in “special schools”

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1. ECtHR, *D. H. and Others v. The Czech Republic*, App. No. 57325/00, Judgment of 13.11.2007, para. 19.

2. *Ibid*, para. 20. It is worth noting that for some applicants, the dates on the consent formulars were later than the dates of the decisions to place children in “special schools”, as well as that some dates have been corrected by hand.

3. *Ibid*, para. 25.

4. *Ibid*, para. 49.

5. *Ibid*.

6. *Ibid*, para. 207.

that offered a more basic curriculum compared to a regular one and isolated them from peers in a broader community, which all compounded their difficulties while hindering their personal development instead of addressing their actual needs or assisting them in integrating into “ordinary schools” to acquire skills conducive to life within the majority population⁷. The difference in treatment was not shown to be objectively and reasonably justified and there was no reasonable relationship of proportionality between the means used and the aim pursued⁸.

Roma people in Hungary also disputed the educational system’s practice of segregating children with mental disabilities into separate “remedial schools” with limited educational opportunities compared to mainstream schools, which took place during the early 2000s⁹. Applicants were continuously diagnosed with a mild mental disability and placed in a remedial school despite showing good academic progress, while their parents were not involved in the assessment process¹⁰. Moreover, the expert panel recommended remedial schools based on their own criteria, which differed from the WHO standard for diagnosing mental disabilities¹¹. However, in 2005, they were both tested at a summer camp by a group of independent experts who found that they were not mentally disabled and recommended mainstream schooling, noting issues with the diagnostic methods used since children could have made better results if the tests had not been created for the ethnic majority¹². It was also emphasised that remedial education itself can have significant impact on the intelligence test results at certain age¹³. Therefore, applicants claimed that they experienced discrimination due to their ethnicity, social, and economic background for being placed in a remedial school – even though they possessed normal abilities – due to the flawed diagnostic system that failed to consider the social and cultural background of Roma children¹⁴. When adjudicating this case in 2013, the ECtHR first emphasised that the right to education requires taking positive measures to assist members of the group that has faced past discrimination to overcome any challenges regarding the school curriculum, especially where there is a history of direct discrimination¹⁵. The Court observed that the Roma community has evolved into a distinct, disadvantaged, and vulnerable minority warranting tailored protection measures¹⁶. It stated that Roma children were disproportionately present at the remedial school attended by the applicants because of systematic misdiagnosis of mental disabilities¹⁷. Consequently, the Court recognised that a general measure had a disproportionately prejudicial effect on the Roma population¹⁸ and, hence, concluded that *prima facie* (indirect) discrimination existed¹⁹. Given the historical bias in

7. *Ibid.*

8. *Ibid.*, para. 208.

9. ECtHR, *Horváth and Kiss v. Hungary*, App. No. 11146/11, Judgment of 29.01.2013, para. 11.

10. *Ibid.*, para. 23.

11. *Ibid.*, para. 18.

12. *Ibid.*, paras. 31-34.

13. *Ibid.*

14. *Ibid.*, paras. 90-92.

15. *Ibid.*, paras. 103-104.

16. *Ibid.*, para. 104.

17. *Ibid.*, para. 110.

18. *Ibid.*, para. 123.

19. *Ibid.*, paras. 128-130.

placing Roma children in “special schools”, the Court emphasised the state’s positive duty to prevent ongoing discrimination through seemingly neutral practices²⁰.

Apart from recognising discrimination against the particular applicants, in the two cases, the ECtHR also acknowledged the systemic character of the problem – the historically established social structures that evidently place certain communities in a disadvantageous position²¹, or in a word, structural discrimination. The aim of this paper is to provide a legal conceptualization of structural discrimination, a sociological notion with remarkable legal implications. Such conceptual analysis should serve to illuminate certain aspects of the broader anti-discrimination domain, by drawing clearer lines between its distinct but interconnected concepts.

The paper employs a combination of theoretical analysis and legal analysis, the latter being conducted through the doctrinal legal method and the case law method. Despite its legal orientation, the research primarily evolves through conceptual analysis as its main method, given that it aims at providing elements for the legal definition of this social phenomenon and, eventually, at contributing to a better understanding of the limits of law in addressing structural discrimination. In the paper, we also point to the broader societal context of the main theoretical contributions, which we analyse in order to situate the research *vis-à-vis* the various stages of the societal attempts to address the entrenched inequalities through law.

The paper is divided into several sections that systematically explore the concept of structural discrimination. Firstly, we look into the notions of social structures, structural inequalities, and structural injustice, as developed within the social sciences and political studies, which are essential for exploring the content of this multifaceted and highly abstract phenomenon. In the second chapter, we highlight the connection between historical oppression and structural discrimination. The central chapter identifies and develops the main definitional elements of the concept at hand, after which indirect discrimination is analysed as a legal tool for addressing challenges imposed by structural discrimination. In the last chapter, we summarise the key findings of the analysis and conclude that the concept of structural discrimination underscores the limitations of anti-discrimination law.

2. The notion of structural discrimination

In the legal texts, structural discrimination is usually used as an umbrella term for the complex forms of discrimination, which have a pervasive impact across various societal domains and require the utilisation of proactive strategies as the method of anti-discrimination law²². Scholars often refer to it as inherently linked to the notion of structural

20. *Ibid*, para. 116. Timmer notes that this was the first time that ECtHR recognized a substantive positive obligation to “undo a history of racial segregation in special schools”, whereas in previous cases, it only insisted on procedural kind of positive obligations with regard to Roma school segregation. A. Timmer, (2013, February 6). *Horváth and Kiss v. Hungary: A Strong New Roma School Segregation Case*. Strasbourg Observers. Available at <https://strasbourgobservers.com/2013/02/06/horvath-and-kiss-v-hungary-a-strong-new-roma-school-segregation-case/> (accessed 30.5.2024).

21. *Ibid*, paras. 104-106.

22. According to Christopher McCrudden, one of the first references to the term structural discrimination in the meaning of institutional and structural reasons for the exclusion of racial minorities in US can be identified in the study of Leon Mayhew “Law and Equal Opportunity: A Study of the Massachusetts Commission Against Discrimination” from 1968 (C. McCrudden, *Institutional Discrimination*, *Oxford Journal of Legal Studies*, (2/3), 1982, p. 306). In this seminal study, Leon

or systemic inequalities that represent the starting point in numerous studies in which the authors criticise the contemporary anti-discrimination law for its underachievement in addressing the deeper-rooted inequalities. Most of these studies can be broadly situated under the heading of the substantive equality doctrine, an influential segment of legal scholarship and judicial practice born from the criticism of the “formal approach to equality”, which places before the anti-discrimination law the goal of combating the complex forms of discrimination and the ensuing inequalities²³.

The term structural discrimination is commonly used interchangeably with the terms “systemic”, “institutional”, or “indirect” discrimination, and many researchers employ it in the meaning which completely or to a great extent overlaps with these notions. For instance, Christa Tobler uses it simultaneously with the terms “systemic discrimination” and “institutional discrimination”²⁴. Melissa S. Williams uses the terms structural inequality, structural discrimination, and systemic discrimination interchangeably. According to her, the concept of structural discrimination includes three distinct subcategories: indirect discrimination, “past-in-present” discrimination and “side-effect” discrimination²⁵. For Masoud Kamali, the interwoven relationship between structural and institutional discrimination makes their separation almost impossible, which is, in his opinion, a plausible explanation why some scholars do not differentiate between the two²⁶.

Expectedly, the concept is seldomly defined in legal studies. In most of them, it serves as an abstract foundation for the main assumptions of the “substantive equality doctrine”. For the proponents of the substantive equality doctrine, which embraces both redistribution and recognition related objectives²⁷, the notion of substantive equality is a direct reflection of the insights into the existence and operation of the complex forms of discrimination epitomised in the notion of structural discrimination. However, they rarely attempt to define the later and use the notion of structural discrimination without determining its meaning. The situation is different in the social sciences, especially in the texts written in the second half of the last century, which bring more profound elaborations of the concept of structural discrimination. For this reason, an attempt to identify its main elements mandates theoretical insights from both legal and non-legal fields, especially sociology and political science.

2.1. *Social structures, structural inequalities, and structural injustice*

The concept of structural discrimination is in the literature employed to highlight the distinction between entrenched and patterned discrimination, on the one hand, and

Mayhew points that in seeking to understand persistent character of race discrimination one has to go beyond personal attitudes and the concept of prejudice and look into the normative patterns and social structures which shape the race relations (L. Mayhew, *Law and Equal Opportunity: A Study of the Massachusetts Commission Against Discrimination*, Harvard University Press, 1968, p. 57).

23. More on the theoretical postulates of the substantive equality doctrine in M. V. Matijević, Navigating Through the Substantive Equality Doctrine: Anti-discrimination Law and Social Change, *Pravni zapisi*, 1/2024, pp. 89-120.

24. C. Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, 2005, Intersentia, p. 61.

25. M. Williams, In Defence of Affirmative Action: North American Discourses for the European Context?, In: E. Appelt, M. Jarosch (eds.), *Combating Racial Discrimination: Affirmative Action as a Model for Europe*, 2000, Berg Publishers, pp. 64-65.

26. M. Kamali, *Racial Discrimination: Institutional Patterns and Politics*, 2009, Routledge, pp. 42-43.

27. S. Fredman, Substantive equality revisited, *International Journal of Constitutional Law*, 14/3, 2016, pp. 712-738.

discrimination seen as a matter of individual pathology, on the other, in the same manner as structural inequalities are different from “relations of inequality that are transient, accidental, or more socially superficial”²⁸. Given that it represents an attempt to grasp the deeper, more elusive layers of social reality, the concept is highly abstract, and attempts to define it are rather rare.

Different authors emphasise different elements of the notion of structural discrimination. In the social sciences, the research is primarily focused on elaborations of the link between structural inequalities and impersonal societal structures, which is an aspect that remains completely unelaborated in the legal scholarship. The work of Iris Marion Young, a prominent American political theorist from the last century, provides an insightful account of this link. Young theorises structural inequality “as a set of reproduced social processes that reinforce one another to enable or constrain individual actions”²⁹. However, structural inequality can hardly be observed through the comparison of social positions of individual members of a society, as much as it cannot be observed in the idiosyncratic characteristics of that position³⁰. Only through the group-based comparisons can we identify those aspects of social relations and processes the evaluation of which could illuminate the realm of social justice³¹. A realisation that there are patterned inequalities between different social groups and their identification, she says, “is [...] only the beginning, but an important beginning, of identification of these forms of basic and persisting injustice”³².

The patterned inequalities are produced and reproduced by social structures³³. Young depicts social structures by invoking Marilyn Frye’s metaphor of oppression as a birdcage. The wires of the cage limit the movement of the bird. However, their relationship with the bird’s captivity cannot be understood by looking at one wire at a time; for how could a single wire prevent a bird from flying. The bird’s lack of freedom can be explained only when we realise that a cage represents a great number of wires arranged and connected to each other in a specific way and with a specific aim³⁴. It is the cage as a whole, not the wires as its separate parts, that prevents the bird from flying. While writing about the social structures, Young also draws on John Rawls’ legal account of the basic structure³⁵, which is in his work related to the process of division of benefits from social cooperation through the distribution of basic rights and duties by the main societal institutions³⁶. Nevertheless, in her posthumously published monograph, she criticizes Rawls description of the basic structure as too limited because he equalises social structure with only a small subset of societal institutions, which he considers more fundamental than others³⁷. For Young, social structures could be determined as the interaction of basic social positions that, to a

28. I. M. Young, Equality of Whom? Social Groups and Judgments of Injustice, *The Journal of Political Philosophy*, (9/2), 2001, p. 2.

29. *Ibid.*

30. I. M. Young, M. Nussbaum, *Responsibility for Justice*, 2011, Oxford University Press, p. 57.

31. I. M. Young, Equality of Whom? Social Groups and Judgments of Injustice, *The Journal of Political Philosophy*, (9/2), 2001, p. 15.

32. By the pattern she means “the mapping of the distribution of some good across all social positions at a particular time”. *Ibid.*, p. 15.

33. *Ibid.*, p. 2.

34. *Ibid.*, p. 10.

35. *Ibid.*, pp. 12-13.

36. J. Rawls, *A Theory of Justice (revised edition)*, 1999, The Belknap Press of Harvard University Press, p. 53.

37. I. M. Young, M. Nussbaum, *Responsibility for Justice*, 2011, Oxford University Press, p. 70.

significant extent, condition the opportunities and life prospects of individuals who find themselves in those positions³⁸. Such conditioning arises due to the way actions and interactions, which are conditioning the social position of an individual in one life situation, reinforce the effects of rules and resources that will be available for other actions and interactions of that individual³⁹.

Social structures should not be seen as a passive confluence of constraints and opportunities, but as the processes that constantly evolve through the action and interaction of individuals⁴⁰. Young also emphasises that people tend to reproduce social structures through the adaptation of their expectations and perceptions⁴¹.

So understood, social structures produce structural inequality, which can be seen as relative constraints to freedom and material well-being encountered by some people, that are “the cumulative effect of the possibilities of their social positions, as compared with others who in their social positions have more options or easier access to benefits”⁴². Young recognises that the patterned, group-centred nature of structural inequalities has a relative nature. Some members of groups that face these constraints do manage to overcome obstacles placed before them through the operation of social structures, while not all members of the better-placed groups actually use the opportunities that their social position endorses. This, however, does not change her conclusion that social structures make individuals from different groups fundamentally unequal and in that way lead to structural injustice⁴³.

The notion of social structures is indispensable for the broader analysis of social justice and its antithesis, structural injustice⁴⁴. Structural injustice, which in the studies of Young approximates the notion of structural discrimination, is the moral wrong distinct not only from the wrongful action of an individual agent but also from the specific actions and policies of the state and other powerful institutions⁴⁵. According to Young and Nussbaum, structural injustice is an outcome of actions, undertaken against the background set by the existing social structures, which an indeterminate number of individuals and social institutions undertake while pursuing their goals and interests and which are mostly within the limits of what is socially accepted⁴⁶. Given that structural inequalities are consequences of structural injustice, *i.e.*, emerge as a normal function of a society, our societies are collectively responsible, Young argues, to remedy such inequalities⁴⁷.

38. I. M. Young, Equality of Whom? Social Groups and Judgments of Injustice, *The Journal of Political Philosophy*, (9/2), 2001, p. 14.

39. *Ibid*, p. 14.

40. *Ibid*, p. 13.

41. According to Sen, it is important to observe that “adaptation of expectations and perceptions [...] are incremental for the perpetuation of inequalities”. In relation to this he recalls the phenomenon of “positionality of observations”, which is “about the objectivity of what can be observed from a specified position”. A. Sen, *The Idea of Justice*, 2009, Harvard University Press, pp. 157, 283.

42. I. M. Young, Equality of Whom? Social Groups and Judgments of Injustice, *The Journal of Political Philosophy*, (9/2), 2001, p. 15.

43. *Ibid*, p. 15.

44. I. M. Young, M. Nussbaum, *Responsibility for Justice*, 2011, Oxford University Press, pp. 2, 58.

45. *Ibid*, p. 45.

46. *Ibid*, p. 52.

47. I. M. Young, Equality of Whom? Social Groups and Judgments of Injustice, *The Journal of Political Philosophy*, (9/2), 2001, p. 16.

2.2. *Structural discrimination and the history of oppression*

The notion of structural discrimination is often based on a more or less explicit connection between the intergenerational patterns of disadvantage, described through the notion of structural inequality, and past oppression. The historical forms of exploitation and oppression, be it slavery, colonialism, Jim Crow legal segregation, or South African apartheid, to name just a few globally known examples, were carried through the ideologies and practices that were inbuilt in the social institutions. By being the results of their own history, Shirley Better observes, present-day institutions cannot but perpetuate practices that advantage the historically dominant groups and disadvantage those who lack social power⁴⁸. The notion of structural discrimination is used by many scholars from both legal and non-legal disciplines to emphasise this insight: the practices of societal institutions are based on beliefs, values and presumptions which are to a greater or lesser extent a reflection of these past oppressive ideologies.

For Masoud Kamali, for instance, structural discrimination represents “systemic acts of interiorization and the “otherization” of some ethnic, religious, and/or immigrant groups by the majority society institutions”⁴⁹. The so-called “structural approach to discrimination”, which marked the development of anti-discrimination scholarship in the United States at the beginning of this century, departs from the pervasive nature of unconscious bias, as unintentional processes of cognitive categorisation that are based on stereotypes and prejudices that are the direct legacy of segregation⁵⁰. At the international plane, Article 5 of the UN Convention for the Elimination of Discrimination Against Women is interpreted as a legal provision which creates upon a state the duty to combat structural gender discrimination, seen as the product of ideologies that assign women to an unequal and subordinate position that were shaped during their historical oppression and became entrenched in societal institutions⁵¹.

There is no doubt that contemporary societal inequalities, to a significant degree, draw their roots from past practices of segregation and oppression and to them related ideologies. However, today, when racism, sexism, and other ideologies of this sort are, at least officially, banished from our societies and have been replaced with the ideology of individual merit and an unbiased free market, it is not easy to establish the link between them and the patterned and entrenched societal inequalities. This is even more so when the patterns of disadvantage can only be identified through the socio-economic indicators of a group’s wellbeing. Fred L. Pincus, an American race-relations sociologist, defines structural discrimination in a way which preserves its connection to past discriminatory practices but at the same time points to the lack of intention as the main *differentia specifica* between this type of discrimination and institutional and individual discrimination, as the other two types of discrimination in his typology. For him, structural discrimination “refers to the policies of dominant race/ethnic/gender institutions and the behaviour of individuals who implement these policies and control these institutions which are race/ethnic/gender neutral in intent

48. S. Better, *Institutional Racism: A Primer on Theory and Strategies for Social Change*, 2008, Rowman and Littlefield Publishers, p. 13.

49. M. Kamali, *Racial Discrimination: Institutional Patterns and Politics*, 2009, Routledge, p. 43.

50. More on this in S. R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, *California Law Review*, 94/1, 2006, pp. 1-48.

51. CEDAW, General Recommendation No. 25 on Article 4 paragraph 1 of the CEDAW, 2004, para. 7.

but which have a differential and/or harmful effect on minority race/ethnic/gender group”⁵². Pincus places an emphasis on the unintended adverse impact on minorities of the anonymous practices which make up the essence of structural discrimination. Bank lending practices based on the standard of creditworthiness that mirrors the wealth levels of better off sections of society and cuts in the public health insurance and welfare programmes that are part of macro-economic strategies for balancing the public budget, are just some of the examples which he uses to illustrate the claim that structural discrimination is carried by “well-intentioned people” through the ordinary societal practices⁵³. As Pincus emphasises, “structural discrimination is not intentional, it is not illegal, and it is about carrying on business as usual”⁵⁴. To confront it asks not only a re-examination of basic cultural values, but even more so to scrutinise the fundamental principles of societal organisation⁵⁵.

3. The elements of a legal definition of structural discrimination

Like Young and Pincus, most of the researchers from the socio-legal field emphasise the embeddedness of structural discrimination in the basic societal arrangements. These societal arrangements, as also stressed in the research, were shaped by past injustices or reflect a human predisposition to establish and maintain group-based and hierarchical systems of social organisation⁵⁶.

Structural discrimination occurs, in the first place, in the process of the allocation of burdens and benefits determined by the basic societal arrangements. For Andrew Altman, “structural discrimination occurs when the rules of a society’s major institutions consistently produce disproportionately disadvantageous outcomes for the members of certain salient social groups”⁵⁷. As previously observed, scholars also stress the complexity of the subject matter, which makes the concept of structural discrimination to a great extent vague and eluding a conclusive definition. The elusiveness of the concept of structural discrimination comes from its abstract nature, as well as from the complexity of the institutional edifice of contemporary society, even if we confine its scope only to the formal rules, procedures, and customary practices⁵⁸. Even more so, its complexity ensues from the fact that structural discrimination takes place as a cumulative effect of rules, procedures, and practices from the different fields of social life which are essential for the individual wellbeing⁵⁹.

52. F. L. Pincus, *Discrimination Comes in Many Forms: Individual, Institutional, and Structural*, *American Behavioural Scientist*, (40), 1996, p. 186.

53. *Ibid*, p. 192.

54. *Ibid*.

55. *Ibid*.

56. See the study of Jim Sidanius and Felicia Pratto, who analyse structural discrimination (there referred to as “institutional discrimination”) through the conceptual framework of social dominance theory: J. Sidanius, F. Pratto, *Social Dominance*, 1999, Cambridge University Press.

57. A. Altman, *Discrimination*, In: E. N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*, 2020, para. 2.3, available at <https://plato.stanford.edu/archives/spr2011/entries/discrimination/> (accessed 17.6.2024).

58. Considering the definition of institutions, as formal rules, procedures, and customary practices that regulate distribution of valuable societal goods and in that way structure the relationship between individuals in various constituent units of society.

59. Affirmative action and equal protection: hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, Ninety-seventh Congress, first session, on S.J. Res. 41, May 4, June 11, 18, and July 16, 1981, p. 742.

This leads us to the observation – very important from the legal point of view – that one of the key aspects of structural discrimination is the impossibility to individualise a specific wrongdoer to whom the discriminatory act can be imputed⁶⁰. Moreover, structural discrimination is so complex that it is mostly beyond awareness of its perpetrators and victims⁶¹. Sidanius and Pratto ascribe the elusiveness of the notion to the intangible, but for that reason, not less real relationship between the discriminatory nature of social criteria on which favourable institutional responses are based, and the seemingly neutral nature of the explicit allocation criteria⁶². Structural discrimination occurs through practices that are not only far from being illegal, but are actually seen as normal; as an integral part of the activities which are socially valued⁶³. Another source of perplexity around the notion lays in the observation that structural discrimination is not a static, one-time phenomenon but that its effects spread across generations and different fields of social activities through “self-perpetuating cycles” of societal inequalities⁶⁴.

The inherent difficulties of individualising structural discrimination are also an obstacle to the further explication of the notion of structural discrimination in individual court cases. That is among the main reasons why the courts *en general* do not attempt to define the notion. In *D. H. and Others v. The Czech Republic*, the ECtHR held that, as it has been determined that the relevant legislation had a disproportionately prejudicial effect on the Roma community, the applicants, as members of this community, consequently, experienced discrimination, thus examination of their individual cases was unnecessary⁶⁵. Similar reasoning was applied in the more recent case of *Tunikova and Others v. Russia*⁶⁶. It concerned domestic violence against women by their partners, where the applicants claimed that the state failed to protect them, remedy the harm they suffered, and that the inactivity of the state *vis-à-vis* the aim of combating gender violence in general amounted to discrimination against women⁶⁷. The Court found violation of the prohibition of inhuman or degrading treatment, as well as the prohibition of discrimination (in conjunction with Article 3), and highlighted that the lack of domestic violence legislation and protection orders shows the Russian authorities' reluctance to recognise the seriousness and extent of domestic violence and its discriminatory impact on women⁶⁸. By allowing a climate that fosters domestic violence for many years, the state has failed to establish conditions for “substantive gender equality”, leaving women unable to live without fear and deprived of equal protection under the law⁶⁹. Since structural bias has been shown to exist, the court determined that the

60. R. O’Connell, Substantive Equality in the European Court of Human Rights?, *Michigan Law Review First Impressions*, (107), 2009, p. 129.

61. A. Somek, Equality and Constitutional Indeterminacy: An Interpretative Perspective on the European Economic Constitution, *European Law Journal*, (7), 2001, p. 171.

62. J. Sidanius, F. Pratto, *Social Dominance*, 1999, Cambridge University Press, p. 303.

63. S. Sturm, Equality and the Forms of Justice, *University of Miami Law Review*, (58/1), 2003, p. 66; A. Somek, Equality and Constitutional Indeterminacy: An Interpretative Perspective on the European Economic Constitution, *European Law Journal*, (7), 2001, p. 180.

64. Affirmative action and equal protection: hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, Ninety-seventh Congress, first session, on S.J. Res. 41, May 4, June 11, 18, and July 16, 1981, p. 742.

65. ECtHR, *D. H. and Others v. The Czech Republic*, para. 209.

66. ECtHR, *Tunikova and Others v. Russia*, App. No. 55974/16 and 3 others, Judgment of 14.12.2021.

67. *Ibid*, paras. 71, 79-81, 101-102, 112-113, 125-126.

68. *Ibid*, para. 129.

69. *Ibid*.

applicants did not need to prove that they were also victims of individual prejudice⁷⁰. ECtHR reminded that a systemic or structural issue arises not from isolated incidents or specific events in individual cases but from flawed legislation that leads to repeated applications to the Court, as well as that the underlying problem causing the Convention violations in this case originates from the legislation itself, and these findings extend beyond the interests of the applicants at hand⁷¹.

The notion of structural discrimination places different levels of institutional practice at a single level of observation and analysis. Being a cumulative effect of the interaction of different social rules, policies, and practices that can be observed at all three levels of theoretical analysis (micro, mezzo, and macro), structural discrimination simultaneously affects an indeterminate number of individuals. For this reason, structural discrimination can be discerned only by looking at its adverse effects on traditionally vulnerable groups, whereby it reinforces or amplifies the existing patterns of socio-economic inequalities⁷². As Colleen Sheppard, who uses the term systemic discrimination, explains:

“The dynamics of systemic discrimination operate to entrench and perpetuate inequality. Exclusion reproduces itself as inequitable norms and standards become the unquestioned backdrop upon which anti-discrimination laws are required to function. What is so disconcerting about systemic discrimination is the ways in which it often imperceptibly reproduces, reinforces and legitimizes inequality and exclusion. Inequitable opportunities, resources and socio-economic conditions result in unequal accomplishments, which then appear to justify the initial inequitable distribution of social goods.”⁷³.

To go back to the more legal considerations of the attempt to define the notion, one should observe here that the term “structural” in the context of “structural discrimination” is primarily used to denote the existence of a societal/institutional framework made up of rules, policies, standards, and practices of different levels of universality within which a concrete act produces disadvantage for persons who belong to traditionally disadvantaged groups. The wider structures that yield disadvantage through a concrete act can be made up of a myriad of different public acts that, to a greater or lesser extent, influence the distribution of societal resources. However, the definition of structural discrimination should not serve to point to an obvious fact that a concrete rule, policy or practice is an embodiment of rules and policies of a more general applicability, up to those which are completely abstract in nature and which do not create individual entitlements. Rather, it should show that the negative effects of a certain act are the end result of the interaction of that act with other acts, which together set the conditions for access to societal goods that are within the scope of anti-discrimination law.

This aggregate nature of structural discrimination implies that it concerns primarily, if not exclusively, the acts of public bodies that are broad in scope, such as rules, procedures,

70. *Ibid.*

71. *Ibid.*, para. 149. Even though the ECtHR did not use the term “structural discrimination”, in the wording used the court actually pointed to the essence of the concept.

72. As Arthur Ripstein notes, a historical account of justice “is not an account of a game with only one round”, but a tale of how fair or unfair were rules of interaction across generations (A. Ripstein, *Equality, Responsibility, and the Law*, 1999, Cambridge University Press, p. 44). The concepts of low socio-economic mobility and high intergenerational transmission of inequality are the main indicators of structural discrimination.

73. C. Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada*, 2010, McGill-Queen’s University Press, pp. 23, 24.

and measures of more general applicability. An important determinant of these acts is that they are applicable to more than one person, *i.e.*, more than one case, and that they directly or indirectly determine conditions under which an unknown number of individuals can enjoy their socio-economic and other rights that are within the ambit of anti-discrimination law. For that reason, as different from the concept of direct and indirect discrimination, the notion of structural discrimination can hardly embrace the acts of natural or juridical persons of private law character, even if they affect the rights of many individuals, as can be the case with the acts of big corporations in the role of employers, or with the acts of private providers of education or health services. That is because the disadvantage that ensues from structural discrimination always comes through the interaction of various laws, rules, and practices, at least some of which are of public law character, *i.e.*, for which no private law entity could be held responsible. To put it differently, the state is always and necessarily complicit in structural discrimination, because state is the one that sets the ground rules for the access to these goods.

Another already accentuated characteristic of structural discrimination that is important for our discussion is its unintentional character. Intentionality is irreconcilable with its aggregate nature, *i.e.*, with the fact that it comes not through an individual act or operation of a distinct rule or practice, but as a cumulative effect of rules and practices and on them based acts from different spheres of social organisation⁷⁴. An act that leads to structural discrimination is *prima facie* neutral but discriminatory in effect. The question of intent, therefore, should not be relevant for the identification of an act as discriminatory, given that the essence of structural discrimination is not the act itself but the disadvantage the act produces. The disadvantageous effect of an act of structural discrimination in that sense exists separately from the question of the intent to produce it. Moreover, intent cannot be an element of the definition of structural discrimination because structural discrimination is about the cumulative effect of interconnected acts of public and private entities.

Disadvantage is the essential element of structural discrimination. The disadvantage produced by structural discrimination comes as a consequence of a distinction that, as defined by the Canadian Supreme Court in the case *Andrews v. British Columbia*, “has the effect of imposing burdens, obligations or other disadvantages on individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society”⁷⁵. However, the disadvantageous effect of a seemingly neutral law, rule, or practice becomes discernible only through an analysis of the aggregate effect of the broader set of related laws, rules, and practices in the relevant

74. A. Somek, Equality and Constitutional Indeterminacy: An Interpretative Perspective on the European Economic Constitution, *European Law Journal*, (7), 2001, p. 180. Some authors argue that structural discrimination embraces both intentional and unintentional discriminatory acts. See: P. Gynther, *Beyond Systemic Discrimination: Educational Rights, Skills Acquisition and the Case of Roma*, 2007, Martinus Nijhoff Publishers, p. 25; M. Kamali, *Racial Discrimination: Institutional Patterns and Politics*, 2009, Routledge, p. 43; C. Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada*, 2010, McGill-Queen’s University Press, p. 23. These are primarily the researchers who interpret structural discrimination, often under the heading of systemic discrimination, as a contemporary version of segregation *i.e.*, widespread *de facto* discrimination coloured by intransigent and diffused prejudices about certain groups. However, it makes more sense to keep the two concepts theoretically distinct. In modern Western democracies, overt displays of prejudice and negative stereotypes have largely been reduced. Nevertheless, exception to this, in the European context, are two distinct groups, members of Roma and Settlers Communities and recent immigrants. Conversely, increasing socio-economic inequalities are emerging in patterns that do not align strictly with racial, ethnic, or religious lines but are more closely linked to the socio-economic status of individuals and groups.

75. *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, 174.

fields. So, in the case of structural discrimination, one could say that the discriminatory nature of an act can be determined only when that act is analysed in its interaction with the other related acts of general applicability, such as general rules, procedures and measures⁷⁶.

Even though structural discrimination comes through cumulative effect of different acts, that does not mean that a concrete act, which in the final instance leads to a disadvantage, cannot be singled out. In the complex picture of causes and effects captured by the notion of structural discrimination, the act with discriminatory effect is the one that in a direct manner regulates access to the protected goods *i.e.*, has direct effect on the subjective rights of individual members of a protected group. However, whether an act with a disadvantageous effect on a protected group can be singled out is a different question from the question of whether its discriminatory effect can be individualised and proved in the court proceedings, as well from the capacity of courts to engage in such complex legal considerations.

The contours of the concept of structural discrimination, which we have tried to draw through the language and logic of anti-discrimination law, should make possible the investigation of the claim that anti-discrimination law can provide a means to tackle structural discrimination and, consequentially, can be a way to come closer to the ideal of substantive equality. Not all the scholars who see substantive equality as one of the goals of anti-discrimination law argue that, at its current development, anti-discrimination law can provide an effective response to entrenched societal inequalities brought about by structural discrimination⁷⁷. But those who do put forward such a claim believe that the concept of indirect discrimination is the main tool to confront structural inequalities *via* anti-discrimination law⁷⁸.

4. Indirect discrimination as a response to structural injustice

Similarly to structural discrimination, the endorsement of the concept of indirect discrimination through anti-discrimination legislation can be seen as promoting the goals of substantive rather than formal equality because it moves judicial inquiry towards examining the disparate effects that equal treatment can produce⁷⁹. Christopher McCrudden explains that the concept of indirect discrimination was born from an understanding that the persistent character of racial disadvantage cannot be fully explained by prejudice and bigotry and that the way in which basic societal institutions structure the relationship between racial and ethnic groups also needs to be taken into account⁸⁰.

76. The act itself sometimes cannot even be distinguished from other connected acts.

77. D. Schiek, Sex Equality Law After Kalanke and Marschall, *European Law Journal*, (4), 1998, p. 165; D. Schiek, Indirect Discrimination, In: D. Schiek, L. Waddington, M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, 2007, Hart Publishing, pp. 323-333.

78. The other one being proactive equality strategies, that will not be further analysed, for the length limits of this paper. For an example of such strategies in the employment see M. M. Molović, Prilika za ravnopravnost: analiza kvota za zapošljavanje osoba sa invaliditetom u Srbiji i državama regiona, *Strani pravni život*, (67/3), 2023, pp. 551-565.

79. G. Quinn, The Human Rights of People with Disabilities under EU Law, In: P. Alston, M. Bustelo, J. Heenan (eds.), *The EU and Human Rights*, 1999, Oxford University Press, p. 171.

80. C. McCrudden, Institutional Discrimination, *Oxford Journal of Legal Studies*, (2/3), 1982, p. 303-343. In US, the doctrine was first developed in the famous *Griggs v. Duke Power Company* (401 U.S. 424 (1971)) of 1971, in which the US Supreme Court interpreted the Title VII (section 703(a)) of the Civil Rights Act of 1964 in a way which made it unlawful for the employers to use a practice or procedure that disproportionately affects persons from the African American community unless it can be justified by the "business necessity". The court said that an unjustified adverse impact or a rule or practice on members of the given community is sufficient to establish liability.

According to EU Council Directive 2000/43/EC, “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”⁸¹. Almost identical definition can be found in EU Council Directive 2000/78/EC⁸², and these two provisions served as the main sources for conceptualising indirect discrimination within the EU and national European legal frameworks.

Collins and Khaitan explain the concept of indirect discrimination by using Aesop’s fable of the fox and the stork⁸³. The story describes how a fox invited a stork for a meal and served soup in a shallow dish, which the fox could eat but the stork couldn’t. In return, the stork invited the fox and served soup in a long-necked jar, which the fox couldn’t access. It highlights the importance of considering others’ needs in order to ensure fair opportunities, as the vessels used excluded the guests due to their specific characteristics, even though they formally had equal opportunity to enjoy dinner. This same example was used in a recent landmark case of *Lieutenant Colonel Nitisha and Others v. Union of India and Others* from 2021, in which the Indian Supreme Court established a conceptual basis for indirect discrimination by drawing on case law from Canada, South Africa, and the US⁸⁴. It stated that the concept of indirect discrimination is based on the crucial understanding that discrimination often arises not from deliberate actions or malicious intentions but from unconscious biases or a failure to recognise how current structures/institutions perpetuate an unjust *status quo*⁸⁵. What is more, the difference between direct and indirect discrimination can generally be understood as the former being based on intent, while the latter focuses on the effect, and the most significant aspect of indirect discrimination being that it bans conduct that, although not intended to discriminate, ends up having that effect⁸⁶.

Indirect discrimination operates through a neutral provision, criterion or practice, and the absence of an intention to discriminate against another person is its *differentia specifica* from direct discrimination. According to the established case law, it is sufficient that a certain provision or criterion has a discriminatory effect in practice. For the European Court of Justice, the prohibition of indirect discrimination starts out with conditions pertaining to the protected group, and in these cases the individual plaintiff stands as a typical representative of the group she belongs to, for the reason of which, in effect, these cases amount to a form

81. Article 2, para. 2 (b) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal L 180, 19/07/2000 P. 0022 – 0026*.

82. “Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice”, Article 2, para. 2 (b) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal L 303, 02/12/2000 P. 0016 – 0022*.

83. H. Collins, T. Khaitan, *Foundations of Indirect Discrimination Law*, 2018, Hart Publishing, p. 1.

84. Indian Supreme Court, *Lieutenant Colonel Nitisha and Others v. Union of India and Others*, 2021, 15 SCC 125, paras. 64-77.

85. *Ibid*, para. 66.

86. *Ibid*, para. 67.

of class actions⁸⁷. In order to establish the discriminatory (unfavourable) effect that a neutral rule has on a certain group, it is only relevant to determine a disadvantageous position of a person or a group in comparison to others⁸⁸. Expectedly, the main issue with indirect discrimination is the difficulty of proving its occurrence, which is why the ECtHR took the view that, in order to ensure effective protection of rights for those affected, less stringent evidence requirements should be applied in cases of alleged indirect discrimination⁸⁹. Where the anti-discrimination law does not contain an open-ended list of prohibited grounds, the concept of indirect discrimination also serves to resolve the problem created by a limited number of forbidden grounds of discrimination⁹⁰.

There are commentators who argue that the legal concept of indirect discrimination was in the first place developed to combat structural discrimination⁹¹, as one of the main objectives of anti-discrimination law⁹². While recognising a very complex nature of structural discrimination, Christa Tobler points to the prohibition of indirect discrimination and proactive anti-discrimination measures as the main legal instruments to encounter it⁹³. For Henn, in contrast to indirect discrimination, structural discrimination refers to a much broader societal context⁹⁴. Even though most instances of structural discrimination are, in his opinion, covered by the existing concept of indirect discrimination, he argues that a better understanding of structural discrimination can enhance our comprehension of the causes and complexities of various forms of social injustice⁹⁵. Dagmar Schiek, on the other hand, is of the opinion that, although it is a useful legal tool to show that even those societal rules that are taken for granted can have disparate impacts on protected groups, the introduction of indirect discrimination is not the path towards the changes needed to eliminate structural discrimination. They provide a limited legal opportunity for affected individuals to challenge before the courts the effects of such rules but in rather limited circumstances⁹⁶.

What does our attempt to identify the elements of a definition of structural discrimination say about the relationship between indirect discrimination, as a legal tool to address the subtle forms of discrimination, and the concept of structural discrimination. In the first place, we can reiterate the claim raised by a number of scholars that the litigation-centred make-up of anti-discrimination law is not fit to remedy the complex forms of discrimination, such as structural discrimination. The basic elements of the definition of

87. ECJ, Case 43/75 (1976), ECR, 455, para. 42.

88. This is often done by examining statistical data, yet that is usually not sufficient to prove indirect discrimination. I. Krstić, *Zabrana diskriminacije u međunarodnom i domaćem pravu*, 2018, Pravni fakultet Univerziteta u Beogradu, pp. 36, 38.

89. ECtHR, *D. H. and Others v. The Czech Republic*, para. 186.

90. R. Etinski, I. Krstić, *EU Law on the Elimination of Discrimination*, 2009, Faculty of Law University of Belgrade, p. 163.

91. E. Ellis, Definition of discrimination in European Community Sex Equality Law, *European Law Review*, 19/1994, p. 572; R. Hunter, *Indirect Discrimination in the Workplace*, 1992, The Federation Press, p. 6.

92. OHCHR, Equal Rights Trust, Practical Guide to Developing Comprehensive Anti-Discrimination Legislation, 2023, pp. xi, 75, available at: https://www.ohchr.org/sites/default/files/documents/publications/2022-11-28/OHCHR_ERT_Protecting_Minority%20Rights_Practical_Guide_web.pdf.

93. C. Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, 2005, Intersentia, pp. 61-62.

94. E. V. Henn, *International Human Rights Law and Structural Discrimination – The Example of Violence against Women*, 2019, Springer, p. 37.

95. *Ibid*, pp. 37-38.

96. D. Schiek, Indirect Discrimination, In: D. Schiek, L. Waddington, M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, 2007, Hart Publishing, pp. 332-333.

structural discrimination identified above, especially its aggregate nature, are to a great extent beyond the reach of the legal tools embraced by the anti-discrimination law, including the concept of indirect discrimination. Even though the burden of proof is reversed in indirect discrimination cases, there still needs to be a concrete act with direct consequences *vis-à-vis* access to the goods within the *ratione materiae* scope of anti-discrimination law, from which judicial scrutiny could depart. The plaintiff needs to at least show that the contested discriminatory impact falls within the scope of the invoked provisions of anti-discrimination law⁹⁷. Moreover, claims of indirect discrimination must rely upon some kind of legal causation, even if it is the one which comes close to an advanced concept of “proximate cause” as the basis for expanded liability. As George Rutherglen observes in relation to the cases based on the theory of implicit bias, yet equally applicable to the present discussion, despite the important developments that have taken place in the field of application of the concepts of proximate cause, liability, and discrimination, we still need to come to the point of their evolution in which we would no longer need to identify the defendant as the agent responsible for the harm suffered by the plaintiff⁹⁸.

Although, theoretically, an act with discriminatory effect could be singled out as the one that in the most direct manner regulates access to the protected goods (*i.e.*, has a direct effect on the subjective rights of individual members of protected groups), that still does not resolve the question of the causal relationship between the given act and the disadvantage. Such a relationship is *causa sine qua non* of structural discrimination, and in the case of structural discrimination, disadvantage is always a cumulative result of acts of different levels of legal abstraction.

Even if there were a possibility to single out an act as a “proximate cause” of a disadvantage and enable application of the concept of indirect discrimination, given the nature of structural discrimination, indirect discrimination litigation could only tackle the “top of the iceberg”. Structural discrimination is described in both legal and non-legal scholarly texts as a phenomenon embedded in the basic societal structures that regulate the process of redistribution, for the reason of which it does not have clearly identifiable boundaries and effects. At the same time, the aggregate nature of structural discrimination makes the question of who could be identified as the perpetrator a rather difficult one. The very fact that the state is responsible for setting the legal and institutional *mise en scène* for the distribution of important societal goods makes it hard, if not impossible, to impute the responsibility for structural discrimination to a private law entity, even if there was a direct connection between the two. On the other hand, in the cases where all the acts in question are of public law character, and it is possible to point to the state as responsible for discrimination, there is a problem of polycentric disputes⁹⁹. In other words, the task of establishing a valid connection between a patterned, deep-rooted disadvantage and the

97. C. Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, 2005, Intersentia, p. 73.

98. G. Rutherglen, Concrete or Abstract Conceptions of Discrimination?, In: D. Hellman, S. Moreau (eds.), *Philosophical Foundations of Antidiscrimination Law*, 2013, Oxford University Press, p. 133.

99. Polycentric disputes are complex legal or policy issues involving multiple interconnected interests and parties, making them challenging to resolve through conventional judicial processes. They involve multiple stakeholders, including both individuals and groups that are interested in the outcome. Moreover, the judicial decision in those cases can affect a multitude of parties even though some of them, or even most of them, may not be in the position to present their view before the court. The term was popularized by legal scholar Lon L. Fuller, who argued that such disputes are better handled by negotiation, mediation, and policy-making processes rather than traditional litigation. See L. L. Fuller, *The Forms and Limits of Adjudication*, *Harvard Law Review*, 92/2, 1978, pp. 395-399.

cumulative effects of public law acts would require courts to determine and evaluate social facts of the level of complexity for which traditional civil adjudication is hardly suitable¹⁰⁰.

And even if the above-described obstacles to identifying the discriminatory act and perpetrator were somehow surpassed, there would still be the question of fault. Even though the disparate impact theory was developed as a way to remove the issue of intent from the focus of the judicial inquiry, Michael Selmi observes, there is no escape from the legal question of fault because our commitment to the elimination of discrimination is about fault and responsibility¹⁰¹. The civil law concept of fault is a too narrow category to embrace legal responsibility in such complex and abstract matters as it is the case with the state's prerogatives to direct and manage societal affairs, such as the national economy, social security, labour and other state policies, all of which could easily find its place in such an investigation.

Finally, one should also address the relationship between the membership in the groups covered by the prohibited discrimination grounds and the entrenched socio-economic inequalities. In their claim that anti-discrimination law can embrace distributive goals, the proponents of the substantive equality doctrine depart from the premise that the main status categories protected by anti-discrimination law correspond to the main patterns of socio-economic inequalities. However, as Colm O'Connell observes, in some social contexts there is no clear consensus on the matter¹⁰². Today, when segregation and other forms of pervasive overt discrimination are behind us, the disadvantage ensuing from structural discrimination cannot anymore be so easily traced along racial, ethnic, gender, and other standard anti-discrimination grounds. The cumulative nature of disadvantages ensuing from structural discrimination cannot be identified through the comparisons that are fit for the court rooms. On the basis of which criteria to determine the appropriate "pool" for comparison in a case of structural discrimination in which disadvantage ensued from the interaction of "apparently neutral provision, criteria or practice" with the laws, policies and standards from different fields of social practice and of varying levels of generality. This brings us to the more general question of the adequacy of a grounds-led approach to discrimination. Even if the list of protected characteristics becomes completely open-ended, the categorical approach to equality embodied in anti-discrimination law, Nitya Iyer says, will never be able to disentangle different aspects of a relationship of inequality needed for an accurate account of such a relationship, which is a necessary condition both for redressing rights violations suffered in an individual case and for successfully undertaking the project of social reform¹⁰³. The capacity of the grounds-based anti-discrimination law to tackle the complex forms of discrimination becomes even more questionable in the light of the growing socio-economic inequalities brought about by the last two decades.

100. Bob Hepple adds to the challenges of polycentric disputes a question whether judges, who mostly come from the dominant groups and hardly have a first-hand experience with discrimination, have the capacity to determine the relevant social facts in the cases of indirect discrimination. B. Hepple, *Have Twenty-five Years of the Race Relations Acts in Britain Been a Failure?*, In: B. Hepple, E. M. Szyszczak (eds.), *Discrimination: The Limits of Law*, 1992, Mansell, p. 25.

101. M. Selmi, *Indirect Discrimination and the Anti-discrimination Mandate*, In: D. Hellman, S. Moreau (eds.), *Philosophical Foundations of Antidiscrimination Law*, 2013, Oxford University Press, p. 257.

102. C. O'Connell, *The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?*, *University College London Human Rights Review*, (1), 2008, p. 89.

103. N. Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, *Queen's Law Journal*, (19), 1993, p. 181.

5. Conclusion

The conceptual analysis reveals that, in its essence, structural discrimination is unintentional, often not illegal, and involves maintaining the *status quo*, which hinders its recognition and definitive formulation. Addressing it necessitates scrutinising both core cultural values and the foundational principles of societal organization. Nevertheless, the results of the research presented in this paper show that there are several elements that could be used in a legal definition of structural discrimination. Firstly, a central aspect of structural discrimination is the inability to identify specific responsible agents, since it is so complex that both perpetrators and victims are often unaware of its existence and, even more importantly, the actions of the perpetrators which led to the discrimination can be very remote from their discriminatory consequences. Given that it stems from the combined impact of various social rules, policies, and practices, structural discrimination can only be identified by examining its negative effects on traditionally vulnerable groups, as it reinforces or amplifies existing socio-economic inequalities. Key indicators of structural discrimination include low socio-economic mobility and high intergenerational transmission of differences in access to opportunities, resources, and socio-economic conditions, resulting in varying levels of achievement, thereby reinforcing the initial unequal distribution of social advantages. Additionally, it is important to underline that the term “structural” refers to the societal and institutional framework, *i.e.*, rules, policies, standards, and practices that systematically disadvantage traditionally marginalized groups. Therefore, no matter to whom the discriminatory behaviour can be impugned, the state is always and inevitably complicit in any instance of structural discrimination because the state is the one that lays the foundational rules for accessing basic public goods. Another characteristic of structural discrimination is that it is a result of a cumulative effect of rules and practices rather than of individual acts or specific rules. To put it differently, structural discrimination is defined by the disadvantage it systematically produces, not by the intentions behind individual actions or rules. Such disadvantage is another element of the concept, and it arises from distinctions that impose unequal burdens or restrict access to opportunities available to others. So defined, it is obvious that structural discrimination refers to a broader societal context and is affecting multiple groups based on characteristics deemed socially relevant. This broader view helps in understanding the underlying causes and intricate entanglements of social injustices.

The examination also shows that addressing this multifaceted societal problem requires moving beyond the traditional anti-discrimination framework, which relies on indirect discrimination. Despite the fact that indirect discrimination as a legal tool covers many aspects of structural discrimination, much more is needed to tackle the persistent socio-economic inequalities entrenched in present-day social structures. Although the acts leading to structural discrimination can affect individual rights directly, proving these effects in court and attributing them to specific individuals or entities is a separate challenge. Even if these obstacles were overcome, the question of fault would still need to be addressed, and that is a hard nut to crack, for the current legal concept of fault is being too narrow to encompass multifaceted causes of structural discrimination.

Being considered one of the greatest “wicked problems”¹⁰⁴ of our days, it was shown that structural discrimination underscores the limitations of anti-discrimination law, which cannot capture its complexity. Structural discrimination is not merely a result of individual prejudices but is deeply embedded in societal institutions and their historical contexts. This requires a shift in perspective towards recognising and addressing the cumulative and mutually reinforcing effects of various social practices; hence, the paper illustrated that the contemporary anti-discrimination law is often not capable of delivering such results.

For meaningful progress towards substantive equality, it is imperative not only to integrate a structural approach into anti-discrimination legislation but also to adopt public policies that would be more appropriate for confronting such complex societal issues. This involves acknowledging the legacy of past oppressions and the unconscious biases that perpetuate structural inequalities, but even more so, a re-examination of the basic premises of the dominant notion of social justice.

104. A wicked problem resists standard solutions because it stems from numerous interconnected, contingent, and conflicting issues, see T. Marshall, Wicked Problems, In: M. Erlhoff, T. Marshall (eds.), *Design Dictionary*, 2008, Board of International Research in Design, p. 44.