



***Racial discrimination,
with particular reference to the Roma
The protection at European level***

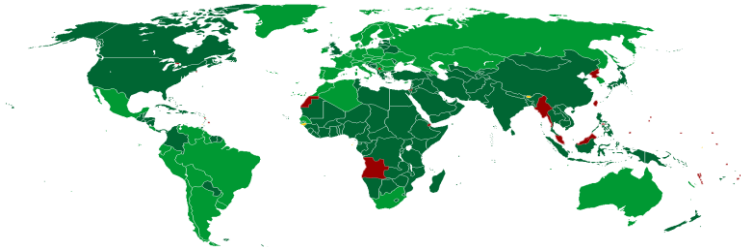
ERA SEMINAR
APPLYING EU ANTI-DISCRIMINATION LAW
9 - 10 MAY 2019



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**THE CONTEXT (I).
Universality of racial discrimination and the fight
against it**

Both (a) *discrimination on grounds of racial or ethnic origin* and (b) the *fight against this phenomenon* now are almost universal.
(a) People who are discriminated against on the basis of their physical characteristics change, but everywhere in the world there is discrimination on grounds of race and ethnic origin: the unique case of the discriminated majority.
(b) The fight against racial discrimination is one of the few missions which today finds almost universal consensus in the international community, as demonstrated by the number of signatures and ratifications of the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* and the numerous other international conventions which affirm the right to equal treatment irrespective of racial or ethnic origin.



Map of countries that have signed / ratified ICERD - BlankMap-World.png made by [Varcion](#).



THE CONTEXT (II).

Directive 2000/43 and the CJEU case-law

The experience of Member States, the dialogue with the ECtHR and the case law of the Supreme Courts outside the European context

The analysis of Directive 2000/43 and the relevant CJEU case law must be seen in a broader context:

- the need to take account of the legal traditions and different procedural systems of each Member State; Article 6 of Directive 2000/43 "*de minimis*";
- the importance of the ECtHR case law on racial discrimination, the dialogue between the courts;
- Analysis of the race discrimination case law of other countries (such as the US Supreme Court, the Canadian Supreme Court, the Australian *High Court* and the *Federal Court*) shows that the definition of race, the structure of reasoning for determining the existence of discrimination, the effects of the distinction between direct and indirect discrimination and the grounds that may justify indirect discrimination are subject to different interpretations; interest in understanding what the European model of anti-discrimination law is today



DIRECTIVE 2000/43 - THE CONTENT

A short directive. The main articles at a glance.

- **Absence of a definition of "race" and "ethnic origin"** in the Directive;
- Article 2: **direct discrimination, indirect discrimination, harassment and an instruction to discriminate** - direct discrimination is unjustifiable (exceptions in Articles 4-5), but often almost impossible to prove; the exceptions/justifications admissible in the case of indirect discrimination (*'the legitimate aim and the means of achieving are appropriate and necessary'*; paragraph 2(b) – *appropriate*: balance between the value sacrificed - equality - and the effect produced; *necessity*: there is no other means to achieve the aim);
- Article 3: the **material scope** of application;
- art. 7: the **right of access to justice** for victims, the **legal standing** and associations; art. 9: protection from victimisation;
- Article 8: **the burden of proof**;
- Article 13: **equality bodies**;
- Article 15: **effective, proportionate and dissuasive sanctions**

Differences from Directive 2000/78 on combating discrimination based on religion or belief, disability, age or sexual orientation as regards employment and occupation in order to give effect to the principle of equal treatment in the Member States.

DIRECTIVE 2000/43

THE CONCEPTS OF RACE AND ETHNIC ORIGIN (I)

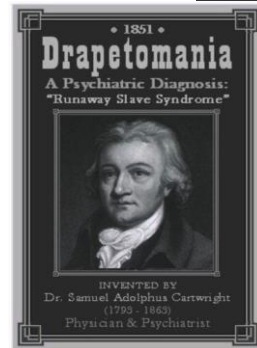
The difficulties of defining the notion of **race**:

- ❑ In the sciences we have moved from studies that ascertained the existence of biologically different races and reconnected them to specific personality traits (the mental disease of "*drapetomania*" discovered by Dr. Cartwright in 1851) to studies that today exclude the possibility of any classification of humans from a biological point of view;

- ❑ Recital 6 of Directive 2000/43:

"The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories".

- ❑ The notion of "race" is a matter of **social perception** (the perception of those who discriminate), not biological truths (relating to the to the victim of discrimination).



DIRECTIVE 2000/43

THE CONCEPTS OF RACE AND ETHNIC ORIGIN (II)

The concept of ethnic origin, on the other hand, can be found in the *CHEZ* judgment of the Court of Justice, which refers to the definition of the term given by the ECtHR:

"The concept of ethnicity origin derives has its origin in the idea of **societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds**

(paragraph 46 of the judgment in *CHEZ* quoting the decisions of the ECHR, *Natchova and A. v. Bulgaria*) 43577/98 and 43579/98, ECHR, 2005-VII, *Sejdic and Finbci v. Bosnia and Herzegovina* nos. 27996/06 and 34836/06, § § 43 to 45 and 50, ECHR 2009)

Race and ethnic origin are related and partly overlapping concepts

Examples that can help to understand the difference with the notion of race.

- The Court of Justice indicates the origin "Roma" as a "established" example of "ethnic origin".
- The example of "Moroccans" united by nationality, faith, languages, cultural origin (see implicitly *FERYN* judgment of the Court of Justice).
- Dutch, French, German, Greek, Hungarian, Irish, Italian, Portuguese, considered as different "ethnic groups", even if they share the "race"?

DIRECTIVE 2000/43 MATERIAL SCOPE (I)

Judgment CHEZ (C-83/14) (CJEU, 16 June 2015): the prejudice can concern any right, legitimate interest, good of life without limitation

It would not be lawful for a national provision to limit protection against discrimination to acts which prejudice a 'right' or a 'legitimate interest' of the person, since

- *this condition is not provided for in the Directive, and*
- *the scope of the directive cannot be interpreted restrictively, since its purpose is to ensure the development of democratic and tolerant societies which allow the participation of all persons.*

"Particular disadvantage" does not refer to particularly serious

But see case C-391/09, Runevič-Vardyn (CJEU, 12 May 2011):

46 It should also be borne in mind that the preparatory work relating to Directive 2000/43, which was adopted by the Council of the European Union, acting unanimously in accordance with Article 13 EC, indicates that the Council was unwilling to take into account an amendment proposed by the European Parliament whereby 'the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions' would be included in the list of activities listed in Article 3(1) of that directive and thus come within its scope.

47 Consequently, although, as is apparent from paragraph 43 above, the scope of Directive 2000/43, as defined in Article 3(1) thereof, must not be interpreted restrictively, it does not cover national rules such as those at issue in the main proceedings which relate to the manner in which surnames and forenames are entered on certificates of civil status.

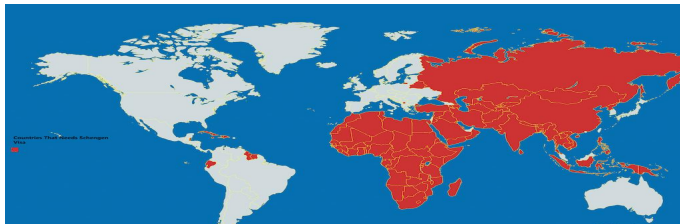
Need to deepen the subject.

DIRECTIVE 2000/43 MATERIAL SCOPE (II)

The relationship between immigration law and anti-discrimination law in relation to race and ethnic origin

The relationship between immigration law, understood as the law governing the entry and residence of foreign citizens, and anti-discrimination law is complex:

- *From a sociological point of view, victims of discrimination are normally those who are perceived as "outsiders":*
 - *both foreigners and people belonging to races other than the dominant one are by definition "outsiders" - both being foreign and belonging to an ethnic minority is associated with disvalue;*
 - *frequently in Europe, in some Member States more than in others, these characteristics are cumulated in the same person (foreign and belonging to a minority ethnic race/origin), but often this is not the case - the case of the ROMA;*
- *From a legal point of view, it is legitimate not to grant the same rights of entry and residence to foreigners as to nationals.*
 - *One could also analyse the regulations on entry from the point of view of "racial criticism", but one would arrive at conclusions that would almost always be irrelevant from the point of view of the law: for example, of the countries whose citizens are subject to a Schengen short-stay visa.*



DIRECTIVE 2000/43 MATERIAL SCOPE (II)

The relationship between immigration law and anti-discrimination law in relation to race and ethnic origin

- ❑ In this regard, Directive 2000/43 clarifies that **the prohibition of discrimination** also applies to third-country nationals, but **"does not cover differences of treatment based on nationality and does not affect the provisions governing the entry and residence of third-country nationals and their access to employment and occupation"**.
- Case C-571/10 KAMBERAJ (CJEU, 24 April 2012):
 - 48. In the present case, it is clear [...] that the discrimination of which the applicant in the main proceedings claims to be victim compared to Italian nationals is based on his status as a third-country national.
 - 50. Accordingly the discrimination claimed by the applicant in the main proceedings does not fall within the scope of Directive 2000/43 and the fourth question is inadmissible.
- ❑ At European level, legal instruments other than Directive 2000/43 exist to verify the legality of national measures excluding foreigners as such from access to certain social goods.
- The equal treatment clauses contained in Directives 2003/109 (holders of long-term residence permits), 2011/98 (holders of a single work permit), 2009/50 (holders of a blue card), 2014/66 (posted workers), 2014/36 (seasonal workers), 2016/81 (university researchers)
- ECHR case law (e.g. Gaygusuz v. Austria) and national case law of the Constitutional Courts
- Some Member States, in implementing Directive 2000/43, have expressly extended protection against discrimination to include discrimination on grounds of nationality.

DIRECTIVE 2000/43 MATERIAL SCOPE (II)

The relationship between immigration law and anti-discrimination law in relation to race and ethnic origin

- this does not mean that Directive 200/43 cannot also apply in the field of application of immigration law
- Two possible examples: access to the international protection procedure by the Roma - internal border controls on the basis of racial profiling
- The determination of racial discrimination against Roma by British Immigration Officers in the judgment of the House of Lords of 9.12.2004 Regina v. Immigration Officer at Prague airport and another ex parte European Roma Rights Centre and others (400:1 possibility of refusal of entry for persons of Roma ethnicity)
- The BIAO case against Denmark decided by the Grand Chamber of the ECtHR on 24 May 2016 (the 28 year rule on family reunification)

DIRECTIVE 2000/43

The Leading Cases of the CJEU: the *Feryn* Case

□ Case C-54/07, *Feryn*, of 10 July 2008

The facts as reported by the Advocate General.

2. NV Firma Feryn ('Feryn') is a firm specialised in the sale and installation of up-and-over and sectional doors. In early 2005, Feryn was seeking to recruit fitters to install up-and-over doors at its customers' houses. To this end, Feryn placed a large 'vacancies' sign on its premises alongside the main road between Brussels and Antwerp.

3. On 28 April 2005, the newspaper *De Standaard* published an interview with Mr Pascal Feryn, one of the firm's directors, under the heading 'Customers do not want Moroccans'. Mr Feryn was reported to have said that his firm would not recruit persons of Moroccan origin: *'Apart from these Moroccans, no one else has responded to our notice in two weeks ... but we aren't looking for Moroccans. Our customers don't want them. They have to install up-and-over doors in private homes, often villas, and those customers don't want them coming into their homes.'*

On the evening of 28 April 2005, Mr Feryn participated in an interview on Belgian national television, in which he stated: *'[W]e have many of our representatives visiting customers ... Everyone is installing alarm systems and these days everyone is obviously very scared. It is not just immigrants who break in. I won't say that, I'm not a racist. Belgians break into people's houses just as much. But people are obviously scared. So people often say: "no immigrants". ... I must comply with my customers' requirements. If you say "I want a particular product or I want it like this and like that", and I say "I'm not doing it, I'll send these people", then you say "I don't need that door." Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? I must do it the way the customer wants it done!'*

*Mr Feryn's justification: 'it is the market that requires me to discriminate':
a CLASSIC case: in many judgments the respondent invokes market needs*

- *Non-white employees excluded from store visibility and warehouse workers*

DIRECTIVE 2000/43

The Leading Cases of the CJEU: the *Feryn* case

□ **THE LEGAL CLAIMS OF THE CJUE**

1. Existence of direct discrimination.

28. The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.

34. Public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements.

2. Discrimination can also be established in the absence of an identified victim;

3. the question of the legal standing of associations/ONGs

4. Identification of the type of sanctions

□ **TWO CONSIDERATIONS IN THE MARGIN**

I. «Easy» case because the discriminatory intent is externalised:

Generally, it is very difficult to prove discrimination in recruitment policies by the individual;

- *E.g. candidate with high skills, but never selected;*
- *The use of statistics: class actions in the USA.*

II. Easy case: banana peel?

Not always. In some cases, pride in discriminating: the possible sanction of the Court counts less than the applause of the society

DIRECTIVE 2000/43
The "Leading cases" of the CJUE: the case of CHEZ

- *The judgment in Case C-83/14 CHEZ of 16 June 2015 (Grand Chamber)*

The facts as reported by the Advocate General.

Ms Nikolova works as a sole trader in the Bulgarian town of Dupnitsa. She runs a food shop there in the 'Gizdova mahala' district, which is supplied with electricity by CHEZ Razpredelenie Bulgaria.

The Gizdova mahala district is known as the biggest Roma district of Dupnitsa. The population of that district belongs predominantly to the Roma ethnic group. That is *not* true of Ms Nikolova, however.

In 1999 and 2000 the electricity meters for all consumers now supplied by CHEZ in that district were attached to the electricity poles for the overhead network at a height of approximately 6 m, which is inaccessible for normal visual checks. It is not disputed that this practice occurs only in districts which have a predominantly Roma population and is applied there to all customers irrespective of whether or not they belong to that ethnic group themselves. The reasons given for that practice are the large number of cases of tampering with electricity meters and the frequent occurrence of unlawful connections to the electricity network in those districts. Elsewhere, on the other hand, electricity meters for all consumers — including those belonging to the Roma ethnic group — are placed at a freely accessible height of approximately 1.70 m, usually in the consumer's home, on the outside walls of their building or on surrounding fences.



DIRECTIVE 2000/43
The "Leading cases" of the CJUE: the case of CHEZ

□ ***THE MATTERS DEALT WITH BY THE COURT***

- 1) the (already seen) notion of "ethnic origin";
- 2) the distinction between direct and indirect discrimination based on ethnic origin;
- 3) Discrimination "by association" (in French "*discrimination par association*" or also "*discrimination par ricochet*");
- 4) the possible justifications for measures of indirect discrimination; the concepts of 'necessity' and 'proportionality' within the meaning of Article 2(2)(b).

Apart from FERYN and CHEZ, only the JYSKE FINANS, KAMBERAJ, RUNEVIC-VARDYN, BELOV and MEISTER cases have reached the Court of Justice.

- What about these cases?
- Why is the amount of case law limited?

Discrimination against Roma examples of action against racial discrimination dealt with by the courts of the Member States; litigation before the ECtHR

- **Roma:** 10-12 million in Europe: the largest ethnic minority in Europe and the most discriminated against. According to the statistics.
- Some cases dealt with by the national courts of the Member States in the field of discrimination against Roma.

The very rich litigation before the ECtHR:

- almost exclusively concerning persons belonging to the Roma ethnic group;
- the ascertainment of the violation of Article 14 ECHR (right to enjoy the fundamental rights provided for by the Convention without racial or ethnic discrimination) remains infrequent, but there has also been a case of great importance (segregation of Roma children in schools)

The case law of the ECtHR on Roma issues

Areas in which the Strasbourg Court has had the opportunity to rule with regard to the Roma:

- **violent attacks on homes and property;** [*Moldovan (no. 2) and others v. Romania; Burlya and others v. Ukraine*]; **murder of a Roma without effective investigation;** [*Fedorchenko and Lozenko v. Ukraine*]; *Ukraine, in other cases, violation of Art. 2 and 3 Cedu, but exclusion of violation of Art. 14 Cedu, for lack of evidence*]; **violent acts of the police against Roma** [*Fbekos and Koutropoulos v. Greece; Cobzaru v. Romania, Petropoulou-Tsakiris v. Greece; Stoica v. Greece*]. *Romania; Lingurar v. Romania; Lakatosova and Lakatos v. Slovakia*]; - *Criminal scope, however*;
- **discrimination by the judicial authorities in the application of sanctions against Roma** [*Paraskeva Todorova v. Bulgaria*];
- **collective expulsions** [*Conka v. Belgium*];
- **the refusal of the right to vote for members of the Roma ethnic group** [*Sejdic and Finci v. Bosnia and Herzegovina*]
- **access to education for Roma children without discrimination** [*D.H. and others v. Czech Republic*: (80-90% of children in "special" schools belonged to the Roma ethnic group: indirect discrimination, same concept of burden of proof as in Directive 2000/43?); *Sampanis and al. c. Greece; Orsus and others v. Croatia* (direct discrimination - protest of non-Roma parents and moving to another establishment)];
- **The removal of Roma children from their families** [*Barnea and Caldararu v. Italy; Achim v. Romania* and similar and (shared) conclusions of the Italian Court of Cassation on racial discrimination and adoptability proceedings in judgment 19744/2018 of 21.3.2018; *Terna v. Romania*]. *Italy - pending case*]

The important principle affirmed by the ECtHR in the dispute over persons belonging to the Roma ethnic group:

- *"as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority" and that 'they therefore require special protection'* [*D.H. and others v. Czech Republic, Grand Chamber decision of 13 November 2007, § 182*].

Outside of court: an example of other initiatives to combat racial discrimination against Roma at EU level

- Infringement proceedings launched by the European Commission against the Czech Republic in September 2014 (connection to *D.H. and others v. the Czech Republic*). Proceedings against other countries.
- The **JUSTROM** European project on access to justice for Roma, Sinti and traveller women, funded by the European Commission and the Council of Europe: what lessons can be learned from the racial discrimination case law, on the interests of beneficiaries and the role of the bodies referred to in Article 13 of Directive 2000/43?
 - the case of the request to change the surname.
 - the importance of access to justice, even for the simple recognition of rights;
 - to meet with the judge;
 - more or less powerful bodies within the meaning of Article 13 of Directive 2000/43: consequences for the effectiveness of protection
- **Instruments outside judicial proceedings** (the European project **Discrikamira**)



Viviane Reding
Vice-President of the European Commission
Commissioner for Justice, Fundamental Rights & Citizenship

Brussels, 22 April 2013

Our Ref: B1446

Dear Ms Reding,

REQUEST TO TRIGGER INFRINGEMENT PROCEDURE AGAINST CZECH REPUBLIC FOR BREACHING RACE EQUALITY DIRECTIVE

We should like to draw your attention to the continuing discrimination against Roma people in the Czech Republic which challenges their right to education. Discrimination and segregation in education constitute a serious breach of the EU's Race Equality Directive (2000/43/EC). We therefore urge you to launch an infringement procedure against the Czech Government.

Our submission catalogues continuing discrimination against Roma children in the Czech education system, which violates the country's obligations under the above Directive, namely Articles 2 and Article 3 (1) (g). We conclude that, contrary to the Czech Republic's obligations under the Directive:

- The Czech authorities continue to systematically segregate and discriminate against Roma children regarding education
- Roma children are disproportionately placed in "practical schools" (formerly "special schools") where they, along with children with disabilities, are segregated from their mainstream peers
- Discriminatory practices now also occur in schools identifying themselves as mainstream elementary schools. They result in the segregation of Roma in separate classes and schools
- The main obstacle to ending systemic discrimination against Roma pupils is the Czech Government's lack of political will, compounded by its failure to properly develop and implement adequate policies to promote inclusive education

In the light of findings based on research by ourselves and other national and international monitoring bodies and given the absence of an effective response by the Czech authorities, we ask the Commission to start infringement proceedings according to Art. 258 TFEU, by submitting formal notice to the Czech Republic for violating protections against direct and indirect discrimination in education as guaranteed under the Directive.

Yours sincerely,

Conclusion

" You can resist an invading army, you cannot resist an idea whose time has come (Victor Hugo)

Is this statement about the right not to be discriminated against on the grounds of race or ethnic origin really true?

It has been shown that the right to equal treatment irrespective of racial or ethnic origin can now be described as a universal value. This idea, however, contrary to what might be hoped by Hugo's phrase, still meets with strong resistance today, particularly in times of crisis, when demands for protection by the most disadvantaged sections of the population emerge.

The importance of anti-discrimination law (internal and European) as one of the instruments for defending this value.