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Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law

Bogdan Michael CIUBOTARU

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CONSIDERATIONS ON THE PROHIBITION OF RACIAL DISCRIMINATION IN THE ROMANIAN POSITIVE LAW

Bogdan Michael CIUBOTARU[1]

Abstract

This study proposes a summary analysis of the prohibition of racial discrimination in Romania. Although specific legislation prohibiting racial discrimination does not exist in Romania, the Constitution (especially in articles 4, 16, 30) and, in general, the legislation in force provide the appropriate legal means against racism and xenophobia. Besides, Romania acceded to most of the relevant international conventions, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination and the European Convention on Human Rights. In addition, it considers acceding to the Convention for the Protection of National Minorities of 1995.

Keywords:

prohibition, racial discrimination, principle of equality, international conventions, jurisdictional control.

[1]Bogdan Michael CIUBOTARU - Lecturer PhD, Faculty of Law, "Mihail Kogălniceanu" University of Iaşi, Email Address: bogdan_ciubotaru@yahoo.com

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

Introduction

The issue of racism and xenophobia is not as important in Romania as in other European countries, as racist and xenophobic manifestations are rather rare. We say rare, but not totally inexistent, as there are known examples in the past and also in the present, on which we do not insist. The discriminatory laws against the Hebrews or Gypsies during the period of the Second World War or, more recently, the violent manifestations of the years 1992-1995 against Roma people (Bolintin Vale, Bolintin Deal, Hădăreni, Ogrezeni, Găiseni) confirm that the Romanians' spirit of tolerance also knows times of crisis (Stefanescu, (1993): 38-41; Stan, (1993): 82-83).

Currently, in our country, although the principle of equality and non-discrimination prohibits all racial manifestations, through a rich legislation regarding this phenomenon, there still remains de facto discrimination, particularly against Roma people.

As it is well known, even the most perfect laws cannot help preventing signs of xenophobia and intolerance if in the mentality of the population, in general, the idea of inferiority or dangerous nature of certain groups of people persists.

Romania, a country where emigration has alarmingly increased over the past 22 years, resulting in the decrease of the population by about two million people (along with other factors, such as the decrease of the birth rate of the population), has gradually become a country of immigration, a phenomenon which was further amplified by Romania's integration into the Euro-Atlantic structures in 2007. This fact will be a challenge for the Romanian citizens, whose sensitivity to racism and intolerance could be affected to a greater or lesser extent depending on many factors, mainly the economic and social ones. The example of some economically developed countries, such as France or Germany, and more recently the United Kingdom, which currently face serious problems of discrimination and intolerance against foreigners, is suggestive.

This paper tries, in a non-exhaustive manner, to provide an insight into the Romanian legislation with an impact on the fight against racial discrimination.

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

The legal foundations of the principle of equality and of the prohibition of racial discrimination

The Constitution of Romania

Provisions on equality and prohibition of racial discrimination

Our country's Constitution, adopted in its initial form on the 21st of November 1991 and entered into force on December 8th, 1991, was amended by Revision Law no. 429/2003. The fundamental act states in paragraph 3 of the first article, that "Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed." thus placing, *MAN* at the center of its regulations. Moreover, consecutively to the "General principles" (Title I), Chapter II of Title II establishes the "Fundamental rights and freedoms".

The principle of equality is stated in article 4 paragraph 2 and article 16 paragraph 1, 2 and 3 of the Constitution, as a general principle underlying the regulations on fundamental rights and freedoms, and should be correlated with article 15, paragraph 1, which states the principle of universality ("Citizens enjoy the rights and freedoms enshrined in the Constitution and other laws and have the obligations contained therein").

Paragraph 1 of article 16 states that "Citizens are equal before the law and public authorities, without any privilege or discrimination." and paragraph 2 of article 4 provides that "Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, gender, opinion, political adherence, property or social origin".

In the specialty literature in our country it was expressed the opinion that "the mere assertion of rights and freedoms may remain a simple slogan, if not followed by guarantees, if in the text there are not also provided concrete obligations incumbent upon the state or if leaving this task to the ordinary legislature, this delays to intervene "or more, the Constitution enshrines a principle and the Parliament violates it, either from an erroneous interpretation of the constitutional text or exceeding its competences. In this regard, it is relevant Law no. 58/1992 (on the

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

correlation of wages stipulated by Law no. 53/1991, Law no. 40/1991 and Law no. 52/1991 with the wages from commercial companies and self-managed public companies) that have seriously violated the provisions of article 16 combined with article 4 on the equality of citizens and article 56 paragraph 2 of the Constitution, which states that "The legal taxation system must ensure a fair distribution of the tax burden." This law, which was intended to extend the aggregate tax **only** for certain categories of employees, revealed other shortcomings of the Constitution. Thus, it has been found that article 4 paragraph 2 of the Constitution is formulated in a manner that enables discrimination on criteria other than those expressly provided herein. In this regard, Law no. 58/1992 discriminated in the case of the rules applicable to tax in case of functions overlapping. Or, if we benchmark article 4 paragraph 2 with article 14 of *The European Convention on Human Rights* and article 26 of *The International Covenant on Civil and Political Rights*, we notice that the constitutional text has a serious shortcoming: it provides an exhaustive list of non-discrimination criteria, instead of using a declarative one, thus leaving a back door open to discrimination (Vrabie, (2004): 351-352).

In the juridical literature in Romania it has been expressed the opinion that the general principle of equality of rights has some particular applications relating to national minorities, the position of women, the special care of children and young people and the protection of people with disabilities, applications determined by considerations of social or natural aspects (Draganu, (1998): 186).

Thus, the prohibition of racial discrimination occurs as a form of prohibition of a wider range of discrimination (on grounds of nationality, ethnic origin, language, religion, gender, opinion, political adherence, property or social origin). But unlike other manifestations of discrimination, broader regulated in the Constitution, such as that concerning to relations between the genders (for example article 16 paragraph 3, article 41 paragraph 4, article 48 paragraph 1), racial discrimination is less mentioned. However, there are some references in article 30 paragraph 7, which prohibits instigation to racial hatred and incitement to discrimination, and in article 44 paragraph 4, which prohibits nationalization or any other measures of forcible transfer of assets to public property based on the owners' ethnic or other discriminatory features (*of race*, A/N).

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

Moreover, corroborating articles 18, paragraph 1, 19 and 57, we can capture a *certain* equivalence between the rights, liberties and duties of Romanian citizens, of foreign citizens and of stateless persons residing in Romania. For example, foreign citizens and stateless persons that live in our country enjoy the general protection of persons and property; extradition of foreign citizens can be made by fulfilling an *alternative* condition - just under an international convention ***or*** reciprocal[2] - while the extradition of a Romanian citizen may be done through a *cumulation* of two conditions, namely under the international conventions to which Romania is a party, under the law ***and*** based on reciprocity [3](Article 19 paragraph 2 of the Romanian Constitution). In both cases, however, extradition will be decided by the court (Article 19 paragraph 4 of the Constitution of Romania).

It must be said, however, that this equivalence is not total. In fact, it is not applicable when we consider the exercise of political rights or of civil service and public, civil or military dignities, these rights being reserved only to Romanian citizens (article 16 paragraph 3). The provision complies with the *European Convention on Human Rights*, which also provides different treatment for nationals and foreigners, but, at the same time, prohibits discrimination (Micu, (1998). On the other hand, through the provisions of paragraph 4 of article 16 of the Constitution, since Romania's accession to the European Union, the Union citizens who meet the requirements of the organic law have the right to vote and to be

[2]Pursuant to article 23 paragraph 1 letters b) and c) of *Law no. 302/2004 on international judicial cooperation in criminal matters*, published in the Official Gazette no. 377/31 May 2011, there can not be extradited from Romania "the persons granted asylum in Romania", respectively "the foreigners who enjoy in Romania immunity from jurisdiction under the conditions and within the limits set by conventions or other international agreements".

[3]Article 24 of *Law no. 302/2004 on international judicial co-operation in criminal matters* provides that the extradition of a Romanian citizen may operate under the international conventions to which Romania is a party and on a reciprocal basis, only if at least one of the following conditions is fulfilled:

a) for criminal prosecution and trial, if the requesting State gives assurances considered sufficient that if a sentence of imprisonment by a final judgment is given, the extradited person will be transferred to execute the sentence in Romania;

b) the extraditable person domiciles in the requesting state at the time of the request for extradition;

c) the extraditable person has also the citizenship of the requesting State;

d) the extraditable person committed the act within or against a national of a Member State of the European Union, if the requesting State is a member of the EU.

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

elected in the local government in our country. However, this does not mean that the constituent Romanian legislator has deprived the foreigners outside the European community of a bunch of fundamental rights and freedoms inherent to human dignity.

Neither regarding *the duties* incumbent on those on the Romanian territory (Romanian citizens, foreigners and stateless persons resident or any other person passing) there is a total equivalence. Thus, if paragraph 5 of article 1 of the Constitution provides, as a general and universal principle, the obligation to respect the Constitution, its supremacy and the laws, and article 57 requires that the exercise of rights and freedoms by Romanian citizens, foreigners and stateless persons to be done without violating, in good faith, the rights and freedoms of others, however most of the obligations are incumbent on the Romanian citizens (article 54 paragraph 2[4], article 55 paragraph 1[5]).

We make a special mention regarding the obligation of *faithfulness towards the country*, stated in article 54 of the Constitution, and those it is incumbent on. As such, we consider that the EU citizens to be elected to public office in the local public administration in our country will have the obligation of taking the oath required by law[6]. In this context, the title of article 54 (*Faithfulness towards the country*) should be reviewed, since it would not be possible for the fundamental law to ask, for example, a German or French citizen for devotion, attachment, faithfulness up to sacrifice in exchange for recognition of the right to be elected in the structures of Romanian local public administration.

The prohibition of racial discrimination has, therefore, the same constitutional importance as all the other forms of discrimination. We note that either in the Constitution, or any other national law, there is no definition of tribal or racial minority. Moreover, as was pointed out, for example, by the European Parliament, the concept of *race* is a one that covers a wide range of meanings, which has no scientific, nor genetic or anthropological basis, and therefore it can only fuel the ethnic, national,

[4]"Citizens holding public offices, as well as the military are liable for the loyal fulfilment of the obligations they are bound to, and shall, for this purpose, take the oath as requested by law".

[5]"Citizens have the right and duty to defend Romania".

[6]For example, article 32 paragraph 1 of Law no. 215/2001 provides the formula for councilors' or mayors' oath: "I swear to respect the Constitution and the laws of the country and to do, in good faith, everything that is in my power and skill for the benefit of inhabitants of the commune (city, county). So help me God! "

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

cultural or skin color discrimination, because it sends to the false idea of the existence of constituted and ranked "races" (Martins, (1999): 905).

Therefore, in Romania, the legal protection of racial minorities is regulated alongside the legal protection of all other forms of discrimination.

The content of the principle of equality and the prohibition of racial discrimination

The problem of the content of the principle of equality is very complex (Tanasescu, (1999). In essence, this principle is inherent in the concept of *democratic stated governed by the rule of law* (for details of the concept, see Draganu, (1992); Deleanu, (2001): 52-66; Vrabie, (2004): 37-45.), stated in article 1, paragraph 3 of the Constitution, which prohibits all positive and negative discrimination, without prior reasonable justification.

The principle of equality includes, before anything else, the equality before law enforcement ("No one is above the law" - article 16 paragraph 2). It includes two types of prohibitions: a. the existence of privilege or benefits in terms of rights or exemption from an obligation, and b. the damage caused by the prohibition of certain rights or imposing certain obligations.

This formal equality does not prevent the existence of discriminatory and unfair situations, so it should be sought a material criterion of equality, which should include principles of law.

Thus, the principle of equality implies the prohibition of arbitrary actions and discrimination and the obligation of differentiation. The prohibition of arbitrary actions refers to the inadmissibility of a different treatment without prior reasonable justification and, at the same time, the prohibition of equal treatment in obviously unequal situations.

The motivation for the inclusion in the fundamental law of the provision that "citizens are equal before the law and public authorities, without any privilege or discrimination." (article 16 paragraph 1) takes into account the conclusions of international debates in the field (Mazilu, (2000): 99), during which attention was drew on the fact that "neither the attempts of the majority population nor of minorities" to impose "privileged rights can not be allowed." The admission of "positive discrimination is unacceptable as it leads to opposite results" (Nastase, (1998): 57).

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

On the other hand, this constitutional text should be read in conjunction with article 4 paragraph 2 of the Constitution, which introduces among criteria of discrimination that of racial distinctions. The corroboration of the two texts focuses therefore on "negative discrimination", not "positive discrimination", in light of the specific circumstances or the purposes of achieving a distributive justice, in order to cancel or reduce objective inequalities. Also, the presented constitutional texts focus on the equality among citizens concerning their recognition of some rights, not the identity of legal treatment concerning the exercise or realization of those rights. This explains not only the admissibility of a different legal treatment and preferential to certain categories of people, but also its necessity (it can be invoked in this respect, article 32 paragraph 3, article 41 paragraph 2, and articles 49 and 50 of the Constitution) (Duculescu V., Calinoiu C., Duculescu G., (1997): 77).

The prohibition of using *race* as a criterion of discrimination is included in the prohibition of discrimination based on difference in treatment between citizens, founded on subjective criteria. Also, historically, race has always been regarded as a ground of discrimination, like the criterion of gender, economic and social situation or birth.

The principle of equality obliges to differentiation in order to compensate for inequalities of opportunities, which means that the public authorities have to eliminate the actual inequalities - social, economic or cultural. In other words, the principle of equality can justify the preferential treatment of groups of individuals who have been subjected in the past to a case of racial discrimination, such as, for example, the Roma people. Consequently, the principle of equality involves a varied approach to different situations and an identical approach to similar situations.

As shown by the constitutional practice[7], the Constitutional Court stated that the principle of equality of rights does not mean *eo ipso* applying the same legal status to some situations which, by their specificity, are different. Thus, it is justified the existence of different legal treatment between civilians, covered by the Labour Code, and between military, for whom the regulations are totally different, given the

[7]Decision no. 139/19 November 1996 of the Constitutional Court published in *Decisions and Rulings of the Constitutional Court. 1996*, p. 697.

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

specificity of this sector, in general, and the conditions of discharge, in particular. Therefore, one refers to different regulations, for different situations, so that the principle of equality is not affected.

The scope of the protection

The obligation of public authorities to materialize the prohibition of racial discrimination

According to article 16, paragraph 1 of the Constitution, "citizens are equal before the law and public authorities, without any privilege or discrimination". Definitely, the compliance with the constitutional provisions on the fundamental rights and freedoms rests not only with the public authorities but also with the private bodies.

The definition of the notion of *public authority* (for a comment on the the concept of *public authority* in the Romanian doctrine, see Draganu, (1998): 202; Vrabie (2004): 272-277) is required firstly because of the varied language used in the Constitution and laws for the organization and functioning of some state structures. Thus, in the fundamental law, there are used concomitantly the phrases "public authority"[8], "organ of state"[9] and "state power"[10], the differences between them not being apparent.

By corroborating the texts in which the three phrases are used, it can be noticed that the concept of "public authority" is used, sometimes, in a broad sense and, other times, in a narrow one. Thus, as expressed in the doctrine, the broad sense would be synonymous with that of "organ of state", understood as organizational form, established by law, consisting of parliamentarians, dignitaries or officials, through which is administered the state power, being able, to this end, to take binding decisions and to enforce them by their integration within a system, endowed with public power of coercion. In this sense, for instance, the Government is a public authority. The narrow sense of the term would coincide with that of "public power", which has a narrower scope, having some additional requirements than the organ of state.

[8]Like this is the notion of "public authority" used to describe Title III of the Constitution ("Public authorities"), Chapter VI ("Judicial Authority"), to characterize the Parliament (Article 61 paragraph 1) etc.

[9]For example, the use of the term "organ" is found in article 61 paragraph 1 ("Parliament is the supreme representative organ of state ....").

[10]For example, in the article 80 paragraph 2 of the Constitution ("...The President of Romania shall act as a mediator between the Powers in the State...").

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

Therefore, "the public authorities appear as organizational forms that exercise the governance duties, each according to the material and territorial competence established by the Constitution, which gives them legitimacy and sustainability. They are integrated into a system endowed with public power of coercion" (Vrabie (2004): 51-52).

Consequently, the term of *public authority,* in the spirit of article 52 paragraph 111 of the Constitution, includes the three powers – legislative, executive and jurisdictional – as well as legal persons of public law or the components of public administration system of central, county or local level. All these have to respect the fundamental rights and freedoms in all the acts they issue or adopt, whether they are legislative acts, administrative acts or judicial decisions. Therefore, all organs of state, all public authorities base their activity on the principle of equality, meaning, in our case, equality and prohibition of racial discrimination. Thus the principle of equality functions as an imperative for the Parliament, which has to comply with it in the regulation of social relations, in the sense that the adopted normative acts shall not discriminate on the one hand and, on the other hand, the legislature is obliged to contribute to the elimination of the *de facto* inequalities.

Also, the activity of the Government and of other components of the public administration system of ensuring compliance with laws and their actual enforcement is based on the same principles circumscribed to the public or private activity.

Judicial authorities have also an important role in the observance of the principle of equality of races. Thus, any person (*regardless of race*, A/N) can bring cases before the courts for the protection of his/her legitimate rights, freedoms and interests, and the exercise of this right shall not be restricted by any law (article 21 paragraph 1 and 2). As such, the free access to justice is guaranteed, all persons are equal before the law, and courts must apply the law in the same manner, without racial discrimination. The judge is, therefore, subjected to the principle of equality.

[11]"Any person injured in its right or legitimate interest by a public authority through an administrative act or a failure to settle claims within the legal term, is entitled to the recognition of the requested right or legitimate interest, the annulment of the act and remedies for the damage".

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

The application of the principle of equality and the prohibition of racial discrimination in the legal relations of private law

As we have seen, the principle of equality has an infinite application in the activity of public structures, which does not prevent its application to individuals, in their private relations. The manner and form of application of the principle of equality in private relations have been the subject of great controversy in foreign legal literature (for details, see Miranda, (1998): 284 and next). However, the content of the principle may differ in the case of the two branches of law, public and private, being more restricted in the case of the latter.

It is very difficult to envisage the direct effect of this principle in private law when the two parties have the same position of power in the created legal relation. It appears, then, a conflict between the principle of equality and the principle of freedom of negotiation, which is not necessarily resolved in favor of the principle of equality. However, the principle of equality functions as a limit to the principle of negotiation, except for those entities that have a certain "social power", such as enterprises, professional associations or churches. They have an obligation to provide equal treatment for all individuals, being prohibited their discrimination based on race. The private entities operating public services such as pharmacies, taxis, schools, restaurants, movie theaters can not discriminate racially (Miranda, (1998): 286).

In conclusion, the racial discriminations, in this case, are also prohibited in the acts and contracts of private law, as there are in civil law provisions that provide means to fight racism. Thus the contracts based on unethical or illegal reasons (for example, containing discriminatory clauses) are void (article 1246 of the new Civil Code)[12], and the persons who have suffered discrimination are entitled to compensation for the caused damage (article 1357 of the new Civil Code).

[12]For example, a services agreement, concluded between the owner of a restaurant and a security company, stating, inter alia, to prevent the entry into the building of the Roma people as consumers, is void on grounds of immoral, discriminatory clause, being violated the constitutional principle of equality of rights.

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

International conventions on the prohibition of racial discrimination

Romania has ratified or acceded to almost all international instruments prohibiting discrimination, and, in particular, racial discrimination. We enumerate, as examples, *the Preamble to the International Covenant on Civil and Political Rights* 13, *the Preamble to the International Covenant on Economic, Social and Cultural Rights* 14, *the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations (1965)*15, *the International Convention on the Suppression and Punishment of the Crime of Apartheid (1960)*16, *the Convention against discrimination in Education (1960)*17, *the Convention on the Prevention and Punishment of the Crime of Genocide (1948)*18, *the Convention relating to the Status of Refugees (1951)*19, *the Protocol relating to the Status of Refugees (1966)*20, *the European Convention on Human Rights (1950) and the additional Protocols to this Convention no. 3, 5, 8 (1970)*21, *the Framework Convention for the Protection of National Minorities (1995)*22.

We add a special mention relating to the *Declaration on the Elimination of All Forms of Racial Discrimination*, adopted by the UN General Assembly on November 20th, 1963. The appearance of this act was preceded and justified by some practice based on race, skin color or ethnic origin discrimination in certain regions of the world. Moreover, these trends have proven to be imposed by governments through legislative, administrative or other kind of measures, such as the apartheid, the segregation or separation (Draganu, (1998): 214). On the other hand, doctrines asserting the supremacy of some races were spread in some regions of the world (such as, for example, the doctrine of the Ku-Klux-Klan movement in the U.S.)

[13]Adopted by the General Assembly of the UN in 1966, ratified by Romania on December 9th, 1974.
[14]Adopted by the General Assembly of the UN in 1966, ratified by Romania on October 31st, 1974.
[15]Romania acceded to it on September 15th , 1970.
[16]Ratified by Romania on August 15th , 1978.
[17]Ratified by Romania on April 20th , 1964.
[18]Romania acceded to it on November 2nd, 1950.
[19]Ratified by Romania on July 4th, 1991 (Official Gazette No. 148 / July 17th, 1991).
[20]Romania acceded to it on July 4th, 1991 (Official Gazette No. 148 / July 17th, 1991).
[21]Ratified by Romania on May 31st, 1994 (Official Gazette No. 135 / May 31st, 1994).
[22]Ratified by Romania on April 29th, 1995 (Official Gazette No. 82 / May 4th, 1995).

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

For the rights proclaimed in the *Universal Declaration of Human Right* 23 to be to the advantage of all individuals, regardless of race, skin color or language, the *Declaration on the Elimination of All Forms of Racial Discrimination* proceeded in several ways (Draganu, (1998): 215-216):

1. It established a number of prohibitions addressed either to the states or institutions, groups or individuals.24.

2. It established a series of prohibitions addressed solely to the governments and the other political powers25.

3. It expressed the desideratum for the states to adopt a series of *positive measures* aiming, among other things, at the development or adequate protection of persons belonging to racial groups, so that it would be guaranteed their full use of the human rights and fundamental freedoms26.

4. It added to the rights proclaimed by the *Universal Declaration of Human Rights* a number of *specific rights,* specially adapted to persons of another race, color or ethnic origin27.

We remind the fact that our country acceded to *the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination* (1965) in 1970 and, under the provisions of article 11 paragraphs 1 and 2 of the Constitution, the treaties ratified by the Romanian Parliament, according to law, belong to the internal law, and the Romanian state is bound to fulfill as such and in good faith the obligations deriving from these treaties. On the other hand, according to article 20 paragraph 1, the

[23]Adopted by the General Assembly of the UN on December 10th, 1948.

[24]For example, the prohibition to practice discrimination in any form, based on race, skin color or ethnic origin; that of constituting or making propaganda for organizations based on the idea of superiority of one race or group of persons.

[25]For instance, the prohibition to encourage, to predict or to support, through police action or otherwise, discrimination based on race, skin color or ethnic origin; to practice the policy of apartheid and any other form of racial discrimination and separation.

[26]For example, the prevention of any discrimination based on race, skin color or ethnic origin; the revision of the policy of governments and other political powers and the repeal of laws and regulations that could cause or perpetuate racial discrimination; taking legislative and other kinds of measures to track and declare illegal the organizations that encourage racial discrimination, incite to such discrimination or to violence, as well as those who use violence to this end.

[27]For instance, the right of every person, without distinction of race, skin color or ethnic origin, to have access to all places and all services designed for public use; the right to be equal before the law and in the administration of justice, to enjoy one's safety and the state protection against any discrimination.

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the *Universal Declaration of Human Rights*, with the convenants and other treaties Romania is a party to, and, according to paragraph 2, where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions (for further insight into the issue of the influence of international constitutional norms on domestic juridical order, see Draganu, (1998): 87-94).

National legislation on the fight against racial discrimination

The materialization and the application of the principle of equality in the national juridical order are manifested by the adoption of legislation aimed at preventing the occurrence of cases of discrimination. The main legislative texts based on the principle of equality and the prohibition of racial discrimination are found in the *Criminal Code*, in *Law no. 60/1991 on the organization and the taking place of public meetings*, amended, republished in the Official Gazette No. 888/29.09.2004, in *Law no. 67/2004 for the election of local public administration authorities* (with amendments), in *Law no. 304/2004 on judicial organization*, in *Law no. 188/1999 on the status of civil servants* (with amendments), in *Law no. 296/2001 on Extradition*, in *Law no. 53/2003 – the Labour Code* (with amendments), in *Law no. 275/2006 on execution of sentences and of the measures ordered by the judicial authorities during the criminal trial*, in *Government Ordinance no. 137/31 August 2000 on preventing and sanctioning all forms of discrimination.*

The Criminal Code incriminates *genocide* committed in order to destroy, in whole or in part, a community or racial group (art. 357) and *the nationalist-chauvinist propaganda* by inciting to racial hatred (art. 317).

Thus, in the case of *genocide,* it is punishable with life imprisonment or imprisonment for 15-25 years and interdiction of certain rights the following:

a. the killing of the members of the community or group;

b. the serious injury of the physical or mental integrity of the members of the community or group;

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

c. subjecting the community or group to living conditions or treatment that leads to its physical destruction;

d. taking measures tending to prevent births within the group or collectivity;

e. forcibly transferring children belonging to a community or group, into another community or group.

The nationalist-chauvinist propaganda is punishable by imprisonment from 6 months to 5 years. The Criminal Code also punishes in article 247, *the abuse of office by restricting certain rights*. The offense is committed by a public official, during performance of his duties, by restricting the use or exercise of some rights of any citizen or by creating for the citizen some situations of inferiority on grounds of nationality, *race*, religion - crime punishable by imprisonment from 6 months to 5 years; the aggravated form of this crime is manifested by causing extremely serious consequences, the penalty being imprisonment from 5 to 15 years and the interdiction of certain rights.

Law no. 60/1991 on the organization and the taking place of public meetings prohibits, even without any data on occurrence of disturbances, the public meetings aimed at spreading totalitarian ideas of fascist, communist, *racis*t, chauvinist nature or of any diversionary-terrorist organizations, in such circumstances there is the presumption that the meetings organized for such purposes would jeopardize public order and safety, civil rights and freedoms (Article 9) (Duculescu V., Calinoiu C., Duculescu G., (1997): 133).

Law no. 67/2004 for the election of local public administration authorities states in article 2: "Romanian citizens exercise equally the electoral rights, without any privilege or discrimination" and the hindrance, by any means, of the free exercise of the right to vote or to be elected shall be punished with imprisonment from 6 months to 5 years and the interdiction of certain rights (article 107 paragraph 1).

Law no. 304/2004 on judicial organization in article 7 paragraph 1 states that "All persons are equal before the law, without any privilege or discrimination" and in paragraph 2 "Justice is done equally for all, irrespective of *race*, nationality, ethnic origin, language, religion, gender, sexual orientation, opinion, political adherence, wealth, social origin or status, or any other discriminatory criteria".

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

Law no. 188/1999 on the status of civil servants, in article 27 paragraph 2, prohibits any discrimination of civil servants on political, trade union, religious, ethnic, gender, sexual orientation, material condition, social origin or any other nature (*race*, A/N).

Law no. 302/2004 on international judicial co-operation in criminal matters states in article 8 paragraph 1 letter b), that judicial co-operation will be refused if the requested State has substantial grounds for believing that its legal assistance is sought for prosecution or punishment of a person on grounds of *race*, religion, sex, nationality, language, political or ideological opinions or membership of a particular social group.

Law no. 53/2003 - the Labour Code establishes, in article 5 paragraph 1, the principle of equality of treatment for all employees and employers in the labor relations, and, in paragraph 2, stipulates the principle of prohibition of direct or indirect discrimination against an employee based on criteria of gender, sexual orientation, genetic characteristics, age, nationality, *race*, skin color, ethnicity, religion, political view, social origin, disability, family status or responsibilities, trade union membership or activity.

Law no. 275/2006 on execution of sentences and of the measures ordered by the judicial authorities during the criminal trial states in article 5 paragraph 1:

"(1) During the execution of sentences it is prohibited any form of discrimination based on *race*, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political affiliation, belief, wealth, social origin, age, disability, non-contagious chronic disease, HIV / AIDS infection or other grounds.

(2) Violation of paragraph (1) is punishable under the criminal law".

Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination is the framework normative act in the field of anti-discrimination. This act defines in article 2 paragraph 1, the term *discrimination*[28], regulates the means to eliminate

[28]"By *discrimination* one understands any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, gender, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, belonging to a disadvantaged group or any other criterion which has as purpose or effect the restriction, the removal of the recognition, use or exercise, under conditions of equality, of human

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

discrimination (article 2 paragraph 10)[29], determines the facts constituting offenses to the mandatory rules on combating all forms of discrimination (articles 5-15)[30], the applicable penalties (article 26) and provides for the establishment of the *National Council for Combating Discrimination*, autonomous state authority, with legal personality, under parliamentary control (articles 16 - 25).

The jurisdictional control of unconstitutionality of legislative acts in the field of non-discrimination

The control of the constitutionality of laws and ordinances

This form of control, based on the principles of equality and non-discrimination, is subjected to the general rules of constitutional control (anterior and posterior), which are stated in articles 146 letters a, d, k and 147 of the Constitution. The violation of the above-mentioned principles may provide grounds for the unconstitutionality of the legal norms contained in a law or ordinance or for the deletion of a political party from the registry of the legally constituted political parties. Although the provisions of article 146 paragraph 1 letter k of the Constitution seem to limit the attribution of the Constitutional Court to declaring unconstitutionality only political parties, the interpretation of these provisions shall be in the sense that the declaration of unconstitutionality of any other organization would still rest with the Court. Only this way it can become operative article 40 paragraph 2 of the Constitution, according to which "The political parties or organizations which, by their aims or activity, militate against political pluralism, the principles of a

rights and the fundamental freedoms or of the legal rights recognized by law, in the politic, economic, social and cultural field or any other field of public life".

[29]The elimination of all forms of discrimination is achieved by:

a) prevention of any acts of discrimination, by establishing special measures, including affirmative action, to protect disadvantaged people, who do not enjoy equality of opportunity;

b) mediation by amicable settlement of conflicts arising from the carrying out of acts or deeds of discrimination;

c) punishment of discriminatory behavior.

[30]For example, it constitutes an offense, under this Ordinance, the conditioning of the participation in an economic activity of a person or of the free choice and exercise of a profession by the belonging to a certain race, nationality, ethnicity, religion, social status, convictions, gender or sexual orientation, age or belonging to a disfavoured category (article 5).

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

State governed by the rule of law, or against the sovereignty, integrity or independence of Romania shall be unconstitutional." (Draganu, (1992): 259). In the Constituent Assembly, in 1990-1991, there were important discussions on two important issues concerning *the right of association*: the parties that would militate against political pluralism and constitutional order and ethnically constituted parties. If in the case of the first category of parties, the views were converging, the result being found in the content of article 37 paragraph 2 of the (unrevised) Constitution, concerning the formulation contained in Thesis II/15, which also prohibited parties "which were exclusively formed on ethnic, religious or linguistic grounds", a solution could not be reached. Moreover, in the political life of Romania during the interwar period there were political parties formed on ethnic or religious criteria (The Hungarian Party, The German Party, The Hebrew Party). But there are also such parties in other states without being challenged their constitutional character. Currently, in our country, there are political parties or organizations of ethnic minorities, such as U.D.M.R.-The Democratic Union of Hungarians in Romania, the Party of the Roma, the Democratic German Forum, the Federation of Hebrew communities etc.

However, in our country, so far, the unconstitutionality of a regulation or a political party or organization, founded on racially discriminatory considerations, was extremely rarely invoked. There were opinions, either in the civil society, or of the representatives of other political parties, that supported the unconstitutionality of the Greater Romania Party (P.R.M.), invoking the extremist attitude, with racist nuances, of, primarily, the party leader, Corneliu Vadim Tudor. In fact, even today, in the international perception, P.R.M. is classified as a far right party, although we are seeing, at least at the level of declarations, an "ideological transformation", a "transfiguration" of the party leader (Bogdan, (2004): 1-2).

The general judicial control

The principle of prohibition of racial discrimination may be invoked before all civil, criminal, administrative or labor law courts, being sufficient the gathering of the necessary legal conditions. However, invoking this principle before the courts does not happen very often. This absence is due on the one hand, to the rare cases of racial discrimination,

Ciubotariu, B.M., (2013). Considerations on the Prohibition of Racial Discrimination in the Romanian Positive Law,Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp: 129-149

and on the other hand, certainly to the lack of information on potential acts or deeds of racial discrimination.

Conclusions

From the above stated, we can conclude the following:

1. Expressions of racism and xenophobia are quite rare in Romania, but not totally absent. The issue is raised, especially in relation with the Roma communities.

2. The Constitution sets the landmarks of the prohibition of racial discrimination, based on the principle of equality and the prohibition of all forms of discrimination, the principle of equivalence of regime of foreign citizens and stateless persons residing in Romania with that of Romanian citizens (except for political rights) and the obligation of public authorities to adopt legal regulations to eliminate discriminatory situations.

3. Public authorities, becoming more and more aware of this problem, adopted, in several stages, the appropriate legislation. Along with classic criminal regulations, the legislation to combat poverty has a major role in the fight against racial discrimination with which it is typically associated.

4. Romania has acceded to or ratified almost all international instruments on the matter.

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