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Discrimination in Employment Relationships Protected Grounds

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Abstract: The concept of discrimination in employment relationships is based on the application of unequal treatment among employees of the same employer in situations where they are in comparable circumstances, or on the application of identical treatment to individuals who are in different situations. The regulation of discriminatory conduct is founded on the recognition of certain protected criteria. These criteria were first established in European secondary law through a series of EU directives, which were subsequently transposed into the national legislation of the Member States. Non-discrimination rules aim not only to limit unjustified differences in treatment, but also to protect specific characteristics such as race, nationality, religious belief, and other comparable grounds. In such cases, the employee may invoke a presumption of discrimination. Even conduct that appears neutral may constitute discrimination if it produces the effect of restricting or preventing the exercise of legally recognized rights. In this context, the prohibition of discrimination is grounded in the protection of fundamental rights and entails banning any distinctions, exclusions, restrictions, or preferences applied by employers to employees who are in comparable situations. This article examines the concept of discrimination in employment relationships, the protected criteria, as well as the classification and development of European and national regulations concerning discrimination.

Keywords: Discrimination, Protected Grounds, European Law, National Law, Case Law

Introduction

The adoption of non-discrimination rules at the European level was based on an analysis of the overall system of citizens' rights and freedoms. The need for regulation also arose from the extension of the protection regime from the traditional framework of the employee's subordination to the employer within employment relationships to the recognition of the principles of dignity and equality at work. Although employment relationships involve a relationship of subordination between employers and employees, this cannot limit the exercise of their fundamental rights and freedoms (Cernat, 2014, p. 51), nor legitimize cases of unjustified direct or indirect discrimination (Ţiclea, 2015, p. 21).

In this context, non-discrimination has been considered primarily as a means of protecting the dignity of employees, functioning in practice as a system situated between the protection of dignity and the prohibition of discrimination. Employees cannot be reduced merely to a set of job duties, as unequal treatment directly affects their rights.

Thus, the principle of equality represents the general framework for excluding any differentiation between employees, requiring employers to take into account the protected criteria derived from EU law. This development introduced a shift in paradigm in the system that traditionally accepted the natural inequalities between individuals. Regulation in the field of equality therefore limited arbitrary conduct by employers through the introduction of criteria belonging to the core sphere of discrimination, with the aim of eliminating privileges characteristic of class-based societies.

Under these circumstances, a paradigm shift occurred through the recognition of equality as a universal natural right, which led to the adaptation of legislation in this field under the influence of international institutions such as the United Nations. Examples include the adoption of the International Labour Organization Convention on Discrimination and the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. Similarly, Convention No. 100 of June 6, 1951 concerning Equal Remuneration was founded on the principle of equality and influenced, at the European level, the adoption of the

European Convention on Human Rights (The European Convention on Human Rights establishes non-discrimination "without any distinction based, in particular, on sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or any other status"), whose Protocol No. 12 extended the scope of protection to any rights capable of being affected by discrimination.

Initially, differential treatment in matters of discrimination was based on protected criteria such as race, religion, belief, and nationality, as well as similar grounds (Dima, 2012, p. 130), thereby limiting both differentiation and the scope of objective justifications. While the legislator initially recognized only a limited list of protected criteria, case law led to the inclusion of additional grounds based on gender, age, and disability. At the level of the European Union, the Treaties introduced criteria relating to nationality and sex, while Article 19 of the Treaty on the Functioning of the European Union later referred also to ethnic origin, religion, beliefs, disability, age, and sexual orientation.

Although a simple reference to the principle of equal treatment did not automatically result in the recognition of new criteria, the case law of European courts, particularly that of the European Court of Human Rights, played a significant role in expanding what was initially a limited list. Through its decisions, the Court sought to interpret cases of discrimination and to mitigate differences in national legislative approaches, encouraging Member States to adapt their legislation and accept new protected criteria.

From a regulatory perspective, EU law contains a closed list of protected criteria referring to race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, chronic non-communicable disease, HIV infection, or membership in a disadvantaged group. From a jurisprudential perspective, the Court of Justice of the European Union interprets this list strictly and does not allow reference to other similar grounds of discrimination (Case C-13/05 *Chacón Navas v. Eurest Colectividades SA,* Judgment of the Court (Grand Chamber) of 11 July 2006, Sonia Chacón Navas v Eurest Colectividades SA, in which the Court excluded illness as a ground distinct from disability).

By contrast, the European Convention on Human Rights contains an open list of protected criteria, referring to sex, race, color, language, religion, political opinions, national or social origin, membership of a national minority, property, birth, or any other status capable of giving rise to discrimination.

At the national level, Romanian law also provides an open list. Discrimination is recognized whenever differential treatment is based on any grounds, even one not expressly listed in legislation, where the purpose or effect of an action restricts or eliminates the recognition, use, or exercise of a person's rights and fundamental freedoms (Riach, 1991), thereby violating the principle of equality.

Although most European legal systems have adopted closed lists of protected criteria, Romania, which later transitioned to a democratic system, opted to maintain a non-exhaustive list. Romanian legislation transposing EU anti-discrimination law recognizes protected criteria such as race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, chronic non-communicable disease, HIV infection, and membership in a disadvantaged group, while allowing the extension of the list to other similar situations not expressly regulated.

At the European level, however, the interpretation of certain criteria has been debated. For example, in interpreting the concept of race, opinions have been divided, as in some states political considerations led to the rejection of the term itself, France replacing it with terms such as neighbor or ethnic.

Discrimination Based on Age

Directive 2000/78/EC (Points 6 and 8 of Directive 2000/78/EC) regulates non-discrimination in access to employment (Truichici and Neagu, 2018, p. 30), as a guarantee of the principle of equal

opportunities, while allowing Member States freedom to regulate (the prohibitions also apply to third-country nationals, except for Member States' provisions regarding their entry and residence on the territory, access to employment, or the concept of citizenship) the retirement age.

The prohibition of age discrimination aims to encourage diversity and access to employment. However, Member States may permit differences (Differential treatment concerns: (a) special conditions for access to employment, vocational training, employment, dismissal, and remuneration for young people, older workers, or persons with dependents, and their professional integration; (b) minimum requirements regarding age, professional experience, length of service, and access to employment; (c) age limits for employment related to the training required or the maintenance of a reasonable period of employment before retirement) in treatment where they are justified (Requirements relating to age conditions, or justified cases, are not discriminatory if they result from the neutral conduct of employers and the existence of certain conditions of employment, vocational training, or remuneration related to the provision of a protection regime to employees), according to Article 6(1) (Council Directive 2000/78/EC of November 27, 2000, establishing a general framework for equal treatment in employment and occupation)**,** by legitimate objectives (Article 6(2) allows Member States to stipulate that age shall not constitute discrimination in occupational social security schemes for membership or eligibility for retirement or disability benefits, provided that it does not constitute discrimination on grounds of sex) and employment policies, without requiring employers to introduce exhaustive lists or examples of such justified situations.

Consequently, national legislation may include provisions allowing differences in treatment where age-based distinctions are proportionate to the pursuit of a legitimate aim (Case C-388/07, *Age Concern England*, paragraphs 34 and 43), for example the automatic termination of individual employment contracts when employees reach a legally established age (Case C-45/09, *Rosenbladt* [2010] ECR I-9391, paragraph 40). In Romanian legislation, Article 56(1)(c) of the Labor Code provides for the termination by operation of law of employment contracts when the standard retirement age and the minimum contribution period are cumulatively fulfilled. However, this provision may be interpreted in conjunction with other special laws. In this regard, Decision No. 387/2018 of the Constitutional Court declared unconstitutional the provisions of Article 56(1)(c), first thesis, of Law No. 53/2003 – the Labor Code, which limited equality, interpreting the expression "standard retirement age" as granting women the right to request continuation of employment until the age of 65 in order to ensure equal rights with male employees. Following legislative amendment (Government Emergency Ordinance No. 96/2018 on the extension of certain deadlines and the amendment and supplementation of certain legislative acts) women were granted the possibility to opt to continue working after reaching the standard retirement age and the minimum contribution period required for retirement at the age of 60. This option may be exercised simply by notifying the employer (Law No. 93/2019 approving Government Emergency Ordinance No. 96/2018), allowing the employee to remain in the same position for up to three years beyond the standard retirement age, with the possibility of annual extensions of the employment contract.

With regard to young persons, Romanian legislation also includes affirmative measures intended to facilitate access to the labor market. The Labor Code and special legislation (Youth Law No. 350/2006) impose obligations on employers to protect young workers against risks related to safety, health, and development, taking into account their lack of professional experience and limited awareness of workplace risks.

Article 13(5) of the Labor Code provides that employment in heavy, harmful, or dangerous work may take place only after the age of 18. Employers must assess risks specific to young workers, while their working time is limited to six hours per day and thirty hours per week without a reduction in salary. Minor employees may not perform overtime or night

work. If their daily working time exceeds four and a half hours, they are entitled to a meal break of at least thirty consecutive minutes and to an additional annual leave of at least three working days.

Nevertheless, protective measures for young persons may lead to discriminatory practices in recruitment, as employers may attempt to avoid hiring young applicants by accepting only applications from adult workers. This has led to the introduction of special measures such as fiscal incentives for employers.

Disability Ground

Initially recognized in the 2006 United Nations Convention (According to Article 1 of the Convention: "Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others") on the Rights of Persons with Disabilities, disability was defined by the Court of Justice of the European Union as a limitation on a person's participation in professional life resulting from long-term physical, mental, or psychological impairments. This definition implies the obligation of employers to provide appropriate accommodations in the workplace.

In the field of non-discrimination, disability is distinctive because it is the only protected ground that imposes positive obligations on employers. Employers must not only refrain from creating disadvantages for employees but must also implement workplace adaptations necessary for the performance of job duties. Such measures are provided for in Directive 2000/78/EC (Points 6 and 8 of Directive No. 2000/78/EC), as positive measures essential to meeting the specific needs of employees with disabilities. However, these obligations do not require employers to provide training, recruitment, or promotion if the employee does not possess the necessary skills or competencies. The obligations instead concern workplace adjustments, such as adapting equipment or modifying the pace of work, taking into account the employer's financial capacity.

Non-discrimination may also involve positive solidarity measures, such as state intervention through rules encouraging or requiring the employment of persons with disabilities, respect for dignity and equality of opportunity, and the elimination of unlawful conduct by individuals, organizations, or private enterprises.

Within employment relationships, persons with disabilities have the equal right to work and to choose their occupation on the labor market, even if the disability occurs during employment. Member States must therefore prohibit discrimination in recruitment, employment, or training. Under Romanian law, Article 5 of the Labor Code prohibits any direct or indirect discrimination against an employee based on disability and requires employers to provide reasonable accommodation in order to facilitate the exercise of the right to work.

Regarding positive discrimination measures, Article 78(2) and (3) of Law No. 448/2006 (republished in the Official Gazette of Romania No. 1 of January 3, 2008), requires public authorities, institutions, and legal entities with at least fifty employees to employ persons with disabilities in a proportion of at least 4% of the total workforce. Entities that fail to comply must pay a monthly contribution to the state budget equivalent to the national minimum gross basic salary multiplied by the number of positions not filled by persons with disabilities. Government Emergency Ordinance No. 60/2017 (republished in the Official Gazette of Romania No. 648 of August 7, 2017) increased this contribution from 50% to 100% of the national minimum gross basic salary multiplied by the number of unfilled positions and removed the possibility of fulfilling this obligation by purchasing products or services from protected units employing persons with disabilities. Employers who hire persons with disabilities on indefinite-term contracts, even when not legally required to do so, may receive monthly fiscal incentives (Article 85(2) of Law No. 76/2002, amended in 2018).

For the public sector, Government Decision No. 751/2018, establishing the categories of persons with disabilities who benefit from a 15% allowance added to the base salary/functional salary/position salary/basic remuneration (republished in the Official Gazette of Romania No. 821 of 25 September 2018), provides that persons classified as having a severe or pronounced disability are entitled, for the activity performed within the normal working schedule, to a 15% allowance calculated on the base salary/functional salary/position salary/basic remuneration.

According to Article 56(1)(c) of the Labor Code, the employment contract terminates by operation of law when the employee reaches the retirement age and has completed the required contribution period. In the case of retirement on grounds of invalidity, however, the contract terminates at the moment when the retirement decision is communicated. Nevertheless, the Constitutional Court, in Decision No. 759/2017 (republished in the Official Gazette of Romania No. 108 of February 5, 2018) held that termination by operation of law on the date when the pension decision is communicated, in the case of a grade III invalidity pension, is contrary to the constitutional provisions concerning equality of rights and results in a restriction of the exercise of the right to work.

On the other hand, Law No. 81/2018 on the regulation of teleworking (republished in the Official Gazette of Romania No. 296 of April 2, 2018) provides for the possibility of performing work through the use of electronic means from a workplace chosen by the employee, which has the potential to ensure better integration of persons with disabilities into the labor market.

Sexual Orientation as a Protected Ground

Directive 2000/78/EC contains provisions aimed at combating discrimination on the ground of sexual orientation, with the objective of ensuring a high level of access to employment and free movement of persons. Although the scope (Article 3(1): "The Directive shall apply to all persons, in both the public and private sectors, including public bodies, in relation to: (a) conditions for access to employment, unpaid activities, or occupation, including selection criteria and recruitment conditions, in all fields of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and levels of vocational guidance, vocational training, advanced vocational training, and retraining, including the acquisition of practical experience; (c) employment and working conditions, including dismissal and remuneration; (d) membership of and involvement in an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits conferred by such an organization") of Directive 2000/78/EC is similar to that of Directive 2006/54/EC (of July 5, 2006, on the implementation of the principle of equal opportunities and equal treatment between men and women in matters of employment and occupation), cases concerning sexual orientation have been relatively limited in European judicial practice (discrimination invoked in relation to other rights, namely privacy, freedom of expression, or parental rights), interpretations focusing mainly on norms prohibiting homophobic conduct.

In Romania, discrimination based on sexual orientation has attracted the attention of European institutions due to a high level of social rejection of persons with different sexual orientations. Article 4(2) of the Romanian Constitution refers only to equality based on race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, property, or social origin. However, sexual orientation is included as a protected ground in special legislation, namely Government Ordinance No. 137/2000 on preventing and sanctioning all forms of discrimination (republished in the Official Gazette of Romania No. 166 of March 7, 2014).

Gender-Based Discrimination

Gender discrimination has been a constant concern of the European legislator, beginning with the European Treaties and the Charter of Fundamental Rights. It originated from the application of social standards and prejudices regarding the allegedly lower professional capacities of women compared to male employees, reflecting traditional patriarchal models (Dimitriu, 2016, p. 319), according to which women were destined only for certain activities, such as child-rearing. Although globalization led to a transformation of women's historical status from that of mother or spouse to that of employee, the emergence of women as workers did not eliminate discrimination, and new forms of unequal treatment continued to appear, particularly through indirect discrimination.

Initially, regulations prohibiting gender discrimination had a general framework. Over time, however, they expanded from the recognition of protected criteria to the introduction of rules aimed at balancing family responsibilities with professional obligations. Equality was also extended to social benefits as a general principle of European law. Equal pay for men and women was established in Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of Member States relating to the application of the principle of equal pay for men and women (OJ L 45, February 19, 1975, p. 19). The rights established by this directive remain protected even after the employment relationship has ended (Case C-185/97 *Coote*, ECR 1998, p. I-5199), including the possibility of compensation for damage suffered (Case C-180/95 *Draehmpaehl*, ECR 1997, p. I-2195; Case C-271/91 *Marshall*, ECR 1993, p. I-4367).

Regulation of remuneration was followed by rules prohibiting discrimination in access to employment, vocational training, promotion, working conditions, and social security, which also allowed the introduction of protective measures related to maternity. Thus, with respect to the protected ground of gender, the focus has moved beyond equal pay to encompass the socio-economic rights of workers and the protection of family relationships. In this development, case law has played a key role in shaping the interpretation of the principle of gender equality, including the recognition of objective justification and positive discrimination in relation to maternity.

From the perspective of European case law, its extensive application has been linked to the analysis of comparison systems used to identify differential treatment, in this case between the work performed by men and women, as well as to the definition of the concept of salary. Equal treatment is typically analyzed in relation to jobs that fall within the same employer. For example, the application of a measure that differentiates between part-time and full-time workers, given that the former are predominantly women, constitutes indirect discrimination. However, a distinction between these categories of workers based on working hours rather than gender would not in itself indicate discrimination.

Thus, the CJEU has specified that, when analyzing cases of discrimination, national courts must also identify the persons who may fall within a particular distinct group, and the use of statistical data (statistical data is relevant in cases of indirect discrimination when establishing the presumption of discrimination, in situations where the burden of proof is reversed. This is based on a comparison between the advantages granted to workers and an analysis of gender composition, with the existence of significant differences giving rise to a presumption of discrimination) is also possible, this aspect being essential for the proper administration of justice, as the foundation of a democratic state (Marinescu, 2022, p. 115).

With regard to positive measures, it has been observed that in certain cases, even when such measures were present, they still reflected a patriarchal society based on gender differences, and the existence of these stereotypes had a direct impact on women's careers. On the other hand, non-discrimination was also regarded as a subsequent attempt to grant female employees certain forms of compensation, by recognizing positive measures rather than attempting to limit gender-based distinctions and mentalities.

With regard to differences in treatment based on sex in the case of activities of a special nature, for example, where sex constitutes an essential element for the proper performance of certain activities, the Court of Justice of the European Union has adopted this approach in order to limit a condescending or paternalistic perspective (Dimitriu, 2016, p. 334). Thus, in activities involving risks, such as military activities, this situation cannot in itself justify the exclusion of women from this professional category. Such an exclusion would fail to recognize the concept of positive discrimination intended to protect them against that risk, while the opposite approach would amount to discrimination (Case 222/84 *Johnston*: Differences in treatment between men and women under Article 2(3) of Directive 76/207, according to which genetic risks and hazards to which any armed police officer is exposed in the performance of their duties are not included, with reference to the protection of women). The mere fact that a particular activity or profession involves a high degree of risk would therefore not be sufficient to exclude women from that field of activity, as this would risk perpetuating stereotypes regarding the division of gender roles in society, such as the association of men with courage and women with the notion of the weaker sex (Ivănuș, 2015, p. 155).

Thus, employers' objective justification for limiting women's access to certain positions must be based on proportionate requirements that exclude discrimination. At the level of state institutions, the relevant evidence concerns the existence of political or social imperatives, as well as proportionate and lawful needs, together with the identification of alternative means that may lead to the elimination of discrimination. In this regard, the application by employers of measures with a potentially discriminatory effect must be accompanied by proof of their appropriateness from the perspective of protecting the rights of female employees, with implicit reference to the requirements applicable to the position to be filled.

Conclusions

At the global level, the principle of non-discrimination is enshrined in the 1998 Declaration of the International Labor Organization, the Universal Declaration of Human Rights, the International Covenants on Civil Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the UNESCO Declaration on Race and Racial Prejudice, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

At the European level, reference can be made to the 1968 European Declaration of Human Rights, the Treaty establishing the European Community, the Treaty of Rome, the Maastricht and Amsterdam Treaties, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Similarly, reference may be made to the provisions of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Thus, the Charter of Fundamental Rights of the European Union (The Union adheres to the European Convention for the Protection of Human Rights and Fundamental Freedoms, fundamental rights being considered general principles of Union law) of 7 December 2000 refers to the prohibition of discrimination on grounds of sex, race, color, ethnic origin, genetic characteristics, language, religion, political or other beliefs, minority status, property, age, disability, or sexual orientation, in employment (aiming to recognize equality between women and men in employment, work, and remuneration, including the granting of advantages to the under-represented sex).

Subsequently, the European Social Charter (according to which all employees have the right to equal opportunities and treatment in terms of employment and the exercise of their

profession without discrimination) highlighted issues relating to free access to employment, vocational training, promotion, and protection in the event of unlawful dismissal, which led to a re-examination of discrimination on protected grounds, beginning with gender (art. 141 TEC - now Art. 157 TFEU), ethnic and racial origin, religious beliefs, sex, age, or disability (Dima, 2012, p. 129), through the Treaty of Amsterdam (article 13 (now Article 19 of the TEU) imposes the right to take "the necessary measures to combat any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation") and the Treaty on European Union (article 2 of the Treaty on European Union sets out the values of dignity, freedom, democracy, equality, human rights, pluralism, non-discrimination, tolerance, justice, solidarity, and equality).

On the other hand, secondary European law subsequently implemented the policy of extending non-discrimination regulations in employment relationships through directives (Directive 79/7/EEC on the progressive implementation of the principle of equal treatment between men and women in matters of social security, Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers, new mothers and breastfeeding workers, Directive No. 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC) in this field (Popescu, 2014, p. 96), namely Directives 2000/43/EC (Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin), 2000/78/EC (on employment relationships and discrimination based on sexual orientation, religious affiliation or beliefs, age, and disabilities) and 2006/54/EC (Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation), given that these legislative acts concerned the recognition of the qualities of employees (Barret, 2003, p. 120) in legal employment relationships.

Similar regulations can also be found in Article 23 of the Universal Declaration of Human Rights, concerning the free choice of employment, and in Article 15 of the Charter of Fundamental Rights of the European Union, with reference to equality and rights to equivalent working conditions for similar professional qualities, while preserving individual freedoms such as freedom of conscience.

Non-discrimination in legal employment relationships thus becomes a system for protecting fundamental natural rights, aiming to ensure professional protection and the recognition of equal opportunities, with employees thus benefiting (Pelissier et al., 2010, p. 174) from all the fundamental rights and freedoms resulting from democratic systems.

In conclusion, the affirmation of the principle of non-discrimination was linked to the recognized protection of the right to work, the elimination of prejudice against disadvantaged persons, and the introduction of standards of conduct for employers.

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