THE EQUALITY PRINCIPLE REQUIREMENTS

CLAUDIA ANDRIȚOI*

Abstract

The problem premises and the objectives followed: the idea of inserting the equality principle between the freedom and the justice principles is manifested in positive law in two stages, as a general idea of all judicial norms and as requirement of the owner of a subjective right of the applicants of an objective law. Equality in face of the law and of public authorities can not involve the idea of standardization, of uniformity, of enlisting of all citizens under the mark of the same judicial regime, regardless of their natural or socio-professional situation. Through the Beijing Platform and the position documents of the European Commission we have defined the integrative approach of equality as representing an active and visible integration of the gender perspective in all sectors and at all levels.

The research methods used are: the conceptualist method, the logical method and the intuitive method necessary as means of reasoning in order to argue our demonstration. We have to underline the fact that the system analysis of the research methods of the judicial phenomenon doesn't agree with "value ranking", because one value cannot be generalized in rapport to another. At the same time, we must fight against a methodological extremism.

The final purpose of this study is represented by the reaching of the perfecting/excellence stage by all individuals through the promotion of equality and freedom. This supposes the fact that the existence of a non-discrimination favourable frame (fairness) represents a means and a condition of self-determination, and the state of perfection/excellency is a result of this self-determination, the condition necessary for the obtaining of this non-discrimination frame for all of us and in conditions of freedom for all individuals, represents the same condition that promotes the state of perfection/excellency.

In conclusion we may state the fact that the equality principle represents a true catalyst of the Romanian law constitution phenomenon, succeeding not just in entraining significant modifications of the legislation, but also determining an obvious acceleration of his phenomenon, an enlargement and in the same time further studies.

Keywords: *equality, privileges, interpretation, perspective, evolution.*

Introduction

The domain covered by the subject of the study refers to the incursion in the history of philosophic and religious ideas, which allows us to also observe a gap between what the great thinkers expressed through their ideas, contained by true thinking systems, and what the social reality has underlined. The importance of the study results from the fact that it is somewhat difficult to follow the problem of equality between people in abstract, by not taking into consideration the facts that generated the respect of disobedience of human rights. Still, it is easy to observe that in the entire modern history the efforts to prove the need of an exercise of human rights and freedoms was a permanent battle to affirm and to invoke human reasoning, in the name of which different institutions took birth, national and international organisms and, which by their activities and the documents emitted tried to establish a social order in which peace and social harmony rule.

The objectives of this study are formed on the basis of an analysis of equality between all citizens in front of the law, an equality in judicial treatment and of connections with other realizations of the process of human thinking which have found some mirroring in the national and international regulations.

These will be fulfilled through the use of research methods indicated in the abstract of the paper, which will lead to the obtaining of assumed finalities.

* Assistant Lecturer, PhD, "Eftimie Murgu" University Resita (e-mail: andritoiclaudia@yahoo.com).

In this paper I have made references to scientific papers relevant for the specialty literature, thus indicating the state of knowledge of the principle of equality in internal and international law. The idea of freedom, equality and human dignity is materialized in basic law principles which govern the entire law process. These aspect are mentioned in contributions of known authors, thus starting our scientific analysis Rousseau, Djuvara, Deleanu and reaching the Beijing Platform[1] and the position documents of the European Commission, which define the integrative approach of equality as representing and active and visible integration of the gender perspective in all sectors and at all levels.[2]

1. The intercalation of the equality principle between the freedom and the justice principles

Equality, like freedom and justice, can be examined from a double perspective. A perfect equality (ideal) which is the real one and an imperfect equality ("earthling") which in fact doesn't exist, but aspires towards an ideal. Platon shows in "The laws" that equality and proportion are not based on the perception of senses, nor on the pleasure that can be found in them, but first of all on truth and almost, on nothing[3]. The foundation of equality is underlined through this sentence: the non-perennial human spirit through which we are equal in front of the Absolute (Supreme Reasoning). The great Greek recognizes the fact that "… truth and perfection is not easy to be known: only Zeus and very few people have this notion"[4] .

In fact, humankind exists due to great ideas of freedom, equality and brotherhood, said E. Roerich. If these ideas will be considered utopian and on for this reason humankind will separate from them, then this will be the equivalent for the death of humankind. Without the assimilation of great ideas in our hearts, mankind will be invaded by unseen crimes and lust, the consequence of which will be human decomposition and death. The principles of equality, justice and freedom represent the ideational trinity of law. Ch. Montesquieu considers that "freedom is the right to do anything permitted by laws and if a citizen could do what is forbidden, he would lose his freedom, because other could do the same thing."[5] The principle of justice according to the containing area encapsulates the principles of freedom and equality. Equality is not just a form of justice, the first being subordinated to the latter.

Platon said that justice is just the equality between unequal things, according to their nature and that there isn't equality between unequal things, but in the measure in which proportion is being kept. Continuity in thinking regarding the rapport equality-freedom has been sustained over centuries by Nicolae Popa, for example. The doctrinaire has the conviction that "there can't be equality but between free humans and not freedom but between humans the equality of which is enshrined from a judicial point of view. Equality refers to the balance of life and freedom looks at humans' capacity to act without obstacles"[6].

The main unit of equality and freedom is materialized from a judicial point of view in the Universal Declaration of Human Rights. "All human beings are born free and equal in dignity and

---

[1] In the United Nations Organization, the most important document dedicated to women's world is the Beijing Platform (1995) signed by 189 states. The platform identifies 12 intervention domains on the women's condition at the world level, from being poor to human rights, health and education. This document and the CEDAW Convention represent beacon-manifests regarding women's situation and are report permanently their legal activity and their practical action of UN and European Union member states.

[2] *National legislation for discrimination prevention and control, promotion of women's rights and equality in chances between men and women* – legislative frame – www.gendermainstreaming.ro.

[3] Platon, *Legile.* Bucharest, IRI Publishing House, 1995, p.85.

[4] Idem, p.170.

[5] Montesquieu, C. *Despre spiritul legilor.* - Bucharest: Scientific Publishing House, 1964, p. 89.

[6] Marian Mihăilă, Dan Stan, Carmen Sucium*, Tratat de drept internațional public*, Vol. III, BREN-V.I.S.PRINT, Bucharest, 2006.

rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." is stipulated in art. 1 of the Universal Declaration of Human Rights. This principle results from the inalienable rights of people as human being[7]. All human beings are gifted with the same basic rights and must be treated with respect and dignity regardless of numerous differences that nature and the surroundings of life create. The human being is considered a lawful person, individually or as a group, and represents the purpose of law, in insuring and guaranteeing the most appropriate judicial conditions for the affirmation and realization of freedom and equality in a society. The values on which law is based on indicate the human being as the main landmark and at the same time as purpose, the judicial norms not being able to find substance, respectively genesis without a plenary affirmation and a judicial guarantee of individual's freedoms and rights.

In this context, J.J. Rousseau stipulates that the process of governing must be realized on law norms provided in a ***Social Contract***, which should contain the rights and obligations of governors and of the ones governed, so that the principles of justice and equity will be fulfilled according to the following commandments. ***"****No one must be so rich so he could buy another****"*** and ***"****No one so poor that he will be obliged to sell himself*"[8]

This aspect refers to equality in rights and in dignity. It doesn't refer to uniformity. Contrary, it allows the foundation of respect of differences. This principle of "equality in dignity and rights" represents a basic pedestal for the law edifice. These ideas receive viability at a subjective level, being consecrated as rights and basic freedoms. A special merit for this is offered to French revolutionaries, who affirmed the principles of freedom, equality and justice as fundaments of the state.

The principle of equality is intercalated between the principles of freedom and justice, equality being manifested in positive law in a double state, as a general idea of all judicial norms and as requirement of the subjective law owner towards the applicants of objective law.

According to the professor Mircea Djuvara, equality represents the means to realize a social equity, one of the "logic elements of justice".

The rejection of uniformity based on the difference of situations is consecrated in the Romanian constitutional jurisprudence for the first time in a decision of 1993[9], in which the law referred to the Court aimed the students' transfer from private faculties to public ones; thus being forbidden the students' transfer from private faculties to public ones, while the contrary was possible at any moment. The judge's reasoning is supported by a comparison of situations, found from an objective point of view as being different, being motivated by the fact that allowing students' transfer both ways would be the equivalent of a privilege for private faculty students which even if they didn't sustain an admission context as all public education students, will benefit from all the rights they have. Thus, we deal with different situations in which the students of the two types of institutions are found, fact which determined different solutions from the legislator, without this breaking the constitutional principle of equality, which doesn't refer to uniformity. But, the legislator's will to respect the principle of equality is hardened by the fact that for certain aspects that are common to the two institutions the law provides identical solutions.

Remarkable is the fact that the Romanian judge has observed not only the variant of relative equality, but also its possible evolutions in time, so that the distinctions which are not discriminatory today will become as so tomorrow. The contrary may also be valid.

2. The judicial configuration of privileges and discriminations

In a traditional conception, discrimination as notion, supposed an ascendant of the party that applies the discriminatory treatment on the other party, of a discrimination essence considering it to

[7] Toma Toader, *Aspecte constituționale ale realizării ordinii juridice în statul de drept,* Chisinau, 2005, p.4.
[8] J.J. Rousseau, *Contractul social*, Bucharest, Scientific Publishing House, Philosophical Library, 1957, p.121.
[9] Decision no. 70/1993.

be (even if only implicitly) a certain subordination. In other words, we can speak about discrimination in the plan of judicial rapport of public law and less or at all in the judicial rapport characterized by the parties' judicial equality.

Equality in front of the law and in front of public authorities can not involve the idea of standardization, uniformity, of enlisting all citizens under the mark of the same judicial regime, regardless of their natural situation or their socio-professional one. The principle of equality supposes that in equal situations the equal judicial system will be applied. But, at the same time, and apparently paradoxically, the equality principle also involves the right to differences in a judicial treatment, because, in the measure in which equality is not natural, the imposing of an equal judicial treatment would mean discrimination. In other words, equal situations must correspond to equal judicial treatment; to different situations, the judicial treatment cannot be but different. Still, for this action there must be an objective and reasonable motivation, in order to avoid reaching a disproportion between the purpose desired through an unequal judicial treatment and means used[10].

Today, the non-discrimination and the interdiction of arbitrary principles has crossed the borders of a rapport with public authorities and has begun to enter every days life, in judicial rapports characterized by a judicial equality of the parties, in the most frequent of the contracts signed (buy-sell agreement, credit contracts, property contracts etc.) and even in extra-contractual social rapport (addressing formulas, behaviour, attitude).

Starting with the year 2000 the protection against discrimination is no longer realized in Romania, but on the grounds of constitutional provisions and of international regulations, and on the basis of detailed internal regulations, that aim (even expressly) work rapports. Thus, more than a self-standing right, non-discrimination appears to be o concrete modality of exercise for other rights. Besides the equality principle has always been understood as representing a "right to rights equality", being added to fundamental rights that need to be strictly respected, but also exercised in conditions of full equality.[11]

Reporting at such a definition, Romanian legislation regarding the gender equality domain is far from retaining and promoting an integrative approach of gender equality. From this point of view, the investigation of Romanian legislation in the domain offers the image of a punctual initiative on segments of problem regarding gender equality. Principles regarding the affirmation of equality, consecrated by the Constitution, the Labour Code and other laws, are taken punctually in normative acts destined to regulate aspects connected to anti-discrimination, labour rights, social protection in a general belief, maternity protection and family violence. The respective normative acts represents in most cases the expression of Romania politic commitment to adopt standards conform to the community acquis.

An equality of chances supposes the solving of all existent discrepancies between individuals, fact resulted from the deficit of individuals' capacities and opportunities for which many circumstances of personal, social and economic nature are outside their control, and which lead to inequality through an inequality of chances[12]. In order words, inequality is a problem derived from perspectives and unequal chances of success in the employment process and the fulfilling of their own goals, thus the reaching of an optimum level of self-determination. This situation leads to losing control over life circumstances, and in the end of their own lives.[13]

The theory of equal opportunities justifies the correction of social injustices (*social redress*) in the favour of those found in a disadvantageous situation, affirming that all individuals have the right

---

[10] I. Deleanu*, op. cit.,* pp. 456-457.

[11] Raluca Dimitriu*, Principiul nediscriminării în raporturile de muncă. Egalitatea de tratament între femei şi bărbaţi,* web page.

[12] Gans, Herbert J., 1991, People, Plans, and Policies: Essays on Poverty, Racism, and Other National Urban Problems (Columbia History of Urban Life), Columbia University Press.

[13]Adrian Dan, *Spre o nouă arhitectură a inegalităţii sociale* Romanian sociology journal, no. 1/2003 www.iccv.ro/romana/dictionar/adi/adi_egalsanse.htm - 47k.

to self-determination, while psychological and social conditions derived from the experimenting of freedom determines that some individuals and some groups experiment incorrect advantages in the determination of their own future, in comparison to others, to diminish their chances of self-determination of those found in a disadvantageous situation, fact resulted from social forces found outside their control and as a consequence of these declines/diminution, it is mentioned the collectivity duty to promote the improvement of success chances in the process of self-determination for those in disadvantage.[14] For this reason, the collective action must include an optimization of chances of success in the process of self-determination through the improvement of autonomy *capacities* in thinking and acting, through the enlargement of the spectrum of *opportunities* of choice and effective action and through an optimization of the *rapport* (*match*) between the individual's capacity and the social opportunity, through the elimination of obstacles and the building of opportunities that encourage in a more accentuated measure and more frequently the expressing and experimenting of self-determining.

But are there equal chances for all individuals?

For this question we have found four answers:

(1) the first results from a dominant ideology of social layering which equals a correct chance and an equal opportunity – in consequence, the lack of chance of some is due to their failure in profiting from opportunities available to all in an equal manner;

(2) the second answer derives from the justice theory as Rawls' *favourability/opportunity* (1971)[15], who affirms that "equal opportunities" refer to an equal splitting of the surplus created, in other words with the redistribution of well-being from those that have more to those that have little;

(3) the theory of justice as Nozick's *empowerment* (entitlement) (1977)[16] – a correct chance means a free exercise of the power of self-determination, minimally restraint only when this expression breaches the self-determining of other;

(4) a theory which is a mix of the three already presented and which takes into consideration three basic factors: capacity, opportunity and final result (*outcome*). The variation of capacity affects and is affected by the results of self-determination in thinking and acting.

The process measurement in the realization of social equity demands a different approach of this concept, the citizen being considered as being interdependent and variable, when referring to him as a person or at the environment, depending on the optimization of values that he attaches to himself in judging correct chances for the reaching of relative different goals of self-determination.

The outcome is represented by the reaching of a state of perfection/excellency by all individuals, by promoting equality and freedom. This supposes the existence of a favourable non-discriminative frame (*fairness*) represents a *means* of self-determination and the state of perfection/excellency is a *result* of this self-determining, and the necessary condition for the obtaining of a non-discriminative frame for all and in conditions of freedom for all individuals, represents the same condition that promotes the state of perfection/excellency.

The promotion of the concept of equality of chances supposes automatically that at the social system level some discriminative actions are manifested at the address of some individuals, damaging actions in general, for the entire society. For this reason, the most affected social groups are minorities (ethnic, religious, sexual), women, old people and disabled persons and in a quasi-general manner – *poor people*, people in general with modest jobs and incomes who don't have the capacity and are not found in the position of influencing and negotiating different structures of power formed in the social system frame. For this reason, two complementary concepts have been launched – *positive discrimination and affirmative action.*

[14] Mithaug Dennis .E., 1996, Equal Opportunity Theory, SAGE Publications, London.
[15] Rawls, John, 1971, *A Theory of Justice*, MA: Belknap, Cambridge, web page.
[16] Nozick Robert, 1977, *Anarchy, State and Utopia,* Basic Books, New York, web page.

Positive discrimination/affirmative action refer to the promotion and application of programs that desire to solve the effects produced by certain discriminations manifested in the past, suffered by different individuals, in the labour sphere, the education one etc., and to prevent the re-apparition and re-manifestation of these discriminations. Affirmative action was promoted especially in the labour and education spheres; *The Civil Rights Act* promoted by the USA Congress in1964 which interdicts discrimination in the employment sphere and an equal treatment from this point of view between men and women. Other legislative documents have forbidden discrimination in employment of old people (*Age Discrimination Act* – 1967) and of disabled people (*Rehabilitation Act* – 1973). Positive discrimination/affirmative action is distinguished from self-discrimination or the laws that promote equal opportunities (which interdict an unequal treatment), because it proposes *positive corrective measures* focused expressly on persons/groups that have suffered in the past from different discriminations.[17]

The adopting of the EU legislation regarding equality between citizens was an indispensable condition for the adherence to the European Union, representing an integrative party of the politic criterion regarding human rights and being necessary for a proper institutional capacity. During the enlargement process, the European Parliament has appealed to an economic support in order to help future member states in adapting procedures and their statistic methods to the European Union standards. The purpose is to develop and to publish gender statistics which are in accordance with the ones used by the European Union, fact which will allow to underline problems and to facilitate comparisons, and to continuously monitor situations regarding equality.[18]

In 1975 the Rome Treaty introduced, in community law, the principle of gender equality regarding the remuneration obtained for the work realized. The European integration process has stimulated the creation of new instruments for the insurance of an equal treatment by developing the provision of the Rome Treaty.

The Amsterdam Treaty stipulated that the promotion of equality between men and women is one of the Union basic tasks, and inequalities had to be eliminated from all activities. A step forward was also represented by the introduction of a new article on the basis of which EU could take measures regarding fighting all forms of discrimination based on sex. The European Charter of Fundamental Rights signed in 2000 and included in the Constitutional Treaty reaffirmed and completed these principles. Persons who were victims of gender discrimination may appeal institutions established in member states according to EU legislation. Beyond the legal frame, Central European institutions are assisted by structures that represent the interest of women, do lobby in their favour and assist the Commission in formulating and implementing measures in this domain. The oldest structure of this type is the Consultative Committee on the equality of chances, established by the Commission in 1981 (representatives of ministries and of different structures of member states which are connected to the subject).

3. Equality - reference norm for the control of constitutional law

Jean Jacques Rousseau mentions the fact that force always tends to destroy equality and legislative force must do its best to maintain it.[19] Direct guarantees offered to individuals under the shape of subjective rights underline a dimension of objective law in the measure in which this represents a condition of exercised of fundamental rights. For this fact, the objective law has been

[17] Cox, Raymond W., Buck, Susan J., Morgan, Betty N., 1996, *Public Administration in Theory and Practice*, Prentice Hall, New Jersey.

[18] *European Union – equality as a basic principle, web page*. www.socialistgroup.eu/gpes/media/documents/21531_21531_gender_equality_ro_060110.pdf.

[19] Notebooks of the Constitutional Council, no.12, *Studies and doctrines*, Presentation du principe constitutionnel de l'egalite, ORACLE, University of Reunion.

qualified in the French doctrine as "guardian" right, also mentioning the fact that the equality principle represents a support for all other fundamental rights.[20]

The democratic principle strictly implemented will need rights of economic equality and politic equality. Lucien Sfez speaks about democracy in correlation to the equality principle, sustaining that democracy doesn't resume only to a normative model, or to a social inclusion or exclusion rapport. The democratic state, in his belief, represents an ensemble, a finite unity, in which equality and freedom pretended to be able to realize they don't find their application field in a well determined circle. Democracy has always been "just one, the democracy of all, of many".[21]

The constitutional principle of equality authorizes differences in treatment, so that equality is susceptible from derogations, the Constitutional Council announcing that "the equality principle in front of the law involves the solving of similar solutions through identical solutions; this doesn't mean at all the fact that different solutions cannot make the objective of different solutions."[22] I

Even before the apparition of the Constitutional Court, in the Romanian judicial plan, equality didn't represent the object of proper analysis; it was studied in a more general context of citizens' rights.

The doctrine as the constitutional jurisprudence constantly underlines that the equality principle doesn't pretend uniformity, so that to equal situations an equal treatment must correspond, and to different situations there may exist a different treatment.

In **Decision no. 90/2005**, emitted on 10.02.2005, regarding the waiver of unconstitutionality of the dispositions written in article 15, paragraph 1 of the Law no. 80/1995 regarding the Statute of military personnel, the Constitutional Court was notified by the civil section with an exception of unconstitutionality of the dispositions of article 15 of the Law no. 80/1995 regarding the Statute of military personnel, exception which was risen by Gabriel Hulea after obtaining a solution for the appeal formulated against the Civil Sentence no. 17 of 16 January 2004, pronounced by the Bacau Court in the Case no. 8.304/2003. The representative of the Public Ministry states rejection conclusions of the exception as being ungrounded. Thus, he shows that the equality principle mustn't be interpreted according to uniformity, so that when situations are objectively different, as in the case presented, the application of a different judicial treatment is justified.

In motivating the waiver of unconstitutionality the author sustains, in essence, that the dispositions of the art. 15 of the Law no. 80/1995 contravene the constitutional principle of equality in rights, because these have a discrimination character. For this reason it has been shown that, contrary to general regulations regarding the public pensions system and other social insurance rights, the criticized law text allows the approval of a paid leave for child care until the age of two only for women which are active military personnel. This being the case, unlike all other categories of employees, active military personnel men cannot benefit from this right and, in consequence, they are discriminated in rapport to civil persons and in rapport to women active military personnel.

The Appeal Court from Bacau – Civil Section appreciated that the dispositions of article 15 of the Law no. 80/1995, which refer to the approval of a child care leave are unconstitutional in comparison to the provisions of article 16 paragraph (1) of the Constitution.

The Ombudsman appreciates that the criticized law text doesn't contravene the criticized legal dispositions. Thus, in his opinion, "the establishment of leaves, in a different manner, for persons – active military personnel – in comparison to those that don't have the same statute, is not generated by supposed discriminations between citizens on arbitrary criteria, but is due to the specific of military activity, which imposes to certain professional categories certain obligations and

---

[20] F. Melin –Soucramanien, *Le principe d'egalite dans la jurisprudence du Conseil Constitutionnel,* Economica –PUAM, 1997, p.251-252.

[21] L.Sfez, *Leçons sur l'Egalité,* Presses de la Fondation Nationale des Sciences Politiques, 1984, p.24.

[22] François GILBERT, *La discrimination positive en France,* in La revue pratique de droit français, no. 20/11/2005.

interdictions". The government appreciates that the waiver of unconstitutionality is grounded. For this reason, it is shown that the law text criticized is in contradiction to the dispositions of the Law no. 19/2000, which provides that the persons insured by the public pension system have the right to a leave and to an allowance for the care of a sick child, and from this allowance benefits, optionally, one of the parents, if the claimant fulfils the conditions of fee stage provided by the law..

After examining the seizure closing, the Government and the Ombudsman's points of view, the rapport written by the reporting-judge, the prosecutor's conclusions, the criticized law dispositions in comparison to the Constitution provisions and the dispositions of the Law no. 47/1992, the Court retains the following: the object of the waiver of unconstitutionality is represented by the dispositions of article 15 of the Law no**.** 80/1995 regarding the Statute of military personnel, published in the he Official Journal of Romania, Part I, no. 155 of 20 July 1995, with subsequent amendments, dispositions according to which: "Women, active military personnel, have the right to a maternity leave and to a leave for child care in the conditions established by the order of the National Defense Ministry, on the basis of legal dispositions applied at a national plan.

Also, women, active military personnel benefit from pauses for child nursing and child care and from other rights provided by the law regarding employed women from public administration."

In sustaining the unconstitutionality of these law texts, the authors of the waiver invoke the breach of provisions from article 16 paragraph (1) of the Constitution, according to which:

- Art. 16 paragraph (1): "Citizens are equal in front of the law and of public authorities, without privileges or discriminations."

By examining the waiver of unconstitutionality the Court observes that, even if its author entirely attacked art. 15 of Law no. 80/1995, in reality his criticism addresses only the dispositions of the first paragraph of this article, dispositions that regulate the granting of a child care leave. In consequence, the Court will examine only the conformity of provisions of article 15 paragraph 1 of the Law no. 80/1995 with the constitutional provisions invoked.

Regarding active military personnel, the Court observes that, indeed, under the aspect of conditions of admission, of attributions, or rights, of incompatibilities and of interdictions, these are in a different situation than other categories of employees. Regardless all these, as insured employees, active military personnel are not different from other categories of insured people, thus the institution of a different judicial treatment, which deprive them of the benefit of a social insurance form provided by the law for all insured persons, it appears as being discriminatory.

Keeping in mind that the right to a leave for child care is granted, according to the criticized law text, only to active women military personnel, with the exclusion of the other parent, also belonging to military personnel, the Court appreciates that article 15 paragraph 1 of the Law no. 80/1995 must also be analysed from point of view of equality in judicial treatment that our state must insure between men and women. For this reason, the solution pronounced by the European Court of Human Rights appears as relevant in the case Schuler-Zgraggen against Switzerland (1993), when it was agreed that an equality between sexes is an important goal for member states of the Europe Council and only very strong reasons may lead to the appreciation that the instauration of a differentiated treatment is compatible to the Convention. Moreover, the Strasbourg Court has underlined the need of an objective and rational justification for the institution of such a treatment.

The Constitutional Court appreciates that, in the case of the text subjected to a constitutionality control, the ideas kept in mind by the legislator cannot be considered to be strong enough to justify, in an objective and rational manner, the institution of a differentiated treatment between women and men, active military personnel, in the granting of a leave for child care. In conclusion, because the two categories of persons have the same professional status, this leads to the conclusion that the only identification of a difference in treatment is based on sex.

According to the reasons exposed, on the ground of article 146, letter d) and of article 147 paragraph (4) of the Constitution, articles 1-3, article 11 paragraph (1) letter A. d) and of article 29 of the Law no. 47/1992, with a majority of votes, the Constitutional Court, in the name of the law, has

decided the admission of the waiver of unconstitutionality raised by Gabriel Hulea in the Case no. 4.089/2004 of the Bacau Appeal Court – Civil Section and observes that the dispositions of article 15 paragraph 1 of the Law no. 80/1995 regarding the Statute of military personnel which contravene the provisions of article 16 paragraph (1) of the Constitution.[23]

In the Decision no. 173 of 22/03/2005[24], regarding the waiver of unconstitutionality of the dispositions of article 1, article 2 paragraph (1) and of article 19 paragraph. (1) letter a) of the Government Emergency Ordinance no.102/1999 regarding the special protection and labor admission of disabled persons, a waiver raised by in the Case no. 563/2004.

The cause being judged, the representative of the Public Ministry states conclusions of rejection of this waiver as being ungrounded. For this reason, he shows that the criticized legal provisions do not represent a differentiated judicial treatment between disabled persons in rapport to age or the date at which the disability appeared. Regarding the difference between the sums of the allowance, for seriously disabled persons, according to article 19 paragraph (1) letter. a) of the Government Emergency Rule no. 102/1999, it has been shown that this is justified by a different situation in which these persons are found under the aspect of incomes realized. In motivating the waiver of unconstitutionality its author sustains, in essence, that the provisions of article 1, article 2 paragraph (1) and of article 19 paragraph (1) letter a) of the Government Emergency Ordinance no.102/1999 **contravene the constitutional principle of equality in rights** and the constitutional dispositions which consecrate the states obligation to grant a special protection to disabled persons. Also, he appreciated that the law texts subjected to control of constitutionality are found in contradiction to the provisions of article 25 paragraph 1 of the Universal Declaration of Human Rights, thus also referring to the dispositions of article 20 of the Constitution, which consecrate the priority towards internal laws of international instruments in the domain of human rights, to which Romania is a party of. For this reason, he has shown that, though the definition offered to this notion of disabled person and through the establishing of social protection granting criteria, the criticized law texts create discrimination between disabled persons, under the aspect of special protection from which these benefit from.

Thus, keeping in mind that the admission in the category of disabled persons is conditioned by a cumulative fulfilling of two demands, respectively the fact of needing support in admission to a social life, and in a professional life, it is considered that persons who have the standard age for retirement and those which gained this affection that determined the disability after the standard age of retirement, are excluded from receiving special protection.

The President of the Deputes Chamber appreciates that the waiver of unconstitutionality is not grounded. The government appreciated that the author's support regarding the unconstitutionality of dispositions of article 1, of article 2 paragraph. (1) and of article 19 paragraph (1) letter a) Of the Government Emergency Ordinance no. 102/1999 are ungrounded. The Ombudsman appreciates that the provisions of article 1, article 2 paragraph (1) and of article 19 paragraph (1) letter a) of the Government Emergency Ordinance no. 102/1999 is constitutional. In sustaining the unconstitutionality of these law texts, the author of the waiver invokes the breaching of provisions of articles 16 paragraph (1) and 50 of the Constitution, according to which:

- Article 16 paragraph (1): "Citizens are equal in front of the law and of public authorities and without discriminations";
- Article 50: "Disabled persons enjoy a special protection. The state insures the realization of national politics of equality in chances, of prevention and of disability treatment, for an effective participation of disabled persons in community life, respecting the rights and duties of parents and tutors"

[23] Decision no. .90/2005, pronounced by the Constitutional Court during the meeting of 10 February 2005.
[24] Published in the Official Gazette, 1st part, no. 447 of 26/05/2005.

- Also, the author of the waiver appreciates that the criticized law texts breach the dispositions of article 20 of the Constitution, because these contravene the provisions of article 25 paragraph 1 of the Universal Declaration of Human Rights.

The Court concludes that the author's support for this waiver cannot be retained, according to which provisions of article 19 paragraph (1) letter a) of the Government Emergency Ordinance no. 102/1999 contravene the constitutional principle of right equality, so that this law text doesn't make a difference between adults according to their ages not in rapport to the period in which the disability appeared. The difference established by this law text is between the sum of allowances offered to seriously disabled persons, which is justified by different situations kept in mind by the legislator, that is, these persons realize or not incomes from salaries or pensions. Thus, the criticized law text is in full agreement to the constitutional principle of equality in rights, as it has already been stated in the jurisprudence of the Constitutional Court and doesn't suppose uniformity, so that different situations justify the institution of a different judicial treatment.

Conclusions

The main directions approached in this paper analyse equality as autonomous norms with a proper structure found under the label of "constitutional principle of equality" – a reference norm for the control of constitutionality of laws, but hiding a large frame of judicial origins the constitutional judge has the freedom to use according to circumstances. The equality exigency is contained by many articles of the Constitution, but also in numerous dispositions of international pacts and treaties[25], the manner in which the Constitutional Court uses all these reference norms depending especially in their normative content.[26]

Another analysis circumscribes the ideal of equality which was born as a demand of natural law, being justified by religious, psychological and philosophical argument, but all proved to be unsustainable. It is real that people are gifted by nature so that the demand that all people are to be treated equality cannot be based on a theory that we are all alike.

If we desire to understand this principle we must begin from a historical examination, as we have done. During modern times, as in ancient times, this principle was used as means of destroying feudal differentiation of individual legal rights. As long as the individual development and the development of important sections of population are stopped by barriers, social life will be troubled by violent uprisings. People without rights are always a threat for social order.[27] Their common interest for the removing of these barriers unites them; they are prepared to use violence when they cannot obtain what they want by peaceful means. Social peace is reached only when all members of the society are allowed to participate in democratic institutions. And this means everyone is equal in front of the law.

The impact of the analysis realized on the principle of equality is represented by the affirmation of the equality principle in internal and international law, fact which was realized in a small measure as a result of doctrinaire constructions realized and more on the basis of a jurisprudence of constitutional jurisdiction. This jurisprudence allowed the identification of all constitutional origins of equality in Romanian law, the stating of all beneficiaries of the constitutional principle of equality and the observing of rapports equality maintains with other fundamental rights consecrates by fundamental law.

[25] The 1991 Constitution refers to the term equality in the following articles: 4,6,16,38,41,44,53 and 59.

[26] Elena Simina Tănăsescu, *op.cit,* p.45-46.

[27] Ludwig von Mises, *Socialism. An economic and Sociological Analysis,* Liberty Classics, Indianapolis, 1981, web page www.misesromani.org.

References

- Cox, Raymond W., Buck, Susan J., Morgan, Betty N., *Public Administration in Theory and Practice*, Prentice Hall, New Jersey,1996.
- Dan Adrian, *Spre o nouă arhitectură a inegalităţii sociale* Romanian Sociology Journal, no. 1/2003 www.iccv.ro/romana/dictionar/adi/adi_egalsanse.htm - 47k.
- Deleanu, I., *Justiţia constituţională*, Bucharest, Lumina Lex, 1995.
- Herbert Gans, J., 1991, People, Plans, and Policies: Essays on Poverty, Racism, and Other National Urban Problems (Columbia History of Urban Life), Columbia University Press.
- Gilbert François, *La discrimination positive en France,* in **La revue pratique de droit français**, no.20/11/2005.
- Mihăilă Marian, Stan Dan, Suciu Carmen, *Tratat de drept internaţional public,* Vol. III, BREN-V.I.S.PRINT Publishing House, Bucharest, 2006.
- Melin F., Soucramanien, *Le principe d'egalite dans la jurisprudence du Conseil Constitutionnel,* Economica –PUAM, 1997.
- Ludwig von Mises, *Socialism. An economic and Sociological Analysis,* Liberty Classics, Indianapolis, 1981, web page. www.misesromani.org.
- Mithaug Dennis .E., 1996, Equal Opportunity Theory, SAGE Publications, London.
- Montesquieu, C. Despre spiritul legilor, Bucharest, Scientific Publishing House, 1964.
- Nozick Robert, 1977, *Anarchy, State and Utopia,* Basic Books, New York, web page.
- Platon, *Legile.* Bucharest, IRI Publishing House, 1995.
- Rawls, John, 1971, *A Theory of Justice*, MA: Belknap, Cambridge, web page.
- Rousseau J.J., *Contractul social*, Bucharest, Scientific Publishing House, Philosophical Library, 1957.
- Sfez L., *Leçons sur l'Egalité,* Presses de la Fondation Nationale des Sciences Politiques, 1984.
- Tănăsescu Simina Elena, *Principiul egalităţii în dreptul românesc*, All Beck Publishing House, Bucharest, 1999.
- Toader Toma, Aspecte constituţionale ale realizării ordinii juridice în statul de drept, Chisinau, 2005.