GLOBALIZATION AND PROBLEMS: THEORY, ECONOMICS INVESTMENTS AND SOCIAL MOBILITY

OBSTACLES AND LIMITS OF THE EQUAL TREATMENT PRINCIPLE IN THE ROMANIAN POLITICAL REGIME

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Abstract: The cases of discrimination and sexual harassment became a certainty in Romania in the last decade. Discrimination, sexual harassment and bullying against women can also exist as a result of the Romanian traditional culture of male authority, in which a certain legal violence against women is acceptable and doubled by a high tolerance in front of this type of violence. On the other side, a modern culture, disseminated mainly by mass-media emphasizes the image of the woman as a sexual object by exposing her to violent behavior with prevalent sexual connotations.

Keywords: discrimination, equal treatment, equality of chances, harassment, sanction.

Introduction

The main role of the Government is to implement the principle of equal treatment between men and women by proposals of normative acts in the field, the collaboration with public authorities, elaboration of studies, reception of requests and complaints etc. A very important moment in the evolution of the Romanian legislation referring to the principle of equal treatment consists of the enactment of the Government Ordinance no. 137/2000 regarding the prevention and sanction of all discrimination forms. The ordinance contains provisions referring to the effective exercise of some fundamental rights: equality in the economic activity, access to public services (justice, administration, health), the right to personal dignity, as well as the specific sanctions entailed in case of the infringement of the ordinance. The institutional frame for the application of its provisions was established through the Government Decision no. 1194/2001 concerning the creation, organization and operation of the National Council for the Fight against Discrimination (NCFD). Although in the employment practices the most frequent criterion of discrimination is the one regarding sex, from the statistics of the NCFD appears that the most frequent petitions sent to be solved by NCFD were formulated mainly by men and had as object the discrimination based on ethnicity, social category, age or religion. The low number of petitions shows the fact that women that confronted themselves with such situations either did not know to whom address a complaint or did not have the

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courage to do it. Under these circumstances, knowing the legal stipulations and procedures of preventing and fighting against discrimination becomes very important for the awareness and the mobilization of the victims.

Besides the passive attitude of the victims of discrimination/sexual harassment, there are also certain limits and obstacles in front of the application of laws and policies concerning the protection of equal treatment principle. Among these obstacles are: the absence of a very detailed regulation of the mediation procedure, the legal impossibility for the victim to ask for the change of his workplace or the one of the author of discrimination/harassment, the difficulty of making the proof of many acts of discrimination.

In the perspective of European integration, the outline of a cohabitation among one's equals, without discrimination, the identification of the reduction and elimination methods, in time, of the actual economic and social discrepancies shall impose more and more as priority subjects and objectives of the common action of Romanian civil society.

1. The Phenomenon of Discrimination in Romania between Law and Practice

Although the phenomenon of discrimination has deep roots in the distorted mentalities and conceptions still active in a Romanian society in a never-ending transition after the crucial moment of the Revolution in December 1989, research on the incidence of this phenomenon and its impact upon the Romanian society started to develop in Romania only during the last years. The almost 20 years that followed the revolution brought substantial changes to our perception regarding the phenomenon of discrimination, and the causes, the effects and the negative implications tremendously dangerous that were produced by it. While other European states had a tradition of almost half of century in the field of anti-discrimination legislation and policies, in Romania there was a lack of knowledge about this issue[1], even more because there was no legislation regarding the phenomena. The legislation void favored the appearance of multiple abusive attitudes and discrimination on the part of the authorities and civil society, also reflected in the violent actions against individuals, against groups or the entire society.

Even though the principle of equal rights was recognized by the Constitution of 1991 in articles 4 and 16, the lack of a legal way of fighting and sanctioning discrimination, increased the proportion of the phenomenon.

In august 2000, *the Emergency Government Ordinance no. 137/2000* was adopted on the prevention and the punishment of all forms of discrimination, which stipulated the right to personal dignity, incriminated the notion of harassment defining it as being any kind of behavior on the basis of race, nationality, ethnicity,

[1] For details, see Mihaela Bărbieru, *Aspects Regarding the Political and Social Organization of Women in Romania in the Intewar Period*, în Claudiu Marian Bunăiașu, Elena Rodica Opran, Dan Valeriu Voinea (editors), *Creativity in Social Sciences*, Craiova, Sitech Publishing, 2015, pp. 130-140.

language, religion, social category, thought, gender, sexual orientation, affiliation to a disadvantaged social category, age, disability, refugee or asylum solicitant status or any other criterion that leads to an intimidating, hostile, degrading or offensive environment and also the one of victimization, seen as any adverse treatment that constitutes a reaction to an intimation or complaint submitted to a court concerning the violation of the equal treatment principle.

Ordinance no. 137/2000 explicitly ensures:

a) the right to equal treatment in front of judicial courts and any other judicial body;

b) the right to personal security and the right to obtain the protection of the state against violence and ill-treatment on the part of any individual, group or institution;

c) political rights, namely the electoral rights, the right to participate in the public life and have access to public functions and dignities;

d) civil rights, namely the right to free movement and free choice of residence; the right to leave one's own country and to return to one's own country; the right to obtain and to renounce Romanian citizenship; the right to freely marry and to choose partner; the right to property; the right to succession; the freedom of thought, conscience and religion; the freedom of opinion and expression; the freedom of meeting and association; the right to address petitions;

e) economic, social and cultural rights, namely: the right to work, free choice of an occupation, fair and satisfying working conditions, protection against unemployment, equal pay for equal work, just and fair remuneration; the right to found trade unions and to affiliate to trade unions; lodgement right; the right to health, medical care, social security and social services; the right to education and occupational training; the right to take part, in conditions of equality, in cultural and sports activities;

f) the right of access to all the places and services intended for public use.

In March 2002, *Law no. 202/2002* on the equality of chances for men and women was adopted, incriminating direct and indirect discrimination, acts of harassment and sexual harassment, discrimination on the basis of gender and multiple discrimination.

After the adoption of these two normative acts, the law revising Romania's Constitution modified article 16 stipulating that the Romanian state guarantees the equality of chances for men and women regarding access to military, civil and public services and dignities. The extension of the equality of chances of men and women in the matter of access to any function, not only in the public but also in the private field, and of all rights stipulated by the labour legislation (payment, promotion and working conditions) results from article 5 of the *Labour Code* (*Law no. 53/2003*).

The first issue raised by the principle of equal treatment and chances is the one of the criteria on which discrimination is founded. Placing it among the

fundamentals of the Romanian state[2], article 4 par. 2 of the Constitution sets out the equality of citizens as follows: "Romania is the common and indivisible country of all its citizens, irrespective of race, nationality, ethnicity, language, religion, sex, opinion, political affiliation, fortune or social origin".

In a strict interpretation given by the Constitutional Court to the principle of non-discrimination meaning that "… through its content, article 16 paragraph 1 of the Constitution needs to be correlated with the provisions of article 4 par. 2 of the basic law which identify the non-discrimination criteria, which are race, nationality, ethnicity, language, religion, sex, opinion, political affiliation, fortune and social origin"[3], it would result that "only what is explicitly prohibited by the constitutional text as being discrimination is contrary to equality, otherwise equality is presumed"[4]. Following this argument, the principle of non-discrimination would prohibit only the discrimination based on the criteria strictly enumerated by the basic law, other forms of differentiation based on criteria other than these but pursuing the same purposes and having, basically, the same effects as discrimination, not being incriminated. Such an interpretation cannot be accepted because there are many other non-discrimination criteria mentioned in the sources of international law. For example, *Convention no. 111 of the International Labor Organization* (I.L.O.) stipulates that discrimination consists of "any distinction, exclusion or preference based on race, color, sex, religion, political opinion, nationality or social origine, which has as a result the distroying or alteration of the equality of chances and treatment in the field of employment and occupation". Similarly, article 1 pct. 1 of the *Convention* concerning the fight against discrimination in the educational field stipulates that the notion of discrimination means any distinction, exclusion, limitation or preference based on race, color, sex, language, religion, political opinion or any other kind of opinion, national or social origin, economic situation or birth, which has as object or effect the abolition or alteration of equality of treatment in the matter of education. Article 14 of *the European Convention on Human Rights* prescribes that "exercising the rights and liberties stipulated by the present *Convention* has to be ensured, without any distinction, based especially on sex, race etc.". Having in view the fact that Romania is a signatory to these international treaties, and, in accordance with article 20 of the *Constitution*, citizens' rights and freedoms shall be interpreted and applied in compliance with the *Universal Declaration of Human Rights*, to agreements and treaties to which Romania is signatory, we can conclude that the enumeration of the criteria in article 4 is only illustrative, not restrictive[5].

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[2] Dan Claudiu Dănişor, *Fundamentul statului şi criteriile de nediscriminare (comentarii ale dispoziţiilor art. 4 din Constituţia României)*, in "Revista de Drept Public", no. 1/2008, p. 36.

[3] Motive no. 4 of *Decision no. 70/1993* of the Romanian Constitutional Court.

[4] Simina Elena Tănăsescu, *Principiul egalităţii în dreptul românesc*, Bucharest, All Beck Publishing, 1999, p. 30.

[5] Dan Claudiu Dănişor, *op. cit.*, pp. 53, 57.

The immediate consequence is the fact that every time a difference of treatment is perceivable but cannot be placed among the cases and criteria enumerated under article 4 par. 2 of the *Constitution*, the judge has to make use of international reference norms.

Moreover, *Ordinance no. 137/2000* prohibits all forms of direct or indirect discrimination, based on a variety of criteria: race, nationality, ethnicity, language, religion, social category, beliefs, sex, age, disability, non-contagious chronic diseases, AIDS, belonging to a disadvantaged category, "as well as *any other criterion* which has as a purpose or result the limitation, removal of the recognition, use or exercise, in conditions of equality, of human rights and fundamental freedoms recognised by law in the political, economic, social and cultural fields or in any other domain of the public life". From this one can infer that any other criterion (such as height, weight, physical aspect etc.) used for such a purpose or having the same effect represents a discrimination criterion.

As for the nature of the non-discrimination criteria (enumerated by the *Romanian Constitution*), the specialty literature identifies two categories of criteria : the first category – race, nationality, ethnicity, language, religion, sex, social origin – is characterized by the fact that "they represent personal features on which individuals do not have any control or have a very low control, and which make them be naturally attached to a group, the affiliation to it playing an self-identification role"[6], while the second category (political opinion or affiliation) consists of criteria which are dependent on the subject's will. Obviously, placing within these two categories such criteria as sexual orientation or transsexuality remains difficult as long as having sexual intercourse either with same sex persons, with opposite sex persons, or both of them, as well as changing sex are conceived as being the result of a willful act, or a manifestation connected with sexual psychism[7].

Although the anti-discrimination legislation plays an important role for the protection of human rights, it is not enough because the discrimination has different forms and types of manifestation. The most frequent cases of discrimination are: sexual discrimination, discrimination on the ground of age, previous professional experience, personal image[8].

From the analysis of employment advertisements there results the conclusion that sexual discriminations reaches approximately 26%, although it is very difficult to know the real proportion of gender discrimination only from studying the employment advertisements. In many cases, some Romanian nouns denoting functions or professions are of the masculine gender, not even allowing the adaptation to the feminine gender, and not falling within the category of sexual discrimination either. The existence of the sexual discrimination cases becomes

[6] *Ibidem*, p. 55.

[7] Case *Rees versus United Kingdom*, October 17th 1986, *apud* D.C. Dănişor, *op. cit.*, p. 63.

[8] The Center for Social Development Sighişoara, *Manifestări discriminatorii în procesul de angajare*, in "Raporturi de muncă", no. 9/2003, p. 10.

obvious when those professions make reference to a certain gender in a grammatically incorrect and far-fetched formulation, or when the gender of the person who is about to be hired is explicitly indicated. At first sight, men are more often discriminated than women are at the moment of the employment application. Moreover, they are not encouraged to occupy posts traditionally considered as "made for women" such as: secretary, nurse and manicurist[9]. But it is strong evidence that the women occupying these kinds of posts are often subject to sexual discrimination/harassment.

In the matter of age discrimination it seems that its proportions are much more reduced, representing almost half of the gender discriminations, fact that shows that employers discriminate mainly on the ground of sex and less on the ground of age. Women seem also much more affected by age discrimination than men.

Discrimination motivated by the image of a person are more difficult to be recorded in practice, with the exception of evident discrimination cases – the introduction of a pleasant physical aspect requirement in the employment advertisements or the express solicitation of a photography.

Another factor that makes the statistical process be extremely difficult is the fact that cases of discrimination on grounds of only one criterion are extremely rare. As a rule, most cases of discrimination are based on a variety of criteria. Research emphasized the existence of multiple discriminatory behaviors, respectively discrimination founded on more than one criterion – gender discrimination combined with age discrimination or discrimination based on personal image[10].

2. Cases of permitted discrimination against cases of prohibited discrimination

Although the normative frame concerning the prevention and sanctioning of all forms of discrimination (*Ordinance no. 137/2000*) does not define the notions of direct and indirect discrimination, these definitions result from the dispositions of the *Labour Code* and *Law no. 202/2002*.

In accordance with article 5 par. 3 of the *Labour Code*, direct discrimination consists of all acts and facts of exclusion, distinction, restriction or preference based on one or more criteria stipulated by law, namely sex, sexual orientation, age, nationality, race, colour, ethnicity, religion, political option, social origin, disability, family situation or responsibility, trade affiliation or activity, which have as purpose or effect the refusal, restriction or removal of the recognition, use or exercise of the rights guaranteed by law. On the other hand, indirect discrimination means "acts and facts based apparently on criteria other than those stipulated by law, but which produce the same effects as direct discrimination"[11].

[9] *Ibidem*, p. 27.
[10] *Ibidem*.
[11] Article 5 par. 4 of *Labour Code*.

Moreover, the definitions of direct and indirect sexual discrimination result from article 4 let. a) and b) under *Law no. 202/2002* on the equality of chances for men and women. Thus, direct (sexual) discrimination refers to a situation in which a person is less favourably treated, on grounds of sex, than another person is, was or would be treated in a similar situation; on the other hand, indirect (sexual) discrimination is defined as a situation in which a disposition, criterion or practice, apparently neutral, would especially disadvantage the persons belonging to a certain gender as compared with persons of the opposite sex, excepting the case when this disposition, criterion or practice is objectively justified by a legitimate purpose and the means of accomplishing this purpose are proper and necessary.

All forms of direct and indirect discrimination are prohibited by the Romanian law. When trying to decide whether a case of direct discrimination occured, we have to ask the question: "Had this person been of a different sex, race, religion etc. would he or she have been treated in the same way?". If the answer to this question is "yes", it is obvious that no discrimination has been committed; if the answer is "no", we can be sure that direct discrimination has occured.

If the problem of determining the existence or non-existence of direct discrimination is apparently simple, the situation is completely different in the case of indirect discrimination. Indirect discrimination is a form of hidden discrimination, covered by the fact that the acts of exclusion, distinction, restriction or preference of one employee in comparison with others are apparently based on criteria other than those stipulated by article 5 par. 3 of the Labour Code, although they produce the same effect as direct discrimination.

An action or a fact (e.g. an employment advertisement) which may at first sight appear as non-discriminating, may on reflection be said to indirectly discriminate against a person or a group of people. For example, the requirement of a test of Romanian language as an examination test would have a discriminatory character because it would disadvantage a large number of persons belonging to ethnical minorities. Similarly, the demand that all applicants have their domicile in a certain region of the city would exclude the ones coming from area with a population prevalently belonging to a certain ethnicity (e.g. Romany people).

The interdiction to discriminate represents only one side of the equal treatment principle. The interdiction to discriminate does not lead in fact to a general and impersonal obligation to respect and put the equality of treatment into operation, but to the interdiction of making fundamental differences based on certain specific factors (criteria) of dicrimination stipulated by law.

By analysing the dispositions of article 14 of *the European Convention on Human Rights* we can notice that these dispositions do not prohibit all forms of discrimination, but only the illegal ones. The question that appears is which are the criteria of separating lawful discrimination from the unlawful one? In order to delimitate these two categories of discrimination we have to analyse those situations explicitly mentioned by *the Constitution* or national legislation as prohibited discrimination, as compared with permitted discrimination, namely those cases

which present certain characteristics and "nuances" that must be taken into consideration and depending on which differences will be made in the matter of settlement and sanctioning : "Within the distinctions which are unavoidable in the process of putting into practice the constitutional principle of equality, some will be taken into account, others will be considered blameworthy and, as a consequence, will be qualified as discrimination"[12].

The notion of "discrimination" has had a significant evolution in the practice of the Romanian Constitutional Court which scored an evolution from explicitly prohibited discrimination to arbitrary or permitted discrimination, evolution that can be also noticed in the matter of constitutional provisions. Thus, *the Romanian Constitution*, while recognising the right of the national minorities to identity, permits to the state to take some protection measures with the object of preserving, developing and expressing the identity of persons belonging to national minorities, under the condition that these measures should be in accordance with the principle of equality and non-discrimination as compared with the other Romanian citizens (article 6 par. 2 of *the Romanian Constitution*). These measures of protection are equivalent to some positive actions, being placed among permitted discrimination.

Along the same line of accepting certain differences of treatment and positive actions, *Law no. 202/2002* on the equality of chances for men and women does not consider as being discrimination the following situations (article 6 par. 5):

a) special measures stipulated by the law in order to protect maternity, pregnancy and nursing;

b) positive actions intended to protect certain categories of men and women;

c) a difference of treatment based on a gender characteristic when, due to the nature of specific occupational activities or the context in which they are carried out, the sex of the person constitutes an authentic and determining professional requirement as long as the objective is legitimate and the demand is proportional with it.

A concrete example of prohibited discrimination and permitted discrimination can be found in *Law no. 202/2002* on the equality of chances for men and women which prohibits discrimination by using practices disadvantageous for persons belonging to a certain gender on the occasion of announcing, organizing competitions or examinations and selecting applicants for vacant posts in the public or private sector (prohibited discrimination), excepting those occupational activities for which, by reason of their nature or the particular context in which work is carried out, gender characteristics constitute a determining factor (permitted discrimination).

As we can notice, the legal frame prohibits sexual discrimination but introduces certain exceptions from this rule. From these legal provisions it results that indirect sexual discrimination is permitted, as an exception, in those cases in which a condition/provision, a criterion or a practice apparently discriminatory is objectively justified by a legitimate aim and the means of achieving this aim are

[12] R. Pelloux, *Les nouveaux discours sur l'inégalité en droit public francais*, in "RDP", 1982, p. 909, *apud* Simina Elena Tănăsescu, *op. cit.*, p. 29.

appropriate and necessary. In accordance with article 9 par. 2 under *Law no. 202/2002*, the exception operates "due to the nature of specific occupational activities or the context in which they are carried out, the sex of the person constitutes an authentic and determining professional requirement as long as the objective is legitimate and the demand is proportional". As a consequence, the conditions required for this exception to operate are: the aim must be legitimate and the demand proportional with the aim pursued. As for article 141 of TEC, the Great Chamber of the European Court of Justice stipulated that it cannot be considered discrimination the use of the years of service criterion in order to establish wages, fact that leads to inevitable differences between women's and men's remuneration, in case of equal work or work of equal value because taking into consideration the years of service criterion is "meant to allow the achievement of the legitimate aim of rewarding previous experience that makes the worker do his job better"[13].

In accordance with the jurisprudence of the European Court of Human Rights, for the purpose of establishing the existence of a discrimination act prohibited by the law, first "it must be settled that persons being in identical or comparable situations enjoy a preferential treatment and this distinction has no objective and reasonable justification"[14]. Article 44 of *Law no. 202/2002* stipulates that the burden of proof is incumbent on the person against whom the intimation/petition or, as the case may be, the complaint was made, which must demonstrate that the principle of equal treatment was not violated. It results that in cases of direct discrimination it is very difficult, almost impossible for the employer to defend himself by proving the non-existence of discrimination. On the other hand, in cases of indirect discrimination, the employer can prove that the condition/provision, criterion or practice apparently discriminatory was objectively justified; he must prove not only the legitimacy of the aim, but also the necessity and proportionality of the demand.

It is a matter of fact and is incumbent on the judge to decide if the aim pursued by introducing the provision, criterion or practice was legitimate and if the demand was necessary and proportional. The judge must take into consideration not only the effect of the act/fact apparently discriminatory but also "the reasonable necessity" that determined the employer to issue such an act (the real and reasonable need in the respect of which the employer gave that disposition). This necessity can be economic or administrative and has to be linked with the employer's activity/business. For example, in *Decision no. 630/ 3 October 2006*, The Constitutional Court considered that the dispositions of article 12² par. 3 of

[13] *Case C-17/05, B.F. Cadman versus Health & Safety Executive*, October 3rd 2006, in *Curierul Judiciar* no. 12/2006, p. 63.

[14] *Case Buchen versus Czech Republic*, November 26th 2002, in Corneliu Liviu Popescu, *Jurisprudența Curții Europene a Drepturilor Omului (1999-2002)*, Bucharest, C.H. Beck Publishing, 2003, p. 470.

the Emergency Government Ordinance no. 95/2002 according to which the persons who do not meet the conditions established by law for receiving unemployment allowance are excepted from the benefit of monthly supplement income are constitutional because "the persons which earn income of a certain level are evidently in a different situation from the ones who do not earn such income, an objective and rational fact that justifies and imposes a *reasonably different juridical treatment*. Thus, the adjustment of the monthly supplement income to persons who do not meet the conditions stipulated by law for receiving unemployment allowance is a *reasonable and rational measure*, being in accordance with the dispositions of article 16 par. 1 of the Constitution"[15].

In cases of sexual discrimination, sex must constitute "an authentic and determining professional requirement" and the demand must be proportional. The proportionality of the apparently discriminatory measure must be analysed in comparison with the legitimacy of the aimin view.

The fundamental question that is raised in the matter of sexual discrimination is: Which are the workplaces in which, in accordance with article 9 par. 2 of Law no. 202/2002, sex is "an authentic and determining professional requirement"? As long as these workplaces are not determined by law, this fact is incumbent on the judge. In contrast with the Romanian legislation which does not make any reference to a criterion depending on which we could identify the situations that make exception from the equal treatment principle, in the United Kingdom, The Sex Discrimination Act from 1975 recognises eight situations where an employer is able to discriminate by favouring someone from a particular sex:

– "The job needs to be done by a man or a woman for reasons of physiology (excluding physical strength or stamina) or in dramatic performances or other entertainment for reasons of authenticity;

– The job needs to be done by a man or a woman to preserve decency or privacy because it is likely to involve physical contact with men or women, and these people would object to the presence of someone of the opposite sex;

– The job involves working or living in a private home and there may be either a degree of physical/social contact with the person living in the home or the worker may acquire intimate knowledge of the person's life;

– The nature of the job means that the employee will have to live at his place of work and the accommodation provided is only suitable for either men or women, and it is not reasonable to expect the employer to make adjustments to that accommodation;

– The job involves working in a single-sex prison or hospital;

– The holder of the job will be expected to provide individuals with personal services promoting welfare or education, and those services could most effectively be provided by a man or a woman;

[15] See *Curierul Judiciar* no. 12/2006, p. 40.

– The job needs to be held by a man because it is likely to involve duties outside of the United Kingdom in a country where laws or customs would prevent a woman from being able to carry out their duties effectively or at all;
– The job is one of two to be held by a married couple"[16].

In the absence of an express legal regulation, we consider that this exception situations should be taken into account by the Romanian jurisprudence.

3. The Notion of Positive Action and the Equal Treatment Principle

Convention no. 111 of I.L.O. does not consider discrimination special measures of protection or assistance of certain categories of persons stipulated by other conventions or recommendations of I.L.O., measures that are justified by certain specific needs of the respective persons, associated with sex, age, disability, family situation, social or cultural level, trade attributions or personal representativity. In the specialty literature, positive discrimination represents those special actions which are temporarily undertaken in order to accelerate the achievement of the equal treatment principle and are not considered discrimination. For example, the acts through which the employer aims at encouraging persons of a certain sex, ethnicity or race to improve their professional training or qualify themselves in a certain profession or trade considering the fact that these persons are underrepresented at the place of work, do not enter within the field of positive discrimination.

The expression of "positive discrimination" itself is anachronic as long as, if a difference of treatment is justified, there cannot be a case of discrimination. More serious is the fact that there are many normative acts in the Romanian legislation which contain unconstitutional provisions. For example, article 2 par. 9 of the *Emergency Government Ordinance no. 137/2000* stipulates that "measures taken by the public authorities or private juridical persons in favour of a person, a group of persons or a community, aiming at ensuring their natural development and the effective achievement of their equality of chances in comparison with other persons, groups or communities, as well as positive measures aiming at the protection of disadvantaged groups do not constitute discrimination". The reference to groups of persons of communities in order to label a different juridical regime applicable to these categories in comparison with the rest of the society is unconstitutional because one of the Romanian state's fundamentals, according to article 4 of the *Constitution*, is the unity of the Romanian people. The term of "unity" does not make reference to the internal unity of the people, but to its indivisibility and "the impossibility to create some divisions to which different kinds of treatment are applicable taking into account certain criteria"[17].

[16] Janice Nairns, *Employment Law for Business Students*, third edition, Essex, Pearson Education Limited, 2008, pp. 57-58.
[17] D. C. Dănişor, *op. cit.*, p. 39.

The existence of some different regulations being often in contradiction with community norms raises problems in the process of applying these norms. Thus, Law no. 69/1991 concerning public local administration stipulates that, in the administrative-territorial units where a minority represents at least a proportion of 20%, its members enjoy certain rights, including bilingual indicators, translation of the local authorities' decisions in their mother tongue etc. At the same time, Recommendation no. 1201, which is a component of the national law, provides the possibility for the local authorities to grant these rights even if the proportion of the minoritary citizens does not exceed 20%. But there is a general practice of the local authorities to apply the dispositions of *Law no. 69/1991* and ignore the ones of the *Recommendation no. 1201*[18].

4. The Legislative Frame of Sanctioning the Acts of Discrimination/ Harassment

The elimination of all discrimination forms is carried out through:

a) prevention of all acts of discrimination by setting up special measures, inclusively affirmative actions for the purpose of ensuring the protection of disadvantaged persons which do not enjoy equality of chances;

b) mediation through amiably solving conflicts emerged as a result of certain acts/facts of discrimination;

c) sanctioning the discriminatory behavior.

An institution whose main role is to implement the principle of equality between citizens by proposals of normative acts in this field, the cooperation with public authorities, elaboration of studies, reception of requests and complaints is The National Council for Fight against Discrimination (NCFD), an executive structure of the central administration, subordinated to the Government. Even if the Ordinance no. 137/2000 stipulated that NCFD (CNCD in Romanian) had to have been founded in 2000, it started to operate in 2002 and exercises its prerogatives in the following fields:

a) the prevention of discrimination acts;

b) the mediation of discrimination acts;

c) the investigation, observation and sanctioning of discrimination acts;

d) the monitoring of discrimination acts;

e) the adjustment of specialty assistance to the victims of discrimination.

Due to the fact that the foundation of the institution and the beginning of its activity had become rather stringent, there was practically no real period meant exclusively to the institutional construction, this being made while applying sanctions, crystallizing of the staff, elaboration of the strategies and position documents. In fact, this is a typical example for the way in which new institutions

[18] Gabriel Andreescu, *Naţiuni şi minorităţi*, Iaşi, Polirom Publishing, 2004, p. 154.

and legal regulations are implemented in Romania but, from the perspective of its beginning, the history of this institution is a real success.

The Council exercises its prerogatives on a notification by a natural or juridical person or *ex officio*. The person who considers himself discriminated can introduce a petition to the Council within a term of one year from the date of commission of the act or from the date when this person could have known about its commission. The Council solves the petition through the sentence of the Directing Committee.

Through the petition introduced, the person who considers himself discriminated has the right to require that the consequences of the discrimination acts should cease and the situation previous to discrimination act be re-established.

The Directing Committee of the Council decides the specific measures necessary for observing the existence of discrimination, with the compulsory citation of the parties. The investigation made by the Directing Committee takes place at the institution's residence or in another place established by it.

The person interested has the obligation to prove the existence of certain facts implying the existence of discrimination, direct or indirect, while the person against which the complaint was made must demonstrate that facts do not constitute a case of discrimination.

The Directing Committee adopts a decision within a term of 90 days from the date of receiving the complaint. The decision is communicated to the parties within 15 days from the date of the adoption and produces effects from the date of communication. The decision is attackable in front of the court of administrative control.

One of the major deficiencies of the Romanian system of fighting against discrimination is the activity of NCFD itself at the beginning and even now. From *The 2004 Activity Report of NCFD* results that this institution received 353 petitions and complaints in 2004 but only 217 of them have been solved[19]. Even in the 34 cases when NCFD acted *ex officio*, only 30 notifications have been solved[20]. Similarly, from 382 petitions received in 2005, NCFD solved only 280; 57 complaints registered in the course of 2004 remained unsolved in the first half of 2005[21]. These data prove that even the institution that is the most in right to sanction the acts/facts of discrimination does not function properly.

In accordance with *Law no. 202/2002*, the fact of comitting any act of discrimination represents a contravention and is punishable by a fine of 1.500 lei (~400 euro) up to 15.000 lei (~4000 euro). In the case of discrimination based on multiple criteria, the contraventional sanctions will be cumulated without being possible to surpass the double of the maximum fine established for the most serious

[19] 2004 Activity Report of NCFD, p. 12, available at http://www.cncd.org.ro/biblioteca/Rapoarte-5/, accessed at February 8, 2017.

[20] *Ibidem*.

[21] *Ibidem*, p. 5.

contraventions or, as the case may be, the general maximum established for the contraventional imprisonment (6 months, respectively 300 hours) or the obligation to carry out an activity for the community benefit[22].

A general problem of the Romanian legislation which also represents an obstacle in the way of putting into practice the equal treatment principle is its incoherence. The dispositions of some anti-discrimination normative acts are contradictory. Thus, while *the Emergency Government Ordinance no. 31/2002* stipulates sanctions for the organizations and persons that promote the fascist, rasist or xenophobe ideas, opinions or doctrines, such as hatred and violence based on ethnical, rasial or religious reasons, the superiority of some races and the inferiority of others, anti-Semitism, the incitement to xenophobia, the appeal to violence for the purpose of changing the constitutional order or democratic institutions, the extreme nationalism, in *Ordinance no. 137/2000* concerning the prevention and fight against all forms of discrimination such actions represent only contraventions.

As a measure of protection and encouragement of the discrimination victims, *Law no. 202/2002* stipulates, under article 13, that it constitutes discrimination and is prohibited for the employer to unilaterally modify the labour relations or conditions or to dismiss an employee who has previously introduced a petition at the unity level or made a complaint to the court of competent jurisdiction, in accordance with the law stipulation, even after the court verdict, with the exception of certain legitimate basis and without connection with the cause. These stipulations are also valuable for the trade union members or employees' representatives who had the prerogatives of supporting the victims in solving the situation at the workplace.

Pursuant to article 39 under *Law no. 202/2002*, when the employees consider themselves sexually discriminated, they have the right to submit petitions to the employer or against him, if he is directly involved, and ask for the support of the trade union or the employees' representatives for solving the work situation.

In contrast with other states' legislations which thoroughly regulate the procedure of mediation at employer's level (e.g. France), in the Romanian legislation there are only brief references concerning this procedure. Because of the fact that this aspect is not regulated by law, it should be included as a distinctive issue in the content of collective labour contracts concluded at the unity level or internal regulations, such as results from the dispositions of the Collective labour contract at national level for the years 2007-2010, article 96 paragraph 2: "In order to create and mantain an environment meant to encourage the respect of each persons's dignity, through the agency of collective labour contract concluded at unity level, there shall be established procedures of amiably solving the individual complaints of the employees, inclusively the ones concerning cases of violence or sexual harassment".

[22] Article 10 par. 2 of *Emergency Government Ordinance no. 2/2001 concerning the juridical regime of contraventions.*

If the intimation/complaint is not solved at the enterprise level through mediation which is a facultative phase[23], the employed person who has features of fact implying the existence of a discrimination, direct or indirect, on the basis of gender, will have the right to inform, on the ground of *Law no. 202/2002* dispositions, the competent institution, as well as to make a complaint to the court of competent jurisdiction or to the instance of administrative control, but no later than one year after the date of committing the act.

In case that the complaint is upheld by the court, the latter can take the following measures: the cessation of the discriminatory situation and the punishment of the guilty person by the payment of damages to the victim of discrimination, damages equal to the real harm suffered by the employee[24]. The damages shall cover both the material and moral prejudices because the violation of dignity at the work place through acts of sexual discrimination/harassment implies the remedy element for prejudice suffered by the victim. Contrary to other legal systems (e.g. British law), in cases of moral/sexual harrasment, the Romanian law does not stipulate that, when a complaint is upheld, it is necessary to relocate or transfer one party – the perpetrator or the complainant. We consider that this situation should be regulated by law and must be dealt with on a case by case basis. If no move (compulsory or voluntary) of either party is possible because there is no vacant and comparable post available, it is important to check the harassment has stopped and there has been no victimisation or retaliation.

Whenever possible, the court shall force the employer to take back the person unlawfully dismissed through a sex discrimination act[25]. At the same time, the employer shall be forced to pay the remuneration not received because of the unilateral modification of labour relations or conditions, as well as all the contributions to the state budget and the state social security that are incumbent both on the employer and the employee. When the employee's reinstatement is no longer possible, the employer shall be forced to pay a compensation equal to the real harm suffered by the employee, the quantum of the compensation being established in accordance with law stipulations.

The burden of proof is incumbent on the person against whom the intimation/petition or, as the case may be, the complaint was made. This person must demonstrate that the principle of equal treatment was not violated. The proof of discrimination can be made through any means of probation, inclusively audio and video registering. The National Agency for Equality of Chances for Men and

[23] Ion Traian Ştefănescu, *Consideraţii referitoare la Legea nr. 202/2002 privind egalitatea de şanse între femei şi bărbaţi, cu privire specială asupra domeniului muncii,* in "Revista Română de Dreptul Muncii", no. 2/2002, p. 9.

[24] Magda Volonciu, *Sesizări, reclamaţii şi plângeri împotriva măsurilor de discriminare pe criteriul sexului*, in "Revista Română de Dreptul Muncii", no. 1/2003, pp. 27-32.

[25] C. Gâlcă, *Hărţuirea sexuală la locul de muncă*, in "Revista Română de Dreptul Muncii", no. 2/2005, pp. 101-106.

Women, trade unions, non-governmental organizations which aim at the protection of human rights, as well as other juridical persons with a legitimate interest in the respect of the principle of equal treatment of men and women have, at the request of the discriminated persons, an active procesual quality in front of the court and can assist these persons in the administrative procedures.

5. Sexual Harassment: Statistical Analysis, Criminal Sanctions and Conclusions

An offence to a person's dignity, sexual harassment is considered an obstacle for the good functioning of the labor market. The victims of sexual harassment at the workplace can be employees of both sexes. Certain categories of employees are especially vulnerable, i.e. divorced women or the ones separated in fact, the new ones entered on the labor market or with a low economic status, the people with disabilities or belonging to ethnic minorities etc.[26].

In the Romanian Law, in accordance with article 4 of Law no. 202/2002 (republished) concerning the equality of chances for men and women, sexual harassment means the situation in which an unwanted conduct with sexual connotation, expressed by physical, verbal or non-verbal means, having as object or result affecting a person's dignity and especially creating an intimidating, hostile, degrading, humiliating or offensive environment[27].

The studies and the statistics carried out in Romania during the previous years focused more on the most frequent causes and criteria for discrimination, and less on the consequences of this alarming phenomenon; sexual harassment constituted only a particular case of the research concerning discrimination in general. The research, both carried out in Romania and at European and international level, limited their interest to the psychological reactions of harassed victim, not focusing on the responses or echoes registered within the organization or the measures that could be taken at judicial and organizational level. The cases of discrimination and sexual harassment became a certainty in Romania.

Of course, the mentalities, the traditions and prejudices play a central role both in generating the behavior of the one that discriminates, and the construction of the victim's reaction as a response. Sexual harassment and violence against women at the work place have a double cultural source: on the one hand, the traditional culture of male authority, including a certain legal violence, doubled by a high tolerance in front of this type of violence; on the other hand, a modern

[26] Nicolae Voiculescu, *Câteva consideraţii privind Legea nr. 202/2002 privind egalitatea de şanse între femei şi bărbaţi şi armonizarea acesteia cu directivele comunitare,* in "Revista Română de Dreptul Muncii", no. 2/2003, p. 17.

[27] For comparison, see *Bullying and harassment at work: guidance for employees*, in "Acas", London, 2007, available at http://www.acas.org.uk/index.aspx?articleid=797, accessed at June 13, 2017.

culture, disseminated mainly by mass-media, who emphasizes the image of women as sexual objects by exposing them to violent behavior with prevalent sexual connotations[28].

Although in the employment practices the most frequent criterion of discrimination is the one regarding the gender, from the statistics of the National Council for Fight against Discrimination one can infer that the most frequent petitions sent to be solved to NCFD, were formulated mainly by men and had as object the discrimination on grounds of ethnicity (Rroma mainly), the social category, age or religion. Regarding the discrimination made on the gender or sexual orientation criterion, the low number of petitions shows the fact that persons who confronted with such situations either did not know who to address a complaint to or did not have the courage to do it[29]. The situation is the more serious as 13% of Romania's adult population reports experiencing sexual harassment at the work place (but only cases of most serious forms of sexual harassment). There are a lot of cases in which different forms of sexual harassment (glances, obscene gestures, offensive language or physical contact) are ignored because they are considered "slight" and "harmless" by the subjects when they do not imply a request of sexual favors or coercion for sexual favors. More than a quarter of Romanian women and over 40% of men do not even accept to talk about this subject[30].

The harassment of any origin is "a complex, dynamic process that starts at the moment when the act of harassment is produced, continues with the reaction of the victim, that will be followed by the response of the organization and of the harasser and the process can continue like this on and on"[31], having serious long-term consequences. In over 80% of sexual harassment cases happened in Romania, the harasser does not bear any consequence because of the victims' distrust and lack of interest towards the institutional ways of solving the conflict.

The Romanian population makes a difference between three forms of sexual harassment:

– the "slightest" form of sexual harassment: glances, obscene gestures, offensive language or physical contact;

– the second form consists of the request of sexual favors in exchange for different promises (promotion, higher salary etc.);

– the most serious form implies coercion for sexual favors.

[28] Elena Zamfir, *Violența împotriva femeii*, in "Revista de Asistență Socială", no. 1-2/2005, pp. 10-13.

[29] STATISTICS PROCESS (court files – 2007, 2006); Analysis of petitions – 2005, 2003, 2002, available at http://www.cncd.org.ro/biblioteca/Statistici-2/, accesed at February 10, 2017.

[30] Partnership for Equality Center, *The National Research concerning Domestic Violence and Violence at Work*, Romania, 2003.

[31] Jeong Yeon Lee, Sharon Gibson Heilmann, Janet P. Near, *Blowing the whistle on sexual harassment: Test of a model of predictors and outcomes*, Human Relations, vol. 57(3)/2004, The Tavlstock Institute, Sage publications, London, Thousand Oaks CA, New Delhi, available at www.sagepublications.com, accesed at February 10, 2017.

Analysis on Sexual Harassment in Romania[32]

1st form – Sexual harassment through glances, obscene gestures, offensive language or physical contact

– is reported by 12,9% of the Romanian adult population;
– 59% of the victims are women, 41% - men;
– Only 6% of women victims and 2% of men victims made a petition to the employer;
– 3% of women victims and 2% of men victims resigned;
– None of the victims lodged a complaint to the court;
– None of the victims resorted to psychological assistance;
– In 87% of cases, the harasser did not bear any consequence of his act.

2nd form – Sexual harassment through the request of sexual favors in exchange for different promises

– is reported by 1,9% of the Romanian adult population;
– 61% of the victims are women, 39% - men;
– Only 10% of the victims made a petition to the employer;
– 7% of the victims resigned;
– None of the victims lodged a complaint to the court;
– None of the victims resorted to psychological assistance;
– In 75% of cases, the harasser did not bear any consequence of his act.

3rd form – Sexual harassment through coercion for sexual favors

– is reported by 1,7% of the Romanian adult population;
– 85% of the victims are women, 15% - men;
– Only 9% of the women victims made a petition to the employer;
– 11% of the women victims resigned;
– None of the victims lodged a complaint to the court;
– None of the victims resorted to psychological assistance;
– In 75% of cases, the harasser did not bear any consequence of his act.

Law no. 61/2002 on the approval of *the Emergency Government Ordinance no. 89/2001* for the modification and completion of some dispositions of the Penal Code regarding some criminal offences against sexual life provided, for the first time in Romania, the offence of sexual harassment.

The incrimination of sexual harassment, one of our legislator's innovation meant to harmonize our national criminal law with the European one, is really useful for repressing some behavior, especially those belonging to the employers,

[32] See Partnership for Equality Center – *The National Research concerning Domestic Violence and Violence at Workplace*, Romania, 2003.

through which the employment or the access to some rights or services are conditioned by obtaining some sexual favors[33].

Article 203[1] of the *Romanian Penal Code* gives to the offence of sexual harassment the following definition: "the harassment of a person through threat or compulsion, in order to obtain sexual satisfaction, by a person who abuses of the authority or influence conferred by the function he performs at the place of work is punishable by 3 months up to 2 years imprisonment or a fine".

This method of incrimination differs from the solutions adopted by other legislations, e. g. German criminal law, which provides the existence of this criminal offence even in the absence of threat or compulsion. We consider that the solution adopted by the Romanian legislator is much more efficient although in practice there can be found situations in which it is very hard to make a difference between the offence of sexual harassment and the one of rape that also involves the existence of threat or compulsion. It is true that sexual harassment represents any consented sexual satisfaction (including sexual act), the consent of the victim being obtained by the person using her authority or influence at the place of work through threat or compulsion but it will be difficult to make the difference between the compulsion followed by the victim's consent and the compulsion that cancelled any consent.

The first difference between the two criminal offences is the fact that, in the case of sexual harassment, both the active and the passive subjects are qualified. The active subject is "a person who abuses of the authority or influence conferred by the function he performs at the place of work", consequently a person having a function superior to the one performed by the victim of the offence. The passive subject can be any person, irrespective of sex or age, having the quality of an employee or not having this quality (it is the case of labor juridical relations which are not based on an individual contract of employment), but being in a relation of subordination towards the offender.

Concerning minors, they can be passive subjects of this criminal offence only if they become employees, consequently if they are between 15 and 18 years of age. Adolescents of fifteen to sixteen years of age have a limited capacity of employment; they can conclude a labor contract only with both parents or previous consent of guardian authority. The sexual harassment committed against a minor employee, irrespective of sex, represents an aggravated form of this offence but unfortunately the criminal law makes no difference between the simple and the aggravated form in the matter of the penal sanctions[34]. Having in view the seriousness of this criminal act and its social danger, we make a "lege ferenda" proposal concerning the introduction, in the article 203[1] of *the Romanian Penal Code*, of the aggravated form

[33] Gheorghe Mateuț, *Reflecții asupra infracțiunii de hărțuire sexuală introdusă în Codul Penal Român prin Legea nr. 61 din 16.01.2002*, in "Dreptul", no. 7/2002, p. 3.

[34] Eliodor Tanislav, Tanislav Eliodor jr., *Infracțiunea de hărțuire sexuală a angajatului. Propuneri "de lege ferenda" privind forma agravantă,* in "Revista Română de Dreptul Muncii", no. 1/2003, p. 67.

of sexual harassment offence, meaning that the acts of sexual harassment committed against a minor employee should be punishable by a more severe penalty. This proposal is sustained also by the fact that *the Romanian Penal Code* also incriminates the fact of having sex with a minor. In accordance with article 198(2), any sexual act with a same sex or an opposite sex person of fifteen to eighteen years, if the act is performed by the guardian, overseer, caretaker, doctor, teacher or educator, using his quality or if the offender abuses of the victim's trust or his authority or influence over him is punishable by 3 up to 10 years imprisonment and the interdiction of some rights. Also, if the sexual act, irrespective of its nature, with a same sex or an opposite sex person of up to eighteen years, is caused by the offender through promising or giving money or other advantages to the victim, directly or indirectly, the penalty is 3 up to 12 years imprisonment and the interdiction of some rights. From these dispositions of the Romanian Penal Code results that the money or other advantages promised or given to the victim may concern her employment rights or that the offender may abuse of his authority or influence at the place of work and, if the victim is a minor of up to eighteen years, the penalty is much more severe in this case than in the case of sexual harassment. So the penalty for the aggravated form of sexual harassment must be 3 up to 12 years imprisonment and the interdiction of some rights.

Drawing the conclusions, we can affirm that the constant stress generated by the violation of dignity at the work place through acts of sexual discrimination/ harassment can produce dangerous effects on the health of the employees, generating professional illnesses, death or even suicide, and also on the quality of the employees' activity by the decreasing of her/his capacity of resistance, of adaptation and reaction of the employees, thus causing work accidents and professional illnesses that imply the responsibility of the employer, the decreasing level of production, increasing health social insurance expenses etc. In the evaluation of risks regarding employees' health and the effects of stress generated by discrimination/harassment at the work place, an important role is played by the doctors that work in the labor medicine field and by the services of labor health and security. From the didactic-academic perspective, it can be considered that, besides law imperfections, there are several categories of deficiencies at organizational level such as: violation of right to dignity at the work place by subjecting the employees to moral/sexual harassment, humiliation, bullying, illegal orders, abuse of right on the part of hierarchical superiors; the lack of employees' information regarding the consequences of discrimination, the stipulations of criminal and work legislation and the practices of defense against any form of discrimination; the insufficiency or the lack of organizational strategies for preventing and fighting against discrimination; the violation of the obligation to organize the mediation of conflicts which have as object sexual discrimination.

At individual level, there is a general distrust in the Romanian judicial system and a fear of the victim to submit a complaint to or against the employer, especially

when the harasser is the employer itself or is in a higher position toward the victim, reason for which the situations when such cases are brought in front of a court are extremely rare. On the other hand, not even the human resource managers encourage the measures that could be taken in cases of discrimination or moral/ sexual harassment, the organization of mediation actions at the unit level is almost non-existent, because of the fact that such situations may cause many problems and affect the image of the organization among public opinion.

Limited only to a sphere in which discrimination can manifest itself, research demonstrates a very important fact: the existence of anti-discrimination laws does not solve the problem. Discrimination and harassment, especially sexual harassment, still maintain themselves at alarming quotes and could become chronic through the inclusion of all sectors in which it can act. The elimination of discrimination or even only its attenuation is one of the necessary conditions for constructing an equitable democratic society, this one implying the intervention of state authorities, changes in employers' vision, but also in every citizen's mentality.