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DISCRIMINAREA RASIALĂ ŞI EFECTELE EI SOCIALE ANALIZATE PRIN PRIZMA LEGII DIN MAREA BRITANIE

RACIAL DISCRIMINATION AND ITS SOCIAL IMPACT ASSESSED FROM THE PERSPECTIVE OF UK LAW

Rezumat

Încă de la formarea primelor societăți umane, acestea au reușit să supraviețuiască datoria unor concepte non-materiale asemeni Contractului Social. Pe cât de util aceasta nu a fost, din păcate aceasta nu era singura construcție sociala ce continuă să ne afecteze comunitățile. Am putea spune că alte idei la fel de reziliente s-au dovedit a fi conceptele de misoginie, intoleranță religioasă si discriminare rasială. Deși inumane, științific neîntemeiate și neiertabile la nivel legal, faptul că acestea au contribuit la formarea societăților curente, în special al Marii Britanii, este indubitabil. De aceea, în acest articol, vom analiza istoria și eficiența Marii Britanii în eforturile sale de a înlătura discriminarea rasială, în conjuncție cu legile si convențiile create in acest scop, în special S.9 al "Legii Egalității" 2010. Vom analiza cât de bine acest act incorporează protecția la nivel vertical, pe cât de adecvată este definiția

acordată conceptului de rasă, şi pe cât de capabilă este aceasta lege în efortul de combatere al rasismului în societatea Britanică.

Cuvinte-cheie: discriminarea rasială, impactul social, legea internațională, convenții, protecția legala, evoluția legala, declarația drepturilor omului ale națiunilor unite, curtea europeană ale dreptului omului, caracteristica particulară protejată, origine etnică, origine națională, religie, hărțuire, victimizare.

Abstract

For as long as society has existed, it has managed to survive though non-intrinsic concepts as the Social Contract. Useful as that was, it is shamefully not the only social construct to shape our current societies. Perhaps, some of the other more resilient ones are ideas as ingrained as misogyny, religious intolerance and racial discrimination. Though inhumane, scientifically unfounded and legally unforgivable they may be, it's undeniable that they still exert a great deal of influence globally, and UK in particular. Which is why in this essay I will assess UK's history and effectiveness in tackling phenomenon of racial discrimination, in conjunction with the laws set to combat it, mainly S.9 of the Equality Act 2010. I will do so by looking at how well the act incorporates law vertically, at how well it defines the concept of race, and whether it managed to combat racism in UK as a whole.

Key-words: racial discrimination, social impact, international law, conventions, legal protection, legal evolution, UNDHR, ECHR, PCP, ethnic origins, national origins, religion, harassment, victimization.

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When assessing legal protections against racial discrimination we have to keep in mind that there are two approaches[2]. The first one is open-ended, regarding all forms of exclusion and discrimination and interconnected, aiming at eliminating discrimination in general. This is how discrimination was tacked by the UNDHR. The second approach treats inequality as an individualized concept, offering legal protection on account of prescribed characteristics. This approach was adopted by ECHR, and although it specifically protected against discrimination based on listed characteristics, it also had the intuition of adding "other status" as a contention point, increasing long-term flexibility. It was adopted by the EU Directories and EA, the latter covering only 9 characteristics with a "duty" to add "caste"[3] to them. Ignoring the fact that the EA failed to cover at least 8 characteristics covered either by EU law[4], ECHR or UNDHR, it has another drawback compared to the open-ended approach in that it is much less efficient in combating instances of multiple discrimination where the reason is uncertain. Thus, it failed at recognizing the inherent link between different protected characteristics, slowing down the development of further equality law in reaction to social progress. Also, through lack of the aforementioned "Other Status" characteristic, or a generalized restriction of "Unfair

[2] Bob Hepple (2014). *Equality: The Legal Framework*. 2nd ed. Oxford and Portland, Oregon: Hart Publishing. p35-36.

[3] The Original draft of EA, s 9(5).

[4] Bob Hepple (2014). *Equality: The Legal Framework*. 2nd ed. Oxford and Portland, Oregon: Hart Publishing. p36, Table 2.1.

Discrimination"[5], the courts' ability to extend protected characteristics will be drastically inhibited. Yet, the circumvention to this inflexibility is patched up through the harmonization of new EU law using delegated legislation[6], thus ensuring consistency across legislation[7], albeit at a slower pace.

Successively, when approaching protection on the ground of race, we must understand what meaning is given to it by S.9 of EA, and whether it's adequate. Race itself as a ground of discrimination was first outlawed in the UK with the introduction of RRA 1965. That law proved inadequate as the definition of race was restricted, providing only protection against direct discrimination in public spaces[8]. Most of the grounds covered by "race" in the EA have actually been introduced in the RRA 1976, defining it as: colour, nationality, and ethnic and national origins; with a 2013 amendment to add "Caste" to the definition. And although the distinction of race itself is a social construct based on irrelevant biological differences, understanding its impact on society isn't as black and white. Nowadays people are unlikely to admit, or even consciously perpetrate discrimination based on race, as its meaning evolved beyond colour alone.

Discrimination and harassment is more often perpetrated on the account of perceived differenced in colour, culture, religion and language, making race itself a shaky definition. As such there is a dire need of procedures enabling discrimination on multiple grounds to be dealt with efficiently. For instance, although ethnicity and religion may be separate, adverse treatment may be tied to belonging to an ethno-religious group. In other cases, discrimination claims had to be constructed with two distinct grounds such as gender and race (Ex: Woman-Asian[9]). Although such factors may be inextricably linked to discrimination, at first courts insisted on analysing each ground separately despite their linkage[10], thus creating difficulties in finding a suitable comparator, and of bringing justice. Only after the "Discrimination Law Review" has there been brought enough evidence related to the difficulty of multiple discrimination claim construction, that the government amended the law with what became S.14 of EA 2010, allowing claims based on a combination of protected characteristics. Despite this approach being criticized and never brought into force, protection wasn't constrained, as case law itself (both before and after EA 2010) has recognized that in instances of multiple discrimination, claims may be constructed if it's established that even one ground may have led to unfavourable treatment[11]. Tribunals aren't obstructed from making findings of discrimination based on multiple grounds, as they have taken the approach of considering every reason of discrimination in order to determine whether it's a significant factor[12], and that it's possible to bring indirect discrimination claims which focus on the combined effects of two different PCPs[13]. After in depth studies on racism in the UK, particularly that which is institutionalized in its public functions[14], it has become clear that racial disadvantage currently must be measured on multiple grounds such as both ethnicity and religion, giving it the name of "ethnic penalty"[15]. This is becoming especially relevant today as Britain's ethic minority population is rising, and Britain itself becomes more diverse[16].

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[5] South African Employment Equity Act 1998, n.55.
[6] European Communities Act 1972.
[7] Equality Act 2010, ss 203-04.
[8] "On this day: 8 December 1965: New UK race law 'not tough enough'". BBC. 8 December 1965. Retrieved 10 April 2017.
[9] *Bahl v The Law Society* [2004] EWCA Civ 1070.
[10] *Bahl v The Law Society* [2004] IRLR 799, para 137.
[11] *Nagarajan v London Regional Transport* [1999] IRLR 572; *O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615, CA.
[12] *O'Reilly v BBC* [2011] EqLR 225.
[13] *Ministry of Defence v De'Bique* [2010] IRLR 271, EAT.
[14] Stephen Lawrence inquiry (1999) para 6.34.
[15] Cheung and Heath (2007) table 12.a.2.
[16] Equalities Review (2007) 41.

A further look at S.9(1) indicates the term "ethnic origin" as a protected ground, yet as its predecessors fails to define it. The current definition was adopted by the HoL after the case of *Mandla v Dowell Lee*[17]. There, Lord Fraser stated that for a group to be "ethnic" it must be perceived by itself and others as a distinct community due to its unique traits[18]. The main ones are essentially a shared history, its own distinct cultural tradition, and other relevant traits such as a common geographic origin, language, literature, religion, and record of oppression by a larger community. With this test groups like Sikhs, Romani Gypsies[19], European Roma[20], Scottish Gypsy Travellers[21] and Irish Travellers[22] became distinct ethnic groups legally protected. Jews are also stated to have become an ethnic group for the purpose of legal protections[23], although law makes the distinction between Jews as members of an ethnic group, and Jews defined by religious principles[24]. Unfortunately Rastafarians didn't make the cut in light of their lack of "prolonged" shared history[25], this posing a risk to them as they are nonetheless easily discernible and thus vulnerable. This just proves how shaky this definition is, considering groups which can be pragmatically discerned may not be offered any kind of legal protection against discrimination.

Further distinctions are made between ethnic origins, and national origins and nationality. Originally the latter two were poorly and narrowly defined. The first two RRAs made no mention of nationality, being backed up by the HoL which held that "national origin" does not protect non-British people, on the account that it indicated a birth connection to a national group rather than a foreign citizenship[26]. Naturally this lack of protection and narrow interpretation allowed for discrimination. Two examples are discrimination on a person "born abroad" not being unlawful in the lack of reference to a country or place of origin[27], nor discrimination justified by birthplace[28]. As such, the law was very lenient towards discrimination against poorly defined groups such as foreigners, immigrants and asylum seekers. The omission of nationality from previous law was equally serious, being corrected only with the inclusion of this term by the RRA 1976. While theoretically EA mirrors this protection, its coverage is restricted only to the citizens of EU member states[29]. EU further undermines nationality based protection through the failure of the EU Race Directive to mention nationality or citizenship as protected grounds. In practice this creates conditions under which "Third Country Nationals" are not offered full legal protection in regards to their ability to work, live and commute within EU borders. This in turn effectively turns them into a secondary class of citizens, opening the possible of ethnic minority abuse and human rights violations[30], which in fact is precisely what happened in cases such as *"Onu v Akwiwy"*[31], where the Supreme Court held the view that vulnerability on the account of being migrant workers isn't covered by race discrimination[32]. EU must consider that although the majority of its population is part of the member states, like any rich and advanced society (USA in parallel), it will be subject

[17] *Mandla (Sewa Singh) v Dowell Lee* [1983] AC 548; [1983] IRLR 209.
[18] *Mandla (Sewa Singh) v Dowell Lee* [1983] AC 562.
[19] *Commission of Racial Equality v Dutton* [1989] IRLR 8,CA.
[20] *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55; [2005] 2 AC 1.
[21] *MacLennan v Gypsy Traveller Education and Information Project*, Employment Tribunal (Scotland).
[22] *O'Leary v Allied Domeq Inns Ltd*, Central London Court, July 2000, cited in Monaghan (2013) para 5.229.
[23] *Seide v Gillette Industries Ltd* [1980] IRLR 427.
[24] *R (on the application of E) v Governing Body of JFS* [2009] UKSC 15; [2010] IRLR 136.
[25] *Dawkins v Department of the Environment* [1995] IRLR 284.
[26] *London Borough of Ealing v Race Relations Board* [1972] AC 342, HL.
[27] *Tejani v Superintendent Registrar for the District of Peterborough* [1986] IRLR 502, CA.
[28] *R (on the application of Elias) v Secretary of Defence* [2006] IRLR 934, CA.
[29] TFEU, Art 9.
[30] Hepple (2004) 4-7.
[31] *Onu v Akwiwu & Anor: Taiwo v Olaigbe & Anor* [2014] EWCA Civ 279
[32] *Healing a divided Britain: the need for a comprehensive race equality strategy*, Equality and Human Rights Commission, p27, ss. 13.

to immigration from TCNs seeking to build a better life for themselves and their families, and in order to preserve both justice and social order it is advised to afford all people within its borders protection of their human rights, sometimes despite public opinions on the necessity of such expansion.

Caste is yet another, more peculiar characteristic mentioned by S.9 EA. Somewhat less intuitive than colour or national origins, it was not mentioned by CERD 1965[33], which relied on the limited ground of "descent". It was not until 2002 that after substantial evidence of the inadequacy of current law that the CERD Committee adopted General Recommendation 29 reaffirming the fact that discrimination based on "descent" effectively includes that against members of communities based on social stratification such as castes. And although this directive required member EU states to identify and protect such communities from further discrimination, UK did not afford such protection until EA 2010 when it gave ministers the "power" to include caste, a power ignored despite pressure from the UN High Commissioner for Human Rights himself. It wasn't until 2013, with the passage of the Enterprise and Regulatory Reform Bill (c. 24) that HoL imposed on the government the duty to add caste as a protected characteristic[34]. Although "caste" is yet to be defined, the EHRC has published 2 reports[35] concluding with the urgent need of adding it under "race" in order to solidify its status within the 2010 EA. Despite the fact that it was not expected to be enforced until 2015, the 2014 case of *"Tirkey v Chandok"*[36] successfully argued that caste is already de facto part of the protected "race" characteristic. Yet there have also been two other simultaneous cases which unsuccessfully alleged caste discrimination[37]. On the 2nd of September 2016 the Government announced a public consultation on the issue, stating that by 2017 it shall be published. The law is yet to fully develop, still technically allowing discrimination to potentially discernible groups that can't be reliably classified under Lord Fraser's definition of "ethnic groups".

So far we have looked to the kind of protections that S.9 EA has afforded people in regards to claims of racial discrimination. We can safely state that the level of protection has drastically increased since the introduction of the first RRA 1965, evolving from a superficial law that only protects against direct discrimination in public spaces, to a more comprehensive and inclusive system which made great efforts to tackle the intricacies of both race perception of discrimination. Yet, alas the current law still presents inadequacies when dealing with claims based on nationality, migrant status, castes, and the general lack of a properly codified approach when dealing with claims based on the perception of multiple discrimination. And the implications of such cracks in the law are fairly visible in the modern British society, as was highlighted by the latest report made by the EHRC. While the report did state an overall numerical amelioration of the status of ethnic minorities throughout society, it also indicated substantial gaps in the per capita treatment between the majority white British population, and the ethnic minority and migrant population. From over representing minorities in the justice system[38], to underrepresentation on the job market and in academia[39], and the stigma attributed to

[33] International Convention on the Elimination of Racial Discrimination

[34] Bob Hepple (2014). *Equality: The Legal Framework*. 2nd ed. Oxford and Portland, Oregon: Hart Publishing. p51.

[35] Doug Pyper (2016). *The Equality Act 2010: caste discrimination.* Briefing Paper Number 06862, House of Commons Library

[36] *Tirkey v Chandok* (2014) 246 EOR 21.

[37] Ashtiany (2014)14 at 16.

[38] Healing a divided Britain: the need for a comprehensive race equality strategy, Equality and Human Rights Commission, p39, ss. 4.1.

[39] *Healing a divided Britain: the need for a comprehensive race equality strategy*, Equality and Human Rights Commission, p20-21.

immigrants both from EU and beyond[40], it is clear that in order to achieve a truly just UK, there is work to be done both in terms of legislation, and in terms of educating wider society to its evolution. For racial discrimination will not die together with racists, of old age, but only when it is systematically eradicated throughout society by teaching kindness, tolerance, and most importantly, by promoting justice.

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6. Treaty on the Functioning of the European Union, Art. 9.

[40] *Healing a divided Britain: the need for a comprehensive race equality strategy*, Equality and Human Rights Commission, p52-53, ss. 5.2.