

EQUAL TREATMENT AND NONDISCRIMINATION ON GENDER CRITERIUM IN ROMANIAN LAW

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Abstract *There have been important changes in Romanian legal framework in the past two decades. Concepts as liberty, equality and equity evolved from declarative level to effective values applied into reality. Romanian Constitution, adopted in 1991 and considerably reviewed in 2003, started the process of adapting the Romanian legal framework to the European law. Fundamental principles, such as liberty, equal treatment and equality between all individuals have been ruled and are in force, as they are included in the constitutional texts. In order to confer stronger guaranties for respecting these principles, there have been adopted laws, ordinances and regulations. Although the separation of the power is ruled on constitutional level, the Romanian govern has the power to adopt ordinances, when the parliament is not able to act. This power is not used properly, the process of ruling through ordinances being the prior method and not the exception, as it should be. So, the equal treatment and the non-discrimination principles are insured by ordinance, many of the aspects being criticized. The constant, systematic and concentrated promotion of the equal opportunity principle for men and women, as it is known today, represents a relatively new worry for the international community, even though legal aspects about equality between men and women have been evoked ever since 1948 in the Universal Declaration of Human Rights. In the European Union, the preoccupation for the promotion of the equal opportunity and treatment for men and women was officially recognized as a necessity starting with the European Treaty from Maastricht (1993), and subsidiary through the adopted Directives for this purpose and not least through the jurisprudence of Luxembourg's Court of Law. On institutional level, there have been founded some private and also public bodies to carry out the mission of protecting the equal treatment and non-discrimination principles. An important role is reserved to the judges, as representing the judgment power in the state. Still, the turnover of the Romanian legal framework is not complete at this time. There are concepts to be ruled and European ideas to be reached. The mechanisms to do so are not completely efficient and the paperwork proposes some way to improve the current situation.*

Keywords: *Non-discrimination, gender equality, institutional mechanism*

Introduction

The evolution of human society asked for legal documents containing general and mandatory behavior rules, which formed, in time, the legal system. The concept we use today to name these rules is “written law”, but for a long period of time the law did not consist of written norms, but of principles, the fundament of the present day legal system.

The fundamental principles of the legal system are the guiding lines for all the legislation. The principles express the essence of the norms and influence the interpretation of the law and the solution for all the litigant situations (Djuvara, 1936).

The principles of the law have the power and the signification of superior norms, having a large degree of generality and being ruled mainly in constitutional texts. If some of these principles are not included in constitutional texts, they still are applied and must be respected, being expressed through Latin sintagma, used since the Romans' legal system (Craiovan, 2001).

The past two decades brought important changes in Romanian legal system. Liberty, equality and equity have being rules and are in force, the state assuming the role of the guardian for respecting these fundamental ideas. The Romanian dictionary defines the principle as the fundamental item, the idea, the base concept which supports a scientific theory, a system or all the laws and the fundamental notion for a scientific discipline.

Having the role of coordinating guiding lines, the principles of the law insure the concordance between norms, the cohesion and the harmony of the legal system, the understanding of their meaning and of their finality, their continuous improvement.

The general principles of the law have an important constructive role for the legal system, as they include the objective demands for the society, with specific action in the process of adopting norms and important contribution in their accurate interpretation.

Principles as equality among all the people and equal treatment are strong values included in international legal document but also in internal legal framework for all the Europeans countries. Every regime, which claims to be protector for the citizens' rights, social order and the state of law, must respect these principles, both on regulatory level and then transforming them into practice.

Equal treatment in legislation in force

Although today this concept is unanimously appreciated and accepted, the equality has not always had the significations and the importance awarded now by all the civilized states. The equality is a fundamental value for every state of law. The principle of equality was the product of the evolution of the law in general, according to the changing in the humans' perception towards their fellows. In Romanians perception, the equality is the principle according to which all the people and the states have the same rights and liabilities, written in the legal texts, and all the persons enjoy the same privileges in a particular situation.

Equality and non-discrimination are companion values, the respect for one of these concepts being in direct connection with another. Still, we consider that the equality as a law principle has a wider sphere of influence than non-discrimination, as someone does not have to argue or consider any other condition when making a reference to this notion. The individuals are and must be considered equal no matter of the criteria that might be applied in a particular situation. On the contrary, when someone considered non-discrimination as the principle applied in a particular case, there must be paid attention to the criteria used when the discrimination was done.

The Romanian legal framework in this field is formed by the constitution, laws and govern ordinance. As a member of International Labor Organization (ILO), Romania

adapted its internal legislation to all the conventions adopted by this international organization. Furthermore, before the accession to the EU (2007), Romania had to include into internal legal framework all the principles and the guiding lines of the European uniform rules in the field of equality and equal treatment. The European rules are included in the Romanian Constitution, the govern ordinance no.137 from 2000 (modified and completed in the following years), the Romanian labor code, the law no. 51 from 1991 regarding workers unions, law no.202 from 2002 about the equality between women and men.

Romania has tradition in constitution rules, as the first Romanian constitution was adopted in 1866. Even if the communist regime before 1990 evolved to absolutism, still it had a constitutional base. In the Romanian legal system, the principle of equality in rights for all citizens has the power of a constitutional rule.

The constitution in force now was adopted in 1991 and considerably reviewed in 2003, according to the imperative of harmonization of the rules, for the accession to the EU. Fundamental principles, such as liberty, equal treatment and equality between all individuals have been ruled and are in force, as they are included in the constitutional texts. Article no. 16 from the Romanian constitution establishes that „all the citizens are considered equal by the law and in front of public authorities; no one is above the law. The Romanian state guaranties the equality between women and men in order to occupy public or civil function and dignities”.

This constitutional principle could not be completely efficient without a regulation to explain the situation it may interfere and the mechanism that the state may use to guarantee its supremacy. It is the mission of the law to widely explain a constitutional norm and its particular meaning. Unfortunately, the principle we analyze was not further detailed in a law, but in a legal text that govern adopted. The separation of the power is ruled on constitutional level, and govern has, in Romanian constitutional system, the executive power. Furthermore, the Romanian govern has the power to adopt ordinances, when the parliament is not able to act. Of course, there is a certain procedure to respect when the govern uses the ordinance, but it is an exceptional method and not a common way to regulate. This power is not used properly, the process of ruling through ordinances being the prior method and not the exception, as it should be. So, the equal treatment and the non-discrimination principles are insured by ordinance, many of the aspects being criticized.

The govern ordinance no.137 from 2000 establish that it is forbidden that public authorities do any form of discrimination, on the reason of race, nationality, ethnic origin, religion, language, sex or sexual orientation. These types of actions are also forbidden for all the public and private subjects (Dezideriu, 2003).

The area of competence of this restriction includes economic activity, the freedom of movement, and the right to choose the residence, the access to public places, the individuals' dignity. Starting with the constitution, Romania is declared state of right, where democracy rules. Article 1 from the govern ordinance no 137 from 2000 established that in Romania the dignity of people, the protection of rights and liberties of the citizens, the development of the human personality are supreme values and they are

guaranteed by the law. The principle of equality among citizens, excluding the privilege and discriminatory actions, is protected especially regarding the following rights:

- The right to an equal treatment in front of the courts of law and any other jurisdictional institution;
- The right to individuals safety and to obtain the state protection against violence of maltreatment from any person, group of individuals;
- The political rights, mainly the election rights, the right to participate to public life, to access to public functions and dignities;
- The civil rights, especially:
 - The right to free movement and to choose the residence;
 - The right to leave and to return to the one's country;
 - The right to obtain and to give up the Romanian citizenship;
 - The right to marry and to choose the partner;
 - The property right;
 - The succession right;
 - The freedom of thinking, the freedom of conscience and religion;
 - The right to free opinion and expression;
 - The right to free of meeting and cooperation;
 - The right to petition;
- The economic, social and cultural rights, mainly regarding:
 - The right to work, the free choose of occupation, to equitable and satisfying working condition, the right of protection in case of unemployment, the right to equal salary for equal labor, the right to equitable and satisfying remuneration.
 - The right to settle an union and to cooperate with other unions;
 - The right to have a home;
 - The right to health, medical assistance, social security and social services;
 - The right to education and vocational training;
 - The right to participate, in equal condition, to cultural and sportive activities;
 - The right to have access to all the public places and public services

Although there is legal support and courts are bound to impartially apply the law, Romania legal practice in similar cases has shown that solution vary from one court to another. The only effective solution is the appeal to the European Court of Human Rights (ECHR), on the base of Protocol 12 of the European Convention of Human Rights. This is a possible and effective method, but the citizens often do not take into consideration the trial in front of such a prestigious court of law, especially when it comes to labor relations. They want to have a quick and just solution to their problem a not a long trial, with unknown financially implication. First, it is to notice the period of time that passes until the final solution will be pronounced. Second possible explication is the lack of information about the cost of the procedure in front of ECHR.

The most convenient way to have these cases properly resolved is to change the Romanian legal framework in this respect, by reducing the ambiguities of its content so that in similar cases, court of law offer the similar solutions.

Romanian concept of non-discrimination

The Romanian juridical literature considers that the principle of equality results from the European law and has as a direct consequence the regulation of non-discrimination principle, understood as “equal treatment of the parties in identical or comparable situations” (Manolache, 2001).

The first, origin meaning of the discrimination concept is the disparity, the difference among identical or similar elements. According to the govern ordinance no 137 from 2000, the discrimination act is any disparity, exclusion, restriction or preference, on the base of race, nationality, ethnical origin, language, religion, social category, beliefs, sex, sexual orientation, age, handicap, chronic non-contagious illness, HIV infection, membership to any underprivileged category, and any other criterion that has as a goal or effect to diminish, to abolish the legal use or practice of a right ruled by a law in force, in political, economic, social, cultural or any other field of the public life. There are also considered as discriminatory facts the apparently neutral situation that creates disadvantages for certain persons compared with other.

There is an exception from this fundamental rule, regulated in the ordinance and applicable if two conditions are respected. So, it is not considered discrimination the situation where the criteria considered are objectively justified by a legitimate goal (first condition) and the methods to reach this goal are adequate and necessary (second condition). Any active or passive behavior is to be under administrative penalty, if it generates, favours, unjustly disfavors or submits to unfair or degrading treatment a person, a group of individuals or a community towards other persons, groups of individuals or communities.

In the field of equality between women and men, the law no. 202 from 2002 has the mission to establish the measures to promote the equality of chance for women and men, in order to eliminate the direct and indirect discrimination in all the sector of the public life in Romania, that is in the field of labor, education, health, culture, information, participation to decision and all the field rules by special laws. It is important to notice that the religious activity and the private and intimate life of every individual do not enter under the prescription of this act (Radus, 2006).

In the Romanian legal framework there may be analyzed different types of discrimination: direct discrimination, indirect discrimination, multiple discrimination and positive discrimination.

Direct discrimination is the situation when a person is treated less favorable than another person in the comparable situation, based on a criterion of discrimination presented in the law in force (Chinole et al., 2007).

Direct discrimination is relatively difficult to prove, as it is difficult to identify the comparable situation for the person that is the victim of the discriminatory fact. If the situations are similar, the discrimination is easy to be observed, but usually the situation is not easy to compare. For example, if the criterion considered is the gravidity, it is not

easy to analyze even in comparison with another woman, if no other women is pregnant at the same time.

Often, the discrimination facts have more subtle forms, and in these cases we speak about the indirect discrimination. According to the article 5 from Romanian Labor code, it is also forbidden the indirect discrimination, like the facts apparently founded on other criteria than the criteria expressed above that produce the results of a direct discrimination. A situation of indirect discrimination is when the employers ask for certificates to show a higher level of education than needed for the specific job.

We may distinguish two types of discriminatory facts: one in connection with the physical identity of the person and second with the moral identity of the person. The physical identity of the person is taken into consideration when we compare the attributes such are sex, race and health. These elements are easy to identify by the author of the discriminatory action and are mainly present in the internal motivation for the decision to act discriminatory (Top, 2006).

The moral identity of the person is in connection with criteria as family situation, mores, conscience, religious believes and political opinion. None of these criteria may be the motif for excluding or discarding a person. Of course, the Romanian law allows entitled inequality such might be the nomination of women (or men, according to each case) for a fashion parade, according to the event characteristics.

The multiple discrimination is a concept present in practice when a person is simultaneously discriminated, on the base of two or more criteria. For example, when a women is excluded both for sex reason and also for age reason. The importance of this concept is revealed by the fact that the persons that cumulate many criteria used for discriminating action are more exposed to this illegal action. Therefore, we appreciate that the multiple discrimination should be punished harder, although the Romanian regulation does not make such a difference.

The positive discrimination appeared in the American legal system, with the name "affirmative action". The collocation "positive discrimination" may sound like a discrepancy, as the discrimination cannot be a positive fact. Still, this concept regards the preferential treatment for a person or a group of person in order to compensate the exclusion situation that happened in the past (Ignatou-Sora, 2008).

The positive discrimination supposes the regulation of some legal measures to pay back, if it is possible in proportional manner, the groups that suffered en exclusion or are still supporting an unequal treatment, in multiple fields, from recreating activities to daily life environment (for example parking places reserved for individuals with a walking disability, jobs for person from certain ethnic groups, places in public universities free of taxes for the members of Roma minority).

There are opinions in favor and also against positive discrimination. Some consider that our day society is in debt towards the victims of the past discrimination actions, even if the specific action stopped. The successors of the victims are still indirect victims, as in competition with the other they have started from a disadvantaged position. According to this logic, the positive discrimination is an act of reparatory justice, a solution to obtain equal opportunities for those previously unjustly excluded. For example, individuals from a minority group have a certain chance to get a job when the

law in force reserves a number of jobs to minority representatives. In this case of positive discrimination, the majority is disadvantaged. The general principle of equal treatment is still respected if the number of reserved job is small, compared to the number of the jobs in the company. On the contrary, this situation will encourage the competition between the applicants, so employer will get a better human resource.

There are still opposite opinions, experts considering that the positive discrimination is not successful in obtaining equal opportunities. Although it is true that until now the minorities were unjustly excluded, the positive discrimination only turns the situation upside down, transforming the persons from the minority group in persons with favors and privileges. So, the majority will not consider that the minorities are their equal, but will consider that the minorities are unjustly protected. This situation will generate more tension between groups and this tension will bring new forms of discrimination.

The strategy of equality between women and men

In Romania, even though civil society and non-governmental organizations that militates for women rights repeatedly pointed out the existing inequities between men and women, public and political institutions showed only formal interest to the matter, being constrained by the adhesion at the EU, adhesion conditioned by reaching the existing standards in the field.

In the legislative sector, Romania proved to have a slow rate of applying the community's aquis regarding equity between sexes. The 2001 national report of the European Commission pointed out that the National Action Plan was not materialized by any concrete action, the legal project regarding equity of sexes remaining for debate in the Parliament more than the reasonable period. Also, in 2001, when Romania made a series of engagements with the European Community, the first measures regarding the implementation of the community's aquis were taken, measures of institutional nature. But what was missing in those new created institutions was a central implementation organism for observing the equality of chances and an adequate system for financing the measures and efforts of these institutions.

The National Strategy that aimed men and women's equality in the 2006-2009 periods has been structured by intervention areas and specific objectives of each area. Thus, Institutional Capacity Area had as main objectives the enforcement of the institutional capacity, the specialization of the involved personnel in the field of equal opportunities, the improvement of the connections with the international organisms in the field. Of great importance is considered to be the second one because it eases experience know-how change between states. But the reference point which has been omitted by the Strategy or which did not get a lot of importance is the one regarding national governmental and nongovernmental organisms, that demonstrate most of the times that are pointed toward initiative and results rather than politics, more social than economical. A good collaboration and a public financing system for this type of organisms could have created a series of projects with the help of which the strategy could have been applied. Non reimbursable European funds, have always been at the citizen's disposal, and

implicit at the disposal of organizations, social protection institutions and county's work-occupation organizations.

The economical life area has as main objective, supporting equal access for women on the labor market. The salary's level is the most contested factor. It is certain that, for equal positions and jobs, the salary is the same, but differences appear when jobs and work conditions are not similar or when semi-objectives factors specific for women, like maternity leave, are taken into consideration. According to the strategy this period is to be blamed for the gap, mostly on the professional development level. It is admitted that the gap exists, but not at such a big scale for the impact to be that important on women. Given the case of a fresh graduated woman, the motivation is maintained without denying the reality, but for high employment experience women, one with five to ten years of experience, not all are affected by the maternity leave and not all are under the threat of losing the job and the need of requalification.

Table 1 Employment rate by sex for 20-64 years, in the 2008-2009 periods

	2008	2009
General employment rate (20-64 years)	63,5%	63,6%
Men employment rate (20-64 years)	70,7%	71,2%
Women employment rate (20-64 years)	56,3%	56%

Source: *National Institute for Statistics for 2005-2008 period, NIS Estimations for 2009.*

Equal opportunity for men and women came as a necessity when differences on both European and national level were noticed on work condition grounds, wages' level, employment and unemployment rate, mainly when separating figure by gender. Its development over time is conditioned by a harmonized development at the institutional, legal, social and cultural level.

The equality of chances and treatment in the work relation regards the equal access to choosing the profession, to apply for a job and to be selected for that particular job, to equal remuneration, promotion, equal working condition, equal benefits and equal social services. The law protects the maternity and the women with children. On European impulse, the Romanian law includes some rule for sexual harassment.

When talking about solutions, the strategy offers the implementation of certain programs of professional reconversion and the stimulation of the interest regarding continual professional formation with the final purpose of easing the access in all economical areas. The professional formation programs, at the time being, have helped not only unqualified, debutant or reconverting personnel, but also some specialized enterprises in implementing this kind of programs.

Institutional mechanisms to protect equal treatment and non discrimination principles

In Romania, there are private but also public institutions to fight against discrimination and to insure the respect of equal treatment; such are the National Council

to Fight against Discrimination and the National Agency for Equality between Women and Men. These institutions from the central public administration system are supported by many private institutions and non-profit organizations, which give support and consultancy to the victims of the discrimination.

The National Council to Fight against Discrimination (CNCD) is the autonomy public authority, with juridical personality, under the parliament control, which functions as a guardian for the respect of the non-discrimination and equal treatment principle. It is an executive structure, subordinated to the government, with the main task to propose new legal documents, to cooperate with other public authorities for the respect of the equal treatment, to elaborate studies and research reports. Also, it receives petition and claims from the victims of the unequal treatment of discrimination actions (Jura, 2004).

The council works independently, without any influences or pressure from any institution or public authority. The council is managed by a president, a vice-president and a board for a 5 year period. The president is the person that signs the activity report of the council and presents the report in front of the parliament until the 15th of April for the previous year. The main tasks of the council are: to prevent the discrimination action, to mediate the discrimination conflicts, to investigate the situation under discrimination suspicion, to monitor the public strategy in its area of competence, to assist and support the victims of the discrimination.

The National Agency for Equality between Women and Men (ANES) is an organ of the central public administration responsible with the implementation of the principle of the gender equality. The agency is subordinated to the minister of labor and social protection. The president of ANES coordinates the activity of the national commission for the equality between women and men, with the following task:

- the global perception of the principle of the equality between women and men, with the purpose of eliminating the gender inequality and the discrimination on sexist criteria
- the respect for the principle of the equality between women and men in the politics for every economy sector
- the analysis of the level of implementing this principle in Romanian legislation gives consultative notice on the national strategy concerning the principle of the equality between women and men
- it insures the free access to any information regarding the commission activity.

In spite of the important mission that is given by the regulatory act to these two public institutions, there are opinions that consider their activity as inefficient and without satisfactory results.

Indeed, if someone analyzes the number of petition that CNCD resolved during the period of one year (from the total of 836 petitions in 2007, only 546 were resolved in the same year), it may appear too small for a country that fights strong discrimination criteria such as minority, genre and ethnic membership.

Conclusion

Romania is member of UE starting 2007 and according to this status, Romania modified the internal legal rules in accordance with the European law on the equality and non-discrimination principles. Still, the turnover of the Romanian legal framework is not complete at this time. Despite the numerous rules in this respect, there are not efficient in all the situations. A possible improvement of the legal framework is proposed for the regulation in the working relation area.

Regarding the positive discrimination in the Romanian context, we conclude the norms in force today may generate more discrimination methods and much many discrimination actions. Respecting the positive discrimination it is possible that we obtain the perpetuation of the exclusion facts and we fail to create equal opportunities. Although it is morally justified, the positive discrimination will create negative discrimination for the majority. This is not a way to act properly and according to the principle of equality and equal treatment, as it is regulated in international and European law.

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