

OPINIONS ON THE RIGHT TO NON-DISCRIMINATION

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Abstract

This study aims to analyze the non-discrimination concept, as regulated by the national and foreign legislation. It is important to know that there are international documents which protect the right to non-discrimination, so that these documents will also be contemplated by this study.

In Romania, the competent authority established in order to investigate and to apply civil sanctions for the deeds or acts of discrimination is the National Council for Combating Discrimination. In this respect, this study shall be focused on the presentation of the role and the activity of this institution in fighting against discrimination.

Keywords: *discrimination, law, National Council for Combating Discrimination, plaintiff, contentious administrative.*

1. Introduction

The right of all persons to equality before the law and protection against discrimination represents a fundamental right recognized by the Universal Declaration of Human Rights, by the United Nations Conventions on the elimination of all forms of discrimination against women, by the International Convention on the elimination of all forms of racial discrimination, by the United Nations Treaties on the civil and political rights and on the economic, social and cultural rights and by the Convention for the protection of human rights and fundamental freedoms, which all member states have signed.¹ As the foreign accepted legal principle noted, “the discrimination principle suggests that individuals in equal situations or equivalent circumstances, to be subject to an equal treatment”²(...). In what concerns Romania, the recent accepted legal principle, the accession to the European Union also implied the establishment of the constitutional grounds³. According to the provisions of art. 148 par.(4) of the Constitution, the authorities of the Romanian state have undertaken to ensure the fulfillment of the obligations under the treaties establishing the European Union, the mandatory community regulations and the act of accession⁴. According to art. 1 of the reviewed Constitution,

Romania is a state subject to the rules of law⁵. The Romanian Constitutional Court, under the construction of this text, noted that: “the state subject to the rule of law is a mechanism of which operation involves the establishing of an order where the recognition and valorization of the individual’s rights cannot be conceived in an absolute and discretionary way, but only in relation to the compliance with the rights of the others and the community as a whole”⁶.

One author noted that article 4 par. (2) of the Constitution lists the criteria of the non-discrimination⁷. Art. 4 par. (2) reads as follows: “Romania is the mutual and indivisible country of all its citizens, irrespective of the race, nationality, ethnic origin, language, religion, gender, opinion, political affiliation, wealth or social origin”. Furthermore, art. 16 par.(1) of the content of the fundamental political and legal settlement of the Romanian state sets out the following: “the citizens are equal before the law and the public authorities, without any privilege or discrimination.”⁸. Decision no. 164/2010 of the Romanian Constitutional Court approaches the same subject: “paragraph 1 of art. 16 is correlated with the constitutional provisions of art. 4 par.(2)”. On the other side, the Constitutional Court provided that: the text of art. 16 par.(1) in conjunction with the text of art. 4 par.(2) of the fundamental law, concerns the prohibited discriminations and not the permitted discriminations,

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¹ Directive 2002/73/EC of the European Parliament and Council on the amendment of Directive 76/207/EEC of the Council on the implementation of the principle of equal treatment for men and women, par.(2) of Preamble, <http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:32002L0073>, accessed on February 17th, 2015

² **Frederic Sudre**, *Drept european și internațional al drepturilor omului (European and international law of human rights)* (translation by R.Bercea coord., V.I.Avrăm, M.Roibu, F.N.F Stârc-Meclejan, A.Verdeș-Olteanu), Polirom Publishing House, Bucharest, 2006, p. 202 apud. **Cristian Clipa**, *Drept administrativ. Teoria funcției publice. Raportul juridic de serviciu- noțiune, părți, obiect și conținut. (Administrative law. The theory of the public office. The service legal relation – concept, parts, scope and content)*, Hamangiu Publishing House, Bucharest, 2011, p. 172

³ **Roxana Mariana Popescu**, *Introducere în dreptul Uniunii Europene (Introduction to the law of the European Union)*, Universul Juridic Publishing House, Bucharest, 2011, p. 178

⁴ Decision no. 1596/2009 of the Constitutional Court, published in Official Journal no. 37/2010

⁵ For a more detailed analysis of the state subject to the rule of law, see **Elena Anghel**, *The lawfulness principle*, the CKS-eBook proceeding 2010, vol. I, Pro Universitaria Publishing House, Bucharest, 2010, ISSN 2068-7796, p. 799

⁶ Decision no. 659/2010 of the Constitutional Court, published in Official Journal no. 408/2010

⁷ **Dan Claudiu Dănișor**, *Fundamentul statului și criteriile de nediscriminare (The basis of the state and the non-discrimination criteria)*, Revista Drept Public (Public Law Magazine no. 1/2008, C.H.Beck Publishing House, Bucharest, p. 53

⁸ **Cristian Clipa**, *op.cit.*, p.171

therefore it does not concern the positive discrimination, but the negative discrimination(...).⁹

2. Content

2.1. The general status of the legislation on discrimination

Internationally, several normative acts create the general framework of the non-discrimination and we selectively present them herein. For example, art. 14 of the Convention for the protection of human rights and fundamental freedoms is entitled: „the prohibition of the discrimination” and provides the following: “the performance of the rights and freedoms recognized by this Convention must be ensured without any distinction, especially on the following grounds: sex, race, color, language, religion, political opinions or any other opinions, national or social origin, the affiliation to a national minority, wealth, birth or any other situation”.¹⁰

Furthermore, art.1 of Protocol 12 to the protection of human rights and fundamental freedoms entitled: “the general prohibition of the discrimination” provides the following:

“1. The performance of any rights provided by the law must be ensured without any discrimination, especially on the following grounds: sex, race, color, language, religion, political opinions or any other opinions, national or social origin, the affiliation to a national minority, wealth, birth or any other situation.

2. No person shall be discriminated by a public authority based on grounds referred to in paragraph 1”.¹¹

The Charter of Fundamental Rights of the European Union provides in art. 20 entitled “the equality before the law” that all persons are equal before the law and art. 21 fully approaches discrimination¹². Therefore, according to par.(1) of art. 21: “the discrimination of any kind, on the grounds of gender, race, color, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other nature opinions, affiliation to a national minority, is prohibited (...).” and according to par.(2) „in what concerns the scope of the Treaties (...) the discrimination on the grounds of nationality is prohibited”.

Another document that relates to the concerned subject is Directive 2000/78/EC establishing a general

framework for equal treatment in employment and occupation¹³. We find in this document several provisions, such as:

- Art. 1 „The scope: this Directive has as main scope the establishing of the general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation with a view to putting into effect in the Member States the principle of equal treatment”.

- Art.2 The discrimination concept defines the direct discrimination and indirect discrimination, as follows:

„Direct discrimination: shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation (...)

Indirect discrimination: shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other (...).”

Directive 2002/73/EC of the European Parliament and Council for the amendment of Directive 76/207/EEC of the Parliament on the implementation of the principle of equal treatment for men and women¹⁴ is another document which falls under the scope of the discussed subject.

2.2. National legislation

Nationally, the legislation on the right to non-discrimination was also drawn up. For sure that each and every inventory of the normative acts firstly begins with the nominalization of the fundamental law which includes several articles on the right to non-discrimination, such as: art. 4, art. 16, etc.

Following the Constitution, Government Ordinance no. 137/2000 on the prevention and sanction of all forms of discrimination¹⁵ is the next document that we refer to. This normative act defines the **discrimination** as being: “any distinction, exclusion, restriction or preference on the grounds of race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, age, disability, non-contagious chronic disease, HIV, infection, affiliation to a disadvantaged category, as well as any other criteria of which scope or effect is the restriction, removing, recognition, use or performance,

⁹ Decision no. 27/1996 of the Constitutional Court, published in Official Journal no. 85/1996

¹⁰ http://www.echr.coe.int/Documents/Convention_ROM.pdf, accessed on February 17th, 2015

¹¹ http://www.echr.coe.int/Documents/Convention_ROM.pdf, accessed on February 17th, 2015

¹² For issues related to the compliance with human rights, prior to the entry into force of the Charter of the Fundamental Rights, see **Roxana-Mariana Popescu**, *Scurte considerații privind evoluția consacării juridice la nivelul UE a respectării drepturilor fundamentale (Brief opinions on the EU legal consecration of the compliance with the fundamental rights)*, Revista Română de Drept European (European Law Romanian Magazine), supplement, 2013, Wolters Kluwer Publishing House Romania, pp. 153-157.

¹³ http://www.anr.gov.ro/docs/legislatie/internationala/Directiva_Consiliului_2000_78_CE_RO.pdf, accessed on February 17th, 2015

¹⁴ <http://eur-lex.europa.eu/legal>

content/RO/TXT/?uri=CELEX:32002L0073, accessed on February 17th, 2015

¹⁵ Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination, published in Official Journal no. 431/2000

on an equal footing, of human rights and fundamental freedoms or of the rights recognized by the law (...)"

Another extremely important document nationwide is Law no. 202/ 2002 on equal opportunities between men and women¹⁶ which regulates the measures to promote equal opportunities and equal treatment between women and men, in order to eliminate all forms of discrimination on the grounds of gender, within all the fields of the public life of Romania. The concept of *equal opportunities* is defined as follows: „the taking into account of the different abilities, needs and aspirations of both men and women and respectively, their equal treatment”.

According to the international legislation, the types of discrimination are defined in art. 4 of this normative act, as follows:

- the direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on the grounds of gender.

- the indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular gender at a particular disadvantage compared with other persons of other gender, except the case when this provision, criterion or practice is objectively justified by a legitimate scope, and the means of achieving this scope are appropriate and necessary (...)"

References on the right to non-discrimination are also found in the criminal legislation, both in the old Criminal Code and in the current Criminal Code¹⁷, as follows:

- art. 317 of the previous Criminal Code (normative act currently repealed) entitled „incitement to discrimination” provided that the “incitement to hatred on the grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, political opinion and affiliation, beliefs, wealth, social origin, age, disability, non-contagious chronic disease or HIV/AIDS infection” was punished with imprisonment between 6 months and 3 years or with fine.

- art. 369 of the current Criminal Code entitled ”incitement to hatred and discrimination” provides that the “incitement of the public by any means to hatred and discrimination against a certain category of persons” shall be punished with imprisonment between 6 months and 3 years or with fine.

3. The Case Law of the Constitutional Court

In what concerns the principle of equality¹⁸, the Constitutional Court, in its constant case law reflected by means of Decision no. 148/2001 or Decision no. 685/2012, provided the following, by means of general mandatory considerations: “the violation of the principle of equality and non-discrimination exists when a different treatment is applied to equal cases without any objective and reasonable grounds, or if there is a disproportion between the scope aimed by means of the unequal treatment and the used means.”¹⁹ The discrimination is the result of a different legal treatment applicable to the same categories of legal subjects or situations that do not differ objectively and reasonably.²⁰

On another occasion, the Constitutional Court showed that: “The legal situation of several categories of persons justifies the implementation of a different treatment, in order for a better fulfillment of the justice”.²¹

In what concerns another case, the Constitutional Court provided that: „The cultural traditions and social realities are still in progress towards achieving a factual real equality between genders, so that it cannot be concluded that currently, the social conditions in Romania support an absolute equality between men and women. Beyond the normal changes which occur within the society in terms of mentality, culture, education and in what concerns the traditions, the provision of an equal treatment between genders is more and more necessary in the context of the European trend which requires the states to comply with the standards of the non-discriminatory equal treatment between men and women”.²² The violation of the principle of equality and non-discrimination exists when a different treatment is applied to equal cases without any objective and reasonable grounds, or if there is a disproportion between the scope aimed by means of the unequal treatment and the used means.²³

4. The National Council for Combating Discrimination

The National Council for Combating Discrimination (C.N.C.D.) is the public authority, under parliamentary control which performs its activity in the field of the discrimination. It was established in 2002 under Government Ordinance no.137/2000. The activity performed by it is in accordance with Government Resolution no.

¹⁶ Law no. 202/ 2002 on equal opportunities between men and women, published in Official Journal no. 150/2007

¹⁷ The new Criminal Code was adopted by means of Law no. 286/2009 on the Criminal Code published in Official Journal no.510/2009 and entered into force in 2014

¹⁸ Elena Comşa, *The principle of freedom and equality*, in Lex et Scientia no. 1/2009, Prouniversitaria Publishing House, Bucharest, 2009, pp. 263-265.

¹⁹ Decision no. 2/ 2014 of the Constitutional Court, published in Official Journal no. 71/2014

²⁰ Decision no. 263/2009 of the Constitutional Court, published in Official Journal no. 170/2009

²¹ Decision no. 553/2004 of the Constitutional Court, published in Official Journal no. 40/2004

²² Decision no. 1237/2010 of the Constitutional Court, published in Official Journal no.785/2010.

²³ Decision no. 107/1995 of the Constitutional Court, published in Official Journal no. 85/1996.

1194/2001 on the organization and operation of the National Council for Combating Discrimination²⁴ The dedicated web page of this state authority is the following: <http://www.cncd.org.ro/>. Government Ordinance no. 137/2000 is the one establishing that the C.N.C.D. is held liable for the implementation of the legislation in the field of discrimination, that it ascertains and sanctions the offences falling under its scope. C.N.C.D. has the material competence in all the fields for the actions of discrimination, as well as the territorial competence, namely a nationwide competence.

In connection with the activity report on 2013²⁵, compared to previous years, as of the establishment of C.N.C.D., 2013 stands out due to the following: “the highest number of petitions (858); the highest number of petitions on the grounds of nationality (61) and sexual orientation (13); the highest number of resolutions issued by the Ruling Council (824); the highest number of ascertainties of discrimination actions (135); the highest number of fines (110) amounting to RON 267,800 (compared to 2012 when the 35 fines amounted to RON 114,000)”.

The activity report of 2013 showed that C.N.C.D. carried out an opinion survey: „Perceptions and attitudes on discrimination” with the support of the Romanian Institute for Assessment and Strategy. The opinion survey was carried out throughout October-November 2013 on 1,415 persons over 18 years old of the rural and urban area and who were distributed questionnaires.²⁶ The conclusions of the survey were the following: 67% of the respondents believed that the discrimination occurs „often” and „very often”; 46% believe that the discrimination would remain the same in the following years; only 11% hoped the discrimination would decrease and 28% expressed their concern that the discrimination would be more common.

The activity report of C.N.C.D. of 2012 showed that, in relation to the previous years, in 2012, a series of discrimination criteria recorded a percentage increasing dynamics²⁷. Therefore, the non-contagious chronic disease, HIV infection, nationality, gender, beliefs and language are the criteria which record an increase in the total number of complaints, in relation to the latest 4 years.

In what concerns the cases settled by C.N.C.D. or submitted directly to the court, having as scope the ascertainment of the discrimination, the practice improves yearly. According to the activity report of 2012, under art. 27 of Government Ordinance no. 137/2000 C.N.C.D. was party in 556 civil cases (...). We hereby present selectively, several cases of C.N.C.D. which were settled and sanctioned with fine.

Case no. 1. Therefore, a press release was posted on the Cuțu-Cuțu Association, which was subsequently modified and entitled as follows: „Câinii nu sunt evrei ca să fie duși la Auschwitz” (Dogs are not Hebrew, so they cannot be taken to Auschwitz). Under resolution no. 207/July 4th, 2012, the Ruling Council ascertained the violation of the provisions of art. 2 par.(1) in conjunction with art. 15 of Government Ordinance no. 137/2000 and punished the plaintiff with fine amounting to RON 1,000. The Council showed that the comparison between the Holocaust and the stray dogs is degrading.

Case no. 2. The Ruling Council took notice of the allegations of plaintiff G.B made on GSP TV tv station addressed to the Muslim people and people from Arab countries, throughout January 8th-18th 2012: „I was disgusted to see that thousands of Romanian people took the streets to defend an Arab against President T. B. (...) How is it possible to defend an Arab against the president of my country. An Arab minister should never be designated”. Under Resolution no. 88/February 29th, 2012 the Ruling Council ascertained that the plaintiff’s allegations represent a differentiation on the grounds of nationality, ethnicity (the Arab) and religion (the Muslim) which results in the violation of the dignity, therefore, they fall under the scope of the provisions of art. 2 par.(1) of Government Ordinance no. 137/2000 and G.B. was punished with civil sanction amounting to RON 3,000.

According to the provisions of art. 20 of Government Ordinance no. 137/2000 in conjunction with art. 6 of law no. 554/2004²⁸ of the contentious administrative, the resolution of the Ruling Council may be appealed before the contentious administrative within 15 as of the pronouncement of the ruling. In what concerns the legal nature, the Decision of the Ruling Council of C.N.C.D. is a jurisdictional administrative act. Furthermore, the law provides the possibility of the persons who consider themselves to be victims of discrimination to resort directly to the court of law and to request damages and restoration.

5. Conclusions

Within the actual society, we often witness cases of discrimination. C.N.C.D. is the national authority specially established in order to supervise the compliance with the law in the field of the discrimination and, as we showed, it is an extremely active authority in punishing and preventing the actions of discrimination. In a society that wants to be democratic, it would be ideal if the actions of discrimination did not exist. We do not lack

²⁴ Government Resolution no., published in Official Journal no. 792/2001

²⁵ http://www.cncd.org.ro/files/file/Raport_activitate_CNCD_2013.pdf, accessed on February 17th, 2015

²⁶ <http://www.cncd.org.ro/files/file/Sondaj%20de%20opinie%20CNCD%202013.pdf>

²⁷ <http://www.cncd.org.ro/files/file/Raport%20de%20activitate%20CNCD%202012.pdf>,

²⁸ Law no. 554/2004 of the contentious administrative, published in Official Journal no. 1154/2004

legislation, but we lack reaction, as the presented survey showed.

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