

Discrimination in Legal Employment Relationships. Ethnic Origin

Dragoș-Lucian Rădulescu

*Oil and Gas University of Ploiești, Romania
dragosradulescu@hotmail.com*

Abstract: Ethnic discrimination in legal employment relations involves the application of differential treatment by the employer, without acknowledging protected criteria relating to race, nationality, color, ethnic origin, language or national origin, including nationality or religion in association with race, with the aim of restricting, removing the use or exercise of the rights of employees from groups considered disadvantaged. Discrimination imposes a regime of inequality and intolerance towards persons belonging to ethnic minorities, thus excluding them from access to jobs or treating them differently after recruitment compared to employees belonging to the majority, in a comparable situation in terms of duties, or treating them in the same way, even though they had different duties in the labor process. The article analyzes ethnic discrimination, with reference to the European legislative framework on the subject, with reference to international and European regulations and relevant case law.

Keywords: Discrimination, Ethnic, Criteria, Regulations, European

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Introduction

In employment relationships, racial or ethnic discrimination covers employment, with reference to the demand and supply of jobs, recruitment mechanisms, conditions of employment or dismissal, training, promotion or remuneration, through direct or indirect discrimination, instigation to discrimination, harassment or victimization. Moreover, in the case of discrimination by association, a person is treated unfavorably in comparison with others by reference to the characteristics of another person with whom he or she has a connection, deriving, for example, from marriage to a person belonging to a particular ethnic group.

The attempt by European countries to eliminate discriminatory employment practices meant the introduction of codes of practice in employment relationships, with the elimination of language requirements for recruitment, recommendations of other employees or the elimination of formal advertising of job offers.

According to the European Council's Commission against Racism and Intolerance (ECRI), racial discrimination (ECRI (CE), Doc. CRI(2003)8, pct.1(b) and (c), December 13, 2002) involves the use of criteria of race, nationality, color, ethnic origin, language or national origin, including citizenship or religion in association with race. On the other hand, according to ECtHR and CJEU, the concept of race also includes ethnicity (*Jyske Finans case*), with reference to the conduct of the perpetrator of discrimination related to the presence of racial intent (ECHR December 13, 2005, *Timishev vs. Russia*) or the ground for it (The decision of July 16, 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, point 46). Last but not least, we can see that national legislators usually opt to use the criterion of origin rather than ethnicity.

EU regulatory framework

In this context in which discriminatory conduct is becoming widespread and has become a practice in many countries worldwide (Kaas & Manger, 2012, 1-20), regulations in this area have been based on the provisions of Article 1 of the United Nations Convention on the Elimination of Racial Discrimination (Resolution 2106 (XX) of December 21, 1965 of the General Assembly of

the United Nations, introduced by Decree No. 345, Official Gazette of Romania Part I, No. 92 of 28 July 1970) issued in 1966, which analyzes discrimination on the basis of race, national origin or ethnicity. On the other hand, racial discrimination is analyzed by Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination of 21.12.1965 (published in the Official Gazette of Romania, in force from July 28 1970), as any form of distinction or exclusion based on race, national origin, ethnicity or color, the essence of a person's belonging to a racial group being his or her own identification with it.

As regards the European Directive 2000/43/EC (Council Directive No. 2000/43/EC of June 29, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin), it does not define race, ethnic origin, color or belonging to a national minority (Council Framework Decision No 2008/913/JHA of November 28, 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law), not interconnecting it with citizenship (Explanatory Memorandum to the Commission Proposal of November 25, 1999 for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [COM(1999) 566 final]), but at the ECHR level it was considered (ECHR December 13, 2005, *Timishev vs. Russia*) that citizenship or language criteria cannot be dissociated from ethnicity (see the judgment in *CHEZ Razpredelenie Bulgaria* (The decision of July 16 2015, *CHEZ Razpredelenie Bulgaria*, C 83/14, EU:C:2015:480, point 46) in which the concepts of ethnic origin or ethnic belonging (Bell, 2008, p. 16)), were analyzed, those criteria being considered as overlapping. Nor does Directive 2000/43/EC contain the citizenship criterion imposed by the European Convention on Human Rights, although at the European level the ethnic origin criterion also includes citizenship.

As for the criterion of race, it is analyzed differently and not defined in concrete terms in the legislation of certain states, usually for ethical reasons (according to Advocate General Wahl in the *Jyske Finans* case (*Case Jyske Finans*, C-668/15, CJUE) the definition of the concept of race or racial origin has become an almost unacceptable element for a modern legal system), at a time when it has been made clear at the ECHR level that race is not limited to skin color or facial shape or ethnicity to mere tribal affiliation, but to membership and the existence of common beliefs, commonality of language, traditions, culture or heritage (ECHR December 13, 2005, *Timishev vs. Russia*)

Methods of discrimination analysis

As a rule, the existence of discrimination in employment relationships is analyzed by carrying out tests in relation to the application of race or origin criteria to people with identical skills in recruitment processes. Thus, the recruitment process entails the first contact between migrants and employers, the invitation to interview and the offer of a job in inferior conditions to ethnic groups, at a time when racial discrimination (Lang & Lehmann, 2012, 959) is also found in countries with a tradition of immigration (see the case of Australia, Booth & Leigh, 2012, p. 547)). In concrete terms, the process of discrimination involved, for example, the action of consultancy firms that asked migrants who wanted to get a job to hide their identity by not including in their CV references to the national language, the country of origin, and giving the English version of their name. Another type of analysis involved random applications for job offers from fictitious persons on a specialized website, differentiated in content only by the candidate's name, with analysis of the employers' conduct. Furthermore, similar job offers were sent, both with names of persons belonging to certain ethnicities, but also with names of native citizens, analyzing possible different responses from employers.

Subsequently, discriminatory behaviors were reported by employers to be related to the need to follow the preferences of their customers, especially in jobs involving direct relationships between employees and those customers. In the same sense, discrimination on the basis of ethnicity was explained by reference to certain stereotypical characteristics, such

as lack of initiative or notorious misconduct, on the grounds that such people are not accepted even by their work colleagues. As a result, as an indirect means of discrimination, employers were recruiting family members of their employees in order to prevent the hiring of persons belonging to ethnic minorities, unequal treatment being thus linked to the lack of public job offers. This discriminatory conduct meant that persons belonging to ethnic minorities, who would have wanted a job but were not accepting of racist behavior in that job, were not able to access the employers' offers and were left unemployed.

With regard to the job interview, the discriminatory conduct of employers stemmed from the very way in which the questions were formulated, as well as from the fact that only applicants of a certain ethnic origin were not interviewed. Employers were also considered to be discriminating in cases where ethnic applicants, although accepted for the interview, were given much less time than nationals.

European mechanisms for non-discrimination

The limitation of discrimination against members of ethnic groups, generally found in industrial areas avoided by citizens of host countries, has led to the adoption of policies in this area, which are related to:

Ensuring access to justice through information, awareness-raising, coordination, analysis and monitoring actions, with limitations deriving from the existence of low knowledge of discrimination or reluctance to file complaints against discrimination. Last but not least, prohibitively high court fees, an insufficiently applied reverse burden of proof mechanism, lack of predictability of the length of the trial and lack of confidence in a favorable outcome have led to a lack of responsiveness of victims of discrimination. In the same sense, the presence of barriers obstructing effective access to justice, such as the failure to grant prior legal assistance or the application of symbolic sanctions, makes non-discrimination mechanisms ineffective.

Another reason for ineffectiveness is the absence of an obligation on Member States to collect statistical data on discrimination as evidence of employers' apparently neutral conduct, given that the evidence in ethnic discrimination litigation is specific. Thus, the professional experience required at the time of hiring, the action of trade unions, the age of preferred workers, as well as the case law of the courts in such disputes, may be aspects necessary to identify patterns (Bovenkerk, 1992, 6) of inequality in a particular state.

Also, the application of low-level warnings or fines rather than effective, proportionate and dissuasive ones, the inefficiency of national equality bodies and the lack of mechanisms for collective action are having negative effects.

As for the psychological component of ethnic discrimination, it is based on the existence of prejudices and distinguishing characteristics (Zick, Pettigrew & Wagner, 2008, 233) at European level against migrants or persons belonging to ethnic groups, including by concealing disadvantaging behavior in employment. In this respect, although the establishment of the European Communities has led to migration phenomena between European states, the subjective categorization of persons belonging to ethnic groups has not been eliminated. Thus, although the need to industrialize Europe made it necessary to accept migrant workers, an aspect that continued after 1989 with the liberalization of the labor market for the new Member States of the European Union, the grandchildren of the migrants of the 1960s are still considered as foreigners in the countries in which they were born.

Last but not least, the indirect acceptance of discrimination based on ethnicity persists in Europe, based also on the economic recession, with tendencies of rejection in relation to the threat to the rights of the indigenous population and the perception that there is a tendency for minorities to preserve only their own characteristics. It can be seen that as the number of migrant groups increases, feelings of acceptance of discrimination on the basis of ethnicity become more accepted in society, in the form of a phenomenon of majority protection, and

the frequency of relations between the various minority groups increases in proportion to the majority's predisposition to discrimination.

The limitation of discrimination based on ethnicity and race has been realized in the European Union through specific regulations, the principle of equality being introduced in primary legislation by the EU Treaty (TFEU) referring to respect for human dignity, freedom, democracy, equality, the rule of law, including minority rights. Thus, the Charter of Fundamental Rights sets out the obligation to prohibit discrimination based on race, color, ethnic origin and membership of a national minority.

The guarantee of non-discrimination in the secondary legislation of the European Union has been realized through Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000 /78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, with the aim (Dima, 2012, p. 134) of reinforcing the application of each of the discrimination criteria contained therein in relation to employment policies, access to employment or vocational training, while stimulating the European and national institutions to recognize the principle of equal treatment (Tăbușcă, 2012, p. 70).

European strategies on non-discrimination on ethnic and racial grounds relate to the current trend of increasing xenophobic anti-migrant attitudes as forms of segregation of foreign workers, although migrants make a positive economic contribution as employees in host countries, although only a small number of EU Member States have published data on racially motivated attacks. Thus, by the Resolution of the Council and of the Representatives of the Governments of the Member States (1995) on combating racism and xenophobia in the field of employment and social affairs, in application of the provisions of Article f (2) of the Treaty on European Union on the guarantee of fundamental rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, has assessed the phenomenon of exclusion of persons belonging to vulnerable groups and related acts on grounds of race, color, national or ethnic origin as a result of expulsion and ethnic cleansing, racist and xenophobic conduct requiring mechanisms to ensure that the free movement of persons, the right of residence or access to recruitment is not affected (Joint Declaration of the European Parliament, the Council and the Commission of 25.6.1986 on the analysis of the committees of inquiry into racism and xenophobia, the resolutions of April 21, 1993 and October 27, 1994 on racism and xenophobia, and of April 20, 1994 on ethnic cleansing).

Combating discriminatory arguments targeting migration was also the aim of the 1997 European Parliament resolution on racism, xenophobia and extreme right-wing extremism (European Parliament resolution on racism, xenophobia and the far-right - Official Journal C 085, 17/03/1997 P. 0150), which condemned acts of racism, xenophobia and anti-Semitism by introducing measures to remove policies related to racial hatred from the public agenda, but also of the Framework Decision 2008/913/JHA of the Council of the European Union (Framework Decision 2008/913/JHA of the Council of the European Union of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law) on the approximation of criminal laws of the Member States (The European Councils of Corfu, June 24 and 25 1994, Essen, December 9 and 10 1994, Cannes, June 26 and 27 1995 and Madrid, December 15 and 16 1995) of the European Union, as regards the introduction of a minimum level of criminal penalties (Articles 6, 29, 31 and 34(2)(b) of the Treaty on European Union, 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Chapters II and VI of the Charter of Fundamental Rights of the European Union, Action Plan of the Council and the Commission for the implementation of the Treaty of Amsterdam on the area of freedom, security and justice, Tampere European Council of 1999, European Parliament Resolution of 2000 on the position of the European Union at the World Conference against Racism) for the intentional

instigation of public incitement to violence or hatred (Articles 6, 7 and 8 of the Statute of the International Criminal Court and Article 6 of the Charter of the International Military Tribunal) against members of communities based on race, color, descent, ethnic or national origin. In this case, the investigation of racist and xenophobic offenses was not subject to the prerequisite of a complaint by the victim, thus creating a new protection regime (Joint Action of July 15, 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat racism and xenophobia (96/443/JAI)).

The need for coordination of judicial procedures at the level of the Member States of the European Union stems from the emergence of contradictory procedural elements in national legislations, such as the recognition of the single passive subject of discrimination offences with the elimination of multiple passive subjects of groups of persons, but also the limitation of the scope of recognition of the criteria of race, color, descent, national or ethnic origin, given that the essential aspects (European Parliament resolution of March 14, 2013 on stepping up the fight against racism, xenophobia and hate crime (2013/2543(RSP)) (2016/C 036/13)) of these facts imply prejudice (Convention on the Elimination of All Forms of Racial Discrimination (UNCERD), European Convention on Human Rights, Charter of Fundamental Rights on discrimination based on race, ethnic origin or language, religion or membership of a national minority, Council Directives No. 2000/43/EC on racial equality, No. 2000/78/EC on equal treatment in employment and occupation, 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime) against migrants and members of ethnic minorities.

In this respect, the European Commission has proceeded to issue fundamental communications, in the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Non-discrimination and equal opportunities for all - A framework strategy (COM/2009/0269 final) stating that the mechanisms to combat discrimination must be related to the criteria of race and ethnic origin, implementation of common rules on racial discrimination, granting rights to third-country residents (Directive 2000/43/EC of June 29, 2000 (OJ L 180, 19.7.2000, p. 22) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of November 27, 2000 (OJ L 303, 2.12.2000, p. 16) establishing a general framework for equal treatment in employment and occupation) and nationals (Council Regulation (EC) No 859/2003 of May 14, 2003 (JO L 124, 20.5.2005)), being achieved through the transposition (The transposition concerns the racial criteria in Directive 2000/43/EC and those of religion or belief, age, disability and sexual orientation in Directive 2000/43/EC.2000/78/CE) into national law of Directives No. 2000 /43/EC and 2000/78/EC into national law. The non-discrimination of ethnic minorities in the labor market, with a differentiated level of protection between EU Member States, also implied stimulating the emergence of policy instruments such as measures to raise public awareness, integration, information and compensation for the harm caused to victims.

Thus, the Green Paper on equality and non-discrimination in an enlarged European Union (COM (2004) 379) provided for the collection of data on discrimination and the identification of policies through the creation of correspondence mechanisms between groups with responsibilities in the fight against discrimination. We envisage specialized non-discrimination bodies such as NGOs, extending cooperation, informing about the existence of non-discrimination rules, issuing common rules with reference to racial offences.

Conclusions

The need for regulations prohibiting discrimination based on racial or ethnic origin stems from a long history of oppression, stigmatization and intolerance. In this respect, there has been a real increase in discriminatory conduct through general practices in many countries worldwide, with racism manifesting itself as a form of segregation on the basis of race, with racially motivated acts

having the effect of undermining the fundamental rights of minorities. In this context in which discriminatory conduct is becoming widespread and practiced in many countries worldwide, the need was felt to introduce specific regulations in the form of special legislation on racially motivated crime, prohibition of xenophobia, discrimination against ethnic minorities, which would have the effect of establishing an unanimously accepted standard of legal protection.

Discrimination leads to limited employment opportunities for people belonging to ethnic minorities, which will ultimately influence employment, thus extending the trends of exclusion from the labor market. In this respect, starting from the fluctuating trends in the economy, the unemployment of ethnic minorities in the territory contributes directly to the withdrawal of migrants into the informal economy. As regards European policies on ethnic discrimination, these relate to the establishment of the possibility for victims to engage in litigation in this area by providing a sufficient mechanism of legal protection in order to limit differences in treatment affecting groups considered to be disadvantaged. In this regard, it is considered necessary to introduce positive measures in European policies, such as an integrated approach to mechanisms to combat racial discrimination and the application of monitoring methodologies.

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