THE PRINCIPLE OF EQUAL RIGHTS: CONCEPT AND REFLECTION IN THE CASE LAW OF THE CCR

Elena ANGHEL[*]

Abstract

In this study I aim to analyze the constitutional principle of equality of rights, starting from the concept. Equality is an objective law principle, is also a subjective public law right and, more than that, as qualified in the doctrine[I], is a "fundamental right with the value of a general principle for the field of fundamental rights". Equality "is rather considered as a principle right than as a law principle", because it accompanies and guarantees the use of the other rights.

On the other side, equality has also been interpreted as a distinct set of rights, composed of different specific realities. In its general form, equality resides in each citizen's right of not being subjected to discrimination and of being treated equally, both by public authorities and by the other citizens. This is about an "equality in rights", opposed to the concept of "actual equality" because the lawgiver provides an equal juridical framework for all citizens, ascertaining a formal equality, but he cannot guarantee equal results.

The jurisprudence of the Constitutional Court underlined the other perspective: the material equality, actual equality or equality by law, which refers to all concrete cases, considering the existent differentiations and aiming for a concrete equality of the results. As we`ll notice, the Constitutional Court analyzed equality also as a possibility of admitting a right to difference in case of different legal situations.

Keywords: *equality, principle, right, constitutional, discrimination.*

1. Introduction

No matter how different people are in terms of sex, race, nationality, language, religious belief, they all carry the same essence. Equality is an innate and inherent right of the human being. The definition of this innate right by normative acts represents only the necessary legal form by which equality takes meaning, and not the act of birth.

Professor Gh. Mihai refers to a principle of "anthropological" equality: "people are equal in the sense that no one is more or less a biopsychosocial being, in any way; this qualitative equality would lead us to identity, because people are essentially identical"[1].

But as poetic as the definition of The Declaration of the Rights of Man and Citizen 1789 is - "*men are born and remain free and equal in rights*"-, throughout life, they feel differently, act differently and valorize differently, therefore, natural equality described above remains only a concept to refer to. It is true that a relative identity of individuals can be nourished by their belonging to a certain human community, which delivers over them common ideologies and beliefs springing from a unique culture, religion or moral, but man goes through his own life experience, distinct of that of his peers.

The aim pursued by means of this study is that, starting from the concept of equality, to analyze the evolution of the constitutional principal of equality in the case law of the CCR[2].

2. Paper content

Human beings have certain rights simply because they are human, not because they are Jewish, Catholic, Protestant, German, or Italian[3]. However, as we have shown above, human beings valorize differently abstract equality of opportunity and abstract freedom of choice. We are born with a common biological background, but each of us consolidates his own traits, aspirations, values. Even though we are similar in the values we receive, we are different in the valorizations we make. There is no universal, perfect, timeless and aspatial moral model[4].

[*] Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: elena_comsa@yahoo.com).

[I] Simina Elena Tănăsescu, *Principiul egalității în dreptul românesc*, All Beck Publishing House, Bucharest, 1999, p. 4.

[1] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, p. 185.

[2] For detailed and exhaustive analyzes of the review of constitutionality performed by the CCR, see I. Muraru, N.M. Vlădoiu, *Contencios constituțional. Proceduri și teorie*, 2nd ed., Hamangiu Publishing House, Bucharest, 2019; I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *Contencios constituțional*, Hamangiu Publishing House, Bucharest, 2009; S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021.

[3] Otfried Hőffe, *Principes du droit*, Les éditions du Cerf, Paris, 1993, p. 65.

[4] For more, see E.E. Ștefan, *Legalitate şi moralitate în activitatea autorităților publice*, in Revista de Drept Public no. 4/2017, Universul Juridic Publishing House, Bucharest, pp. 95-105.

According to Simina Tănăsescu[5], equality is "a fundamental right with the value of a general principle for the matter of fundamental rights", a guarantee right and, at the same time, an objective principle of law concerning the balance of life, being considered "rather as a right of principle that as a principle of law", due to the fact it accompanies and guarantees the exercise of the other rights. As a right to equal rights, the principle of equality has a content enhanced by the content of the fundamental rights accompanied by it.

Therefore, the principle of equality is analyzed in the doctrine as a consequence of all the other rights, as it secures the full and non-discriminatory fulfillment thereof. The concept of "equal rights" concerns all the rights of citizens, whether or not defined in the Constitution or other laws[6]. In this respect, equality is assigned an essential feature: it has the role of strengthening the effectiveness of the other citizen's rights.

S.E. Tănăsescu highlights the fact that, in the field of the law, the standard called principle of equality is one of the most polymorphic principles of positive law. The author analyzes the options available to the legislator: either he resorts to a formal legal equality, thus establishing an equality by right of all subjects, or he supports his reasoning on a material equality, which aims at an equality of results.

Formal equality of opportunity is the one inspired by the famous formula defined by the Declaration of the Rights of Man and Citizen: "men are born free and equal in rights". By reprobating the inequalities enshrined in feudal law, French Revolution of 1789 proclaimed equality, freedom and fraternity among its commandments, being subsequently taken over and regulated as fundamental principles of law. The law has thus become a guarantor of the fulfillment of equal opportunities for human beings.

Natural equality starts from the premise that people are born equal by right, ignoring the reality that they are not equal in fact. The doctrine points out that "the famous natural equality does not identify itself *eo ipso* with legal equality": if positive law were an accurate reflection of natural law, legal equality should require the legislator not to discriminate against nature. The legislator strives to establish an equal legal framework for all citizens, the latency to universalism of equality taking meaning by means of the general legal norm.

However, by legally enshrining equal opportunities, the legislator cannot guarantee equal results, because inequalities in fact are inherent in social life. The fact that the law cannot establish privileges and discrimination does not mean that it can remove inequalities existing in social life, by ensuring mathematical equal treatment. Therefore, the concept of equal rights is purely formal, it remains at a superficial level of the prohibition of discrimination[7], as "this framework has only the vocation to universalism; it cannot cover all subjects of law at the same time".

Material equality is situated at the opposite pole, de facto equality or equality by law, which descends from the abstract of the general and impersonal legal norm and focuses on concrete cases. Taking into account the existing natural differences and pursuing a concrete and fair equality of results, material equality "rejects the vocation to universalism of the principle".

By giving expression to the requirements regarding the generality and impersonality of the legal norm, the law can only provide a virtual equality of opportunity for the members of the society. If the identity of the legal norms that define equality is a natural and necessary reality, the equal treatment under the law is inconceivable, social life not being able to produce perfectly identical situations, but at most similar. In this background, a rigorous identity of the legal treatment applicable to different situations would be discriminatory, unequal, so that a differentiated equality must exist behind formal equality. "In order to compensate for the inequalities inherent in social life, equality redistributive discriminations are needed", according to Simina Tănăsescu. These positive discriminations, which the material equality itself postulates, have a corrective role, aiming at repairing de facto inequalities or reducing certain existing legal inequalities, materialized in (negative) discriminations that certain categories of persons endure.

This perspective which implies not only a vocation to equality, but an effective, tangible equality able to diminish the inequalities inherent in social life, as well the establishment of certain obligations on public authorities[8], has rarely been adopted by the Romanian constitutional judge.

Therefore, by means of **Decision no. 27/1996**[9] , the CCR noted that the wording of art. 16 para. (1) of the Constitution, corroborated with that of art. 4 para.

[5] See Simina Elena Tănăsescu, *Principiul egalității în dreptul românesc*, All Beck Publishing House, Bucharest, 2003. See also, Tudorel Toader și Marieta Safta, *Constituția României*, 3rd ed., Hamangiu Publishing House, Bucharest, 2019.

[6] To have a view on the principle of equality in the Romanian Constitution of 1866, see C. Ene-Dinu, *Istoria statului și dreptului românesc*, Universul Juridic Publishing House, Bucharest, 2020, p. 288.

[7] We point out an interesting study regarding discrimination in our times, please see Marta-Claudia Cliza, *What Means Discrimination in a Normal Society with Clear Rules?*, published in LESIJ - Lex ET Scientia International Journal, no. 1/2018, vol. XXIV, pp. 89-99.

[8] For more information on public authorities in Romania, please see Marta-Claudia Cliza, Constantin-Claudiu Ulariu, *Drept administrativ. Editie revizuita conform modificarilor Codului administrativ*, Pro Universitaria Publishing House, Bucharest, 2021, pp. 7-22.

[9] CCR Decision no. 27 of 12 March 1996 on the ruling on the second appeal against CCR Decision no. 107 of 1 November 1995.

(2) of the Fundamental Law, refers to prohibited discrimination, not to admissible discrimination, therefore to "negative discrimination" not to "positive discrimination", taking into account the specificity of certain situations or the purpose of achieving distributive justice, in order to nullify or reduce objective inequalities. Furthermore, the aforementioned constitutional wording aims at equality between citizens as regards the recognition in their favor of certain rights, not the identity in legal treatment as regards the exercise or fulfillment of those rights. This explains not only the admissibility of a legal treatment which is different and privileged compared to certain categories of persons, but also the necessity hereof.

Essentially, equality, in its general wording, lies in the right of every citizen not to be subject to discriminations and to be treated on equal footing, both by public authorities[10], and by the other citizens. Notwithstanding, Tudor Drăganu distinguishes between equality in subjective rights and equality in the exercise of such rights. Therefore, it is shown that equality has two dimensions: an ideal dimension, defined under the law, equality as an intangible right and a technical dimension, by which equality acquires substance in the exercise of subjective law, as the case may be.

The principle of equality has been the subject of great resizing in the case law of the CCR. Therefore, the construction given by the Constitutional Court to the principle of non-discrimination has evolved from a strict conception according to which equality means non-discrimination, and the criteria of appreciation are those expressly provided by the aforementioned wording, to an extensive conception according to which discrimination is not necessarily the opposite of equality, only arbitrary discrimination being prohibited. By means of **Decision no. 26/1995 on the settlement of the second appeals against Decision no. 1/1995 ruled by the Constitutional Court on 4 January 1995**, the Constitutional Court provided that the legislator is free to assess objective situations in social life but "he cannot exceed the constitutional limits thus established, because otherwise he would violate the provisions of the fundamental law". In addition, differences in situations must be based on the law.

The scope of the wording of art. 4 of the Constitution was considerably widened when the case law of the Constitutional Court marked out the idea that not only the non-discrimination criteria expressly provided in the fundamental law must be complied with; all arbitrary exclusions of subjects of law shall be deemed discriminations. Therefore, according to Simina Tănăsescu, "within the categories set out by the law, the legislator shall not create discrimination between categories, but differences are possible or even necessary".

The doctrine points out that "any act that tends to degrade or enslave certain categories of persons due to such criteria is an act that threatens the universality of man, an act that tends to exclude from the human race some beings who have an inalienable right to belong to it". It is considered that human dignity, the supreme value of society, is the one to oppose to both differentiation for exclusion, and to assimilationist identity. Human dignity prescribes unity in diversity, thus reconciling freedom with equality.

The evolution of the constitutional case law reveals two distinct tendencies: on the one hand, there has been stated that equality should not be defined by opposition to discrimination, but by reference to that of difference; on the other hand, equality does not mean uniformity, but rather proportionality.

Therefore, in the first stage of the evolution of the concept in terms of the case law, a relative version of the principle of equality was admitted, stating that equality does not mean uniformity. Equality does not mean equal treatment in all situations; equal treatment must correspond to equal situations, but in different situations there may be different treatment.

By means of **Decision no. 70/1993**, the Constitutional Court, notified to rule on the unconstitutionality of art. 11 para. (1) and (2) of the Law on accreditation of higher education institutions and diploma recognition, which established the possibility for the students of a state higher education institution to continue their studies within both state and private institutions, while para. (2) established that the students of a private higher education institution can continue their studies only within institutions of the same nature, namely private, noted that: "special situations in which the students from the two types of higher education institutions find themselves have also determined different solutions of the legislator, without violating the principle of equality, which, as we have already mentioned, does not mean uniformity. In other words, the principle of equality does not challenge the possibility of a law to establish different rules in relation to persons who find themselves in special situations".

Subsequently, the Constitutional Court reconsidered its case law, by admitting not only the possibility, but also the need to establish a different legal regime in different situations. Therefore, it was established that "equal treatment must correspond to

[10] E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 63-64.

equal situations; in case of different situations legal treatment can only be different". However, in the latter case, there must be an objective and reasonable justification, so that there is no obvious disproportion between the aim sought by the unequal legal treatment and the means employed.

In the light of these considerations, we note that the limits of the constitutional principle of equality have varied between strict equality, sometimes assimilated with non-discrimination and relative equality, which accepts and subsequently claims a differentiation of legal treatment for different legal situations. By postulating that legal equality in subjective rights does not mean an equal measure for different situations, the court of constitutional control confirmed the need for the right to apply different treatment for situations which, by their nature, are not identical.

There was only one step from the admission of a right to differentiation to the definition of a new fundamental right, the right to difference, "as an expression of the citizens' equality before the law, incompatible with uniformity". By means of **Decision no. 107/1995 on the constitutional challenge of art. 8 para. (1) of Law no. 3/1977**, the Constitutional Court provided that "it is generally held that the violation of the principle of equality and non-discrimination occurs when different treatment is applied to equal cases, without an objective and reasonable justification or if there is obvious disproportion between the aim sought by the unequal legal treatment and the means employed. In other words, the principle of equality does not prohibit specific rules in the event of different situations. Formal equality would lead to the same rule, despite the difference in situation. Therefore, real inequality that results from this difference may justify distinct rules, depending on the purpose of the law they are contained in. This is why the principle of equality leads to the emphasis on the existence of a fundamental right, the right to difference, and provided that equality is not natural, to impose it would mean to establish discrimination".

In its case law, the CCR has ruled that when the criterion according to which a legal regime is applied is objective and reasonable and not subjective and arbitrary, being established by a certain situation provided by the hypothesis of the norm, and not by the belonging or quality of the person, the application of which depends on, therefore *intuitu personae*, there is no ground for the classification of the regulation subject to control as discriminatory, therefore contrary to the constitutional norm of reference[11].

In the same respect, we mention the constant case law of the ECtHR, which provided, in the application of the provisions of art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the prohibition of discrimination, that any difference in treatment committed by the State between individuals in similar situations without an objective and reasonable justification shall represent an infringement of these provisions (for example, by means of Judgment of 13 June 1979, ruled in case Marckx v. Belgium, and by Judgment of 29 April 2008, ruled in case Burden v. The United Kingdom). Furthermore, by means of Judgment of 6 April 2000, ruled in case Thlimmenos v. Greece, the European Court of Human Rights provided that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention was violated not only when States treated differently persons in analogous situations without providing an objective and reasonable justification (such as Judgment of 28 October 1987, ruled in case Inze v. Austria), but also when States, without an objective and reasonable justification, failed to treat differently persons whose situations were different (**Decision no. 545 of 28 April 2011, OJ no. 473 of 6 July 2011**).

The ECtHR provided that a difference of legal treatment is discriminatory if it has no objective and reasonable justification[12], this means that the aim sought is not legitimate or that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized (in this respect, see judgments ruled in cases "Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, 1968, Marckx v. Belgium, 1979, Rasmussen v. Denmark, 1984, Abdulaziz, Cabales and Balkandali v. The United Kingdom, 1985, Gaygusuz v. Austria, 1996, Larkos v. Cyprus, 1999, Bocancea and others v. Moldova, 2004). Furthermore, in accordance with the case law of the same Court of Human Rights, the States benefit from a certain margin of appreciation in deciding whether and to what extent the differences between similar situations justify a legal treatment, and the aim of this margin varies according to certain circumstances, scope and content (in this respect, see judgments ruled in cases "Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, 1968, Gaygusuz v. Austria, 1996, Bocancea and other v. Moldova, 2004) (**Decision no. 190 of 2 March 2010, OJ no. 224 of 9 April 2010**).

Following the assessment of the aforementioned case law, we note that, despite the vocation for universalism of natural equality, legal equality is not an absolute principle. The following are considered **limits**

[11] Decision no. 192/2005.

[12] Please see Laura-Cristiana Spătaru-Negură, *Protecția internațională a drepturilor omului*, Hamangiu Publishing House, Bucharest, 2019, pp. 180-181.

of the constitutional principle of equality: the principle of non-discrimination[13] and the principle of proportionality.

Paragraph (1) of art. 16 is correlated with the constitutional provisions of art. 4 para. (2), which established the criteria of non-discrimination, namely race, national or ethnic origin, language, religion, sex, political opinion or affiliation, property or social origin.

The principle of non-discrimination entails two possibilities of conception: in the narrow sense, it concerns the protection of persons against any restriction or preference in the exercise of the rights and freedoms enjoyed by other persons for reasons of identity; in the broad sense, combating discrimination[14] involves taking special measures in favor of disadvantaged groups. We thus distinguish between negative and positive discrimination.

In what concerns the concept of "negative discrimination", this must be understood as an unjustified, illegitimate, arbitrary differentiation. By the constitutional definition of the equality before the law, the legislator is prohibited to introduce arbitrary discriminations between different categories of addressees in the content of the norm. According to art. 2 para. (1) of GO no. 137/2000 on preventing and sanctioning all forms of discrimination, republished, discrimination shall mean "any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of a disadvantaged group and any other criteria which has the purpose or the effect of restriction, elimination of recognition, use or exercise of fundamental human rights and freedoms or of rights recognized by the law in the political, economic, social or cultural field or in any other field of public life".

In addition to the State's obligation to abstain, public authorities are required in certain circumstances to adopt positive measures in order to secure equal treatment. In what concerns "positive discrimination", sometimes called compensatory inequality, art. 2 para. (9) of GO no. 137/2000, republished, provides that "measures taken by public authorities or by legal entities under private law in favor of a person, a group of persons or a community, aiming to ensure their natural development and the effective achievement of their right to equal opportunities as opposed to other persons, groups of persons or communities, as well as positive measures aiming to protect disfavored groups, shall not be regarded as discrimination under the ordinance herein". The aforementioned normative act defines in art. 4, the concept of disfavored category as the category of persons that is either placed in a position of inequality as opposed to the majority of citizens due to their social origin or is facing rejection and marginalization.

The Treaty on European Union also provides on "positive discrimination", specific right being recognized for children, elderly and disabled persons. A constant concern of the Union is to ensure equality between men and women, in this respect art. II-83 para. (2) of the Treaty provides that "the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex.".

The establishment of special measures to protect disfavored categories (women, minorities, disabled persons or HIV infected persons) is a necessary redistribution of formal equality, a remedy against discrimination.

3. Conclusions

Equality valorizes the whole system of law, representing the foundation of the European construction, along with universal ideas such as human dignity, freedom, solidarity, democracy. The European rule of law model is a liberal model, structured around the idea of respecting and defending fundamental rights[15]. In this respect, the Preamble of the Treaty Establishing a Constitution for Europe defines equality and the other inviolable and inalienable human rights as universal values inspired by Europe's cultural, religious and humanist heritage.

References

- Cornelia Ene-Dinu, *Istoria statului și dreptului românesc*, Universul Juridic Publishing House, Bucharest, 2020;
- Cornelia Ene-Dinu, *Discriminarea și libera circulație a lucrătorilor în lumina dispozițiilor art. 45 din Tratatul privind funcționarea Uniunii Europene*, in Revista de Drept Public no. 1-2/2021;

[13] For more see E.E. Ștefan, *Opinions on the right to nondiscrimination*, in CKS e-Book 2015, pp. 540-544, available online at http://cks.univnt.ro/cks_2015/CKS_2015_Articles.html, Public law section.

[14] For a specific perspective, see C. Ene-Dinu, *Discriminarea și libera circulație a lucrătorilor în lumina dispozițiilor art. 45 din Tratatul privind funcționarea Uniunii Europene*, in Revista de Drept Public no. 1-2/2021, pp. 145-150.

[15] Human rights have to be respected all the more in our times, please see Laura-Cristiana Spătaru-Negură, *Militating in Favor of International Human Rights Law (Even in Times of Covid-19 Pandemic)*", published în CKS Proceedings (Challenges of the Knowledge Society) 2021, Bucharest, pp. 517-523, http://cks.univnt.ro/cks_2021.html.

- Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013;
- Elena Emilia Ștefan, *Opinions on the right to nondiscrimination*, in CKS e-Book 2015, available online at http://cks.univnt.ro/cks_2015/CKS_2015_Articles.html, Public law section;
- Elena Emilia Ștefan, *Legalitate şi moralitate în activitatea autorităţilor publice*, in Revista de Drept Public no. 4/2017, Universul Juridic Publishing House, Bucharest;
- Gheorghe Mihai, *Fundamentele dreptului*, vol. I-II, All Beck Publishing House, Bucharest, 2003;
- I. Muraru, N.M. Vlădoiu, *Contencios constituțional. Proceduri și teorie*, 2nd ed., Hamangiu Publishing House, Bucharest, 2019;
- I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *Contencios constituțional*, Hamangiu Publishing House, Bucharest, 2009;
- Laura-Cristiana Spătaru-Negură, *Protecția internațională a drepturilor omului*, Hamangiu Publishing House, Bucharest, 2019;
- Laura-Cristiana Spătaru-Negură, *Militating in Favor of International Human Rights Law (Even in Times of Covid-19 Pandemic)*, published în CKS Proceedings (Challenges of the Knowledge Society) 2021, Bucharest, http://cks.univnt.ro/cks_2021.html;
- Marta-Claudia Cliza, Constantin-Claudiu Ulariu, *Drept administrativ*, Ediție revizuită conform modificărilor Codului administrativ, Pro Universitaria Publishing House, Bucharest, 2021;
- Marta-Claudia Cliza, *What Means Discrimination in a Normal Society with Clear Rules?*, published in LESIJ - Lex ET Scientia International Journal, no. 1/2018, vol. XXIV;
- Otfried Hőffe, *Principes du droit*, Les éditions du Cerf, Paris, 1993;
- Simina Elena Tănăsescu, *Principiul egalității în dreptul românesc*, All Beck Publishing House, Bucharest, 2003;
- S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021;
- Tudorel Toader și Marieta Safta, *Constituția României*, 3rd ed., Hamangiu Publishing House, Bucharest, 2019.