

REFLECTIONS ON THE REGULATION OF THE PRINCIPLE OF NON-DISCRIMINATION IN THE ROMANIAN CONSTITUTIONS AND IN THE INTERNATIONAL BILL OF RIGHTS – SELECTIVE ASPECTS

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Abstract: *At the onset of the study it is necessary to mention that its topic will be circumscribed to "Reflections on the regulation of the principle of non-discrimination in the Romanian Constitutions and in the International Bill of Human Rights - Selective aspects". By this approach, the proposed study opens a complex and complete vision, but not exhaustive, on the "Reflections on the regulation of non-discrimination in the Romanian Constitutions and in the International Bill of Human Rights - Selective aspects". In the analysis of the International Bill of Human Rights, we will keep a symmetrical approach to identifying regulations concerning non-discrimination. The subject of the scientific endeavour will be circumscribed to the scientific analysis of its parts, as follows: 1. Preliminary considerations. 2. Identification of constitutional rules on the principle of non-discrimination in the Romanian Constitutions. 3. Identification of rules on the non-discrimination in the International Bill of Human Rights. 4. The highlights of Romanian doctrine on the non-discrimination. 5. Jurisprudence of the Constitutional Court regarding non-discrimination (Selective aspects) 6. Conclusions.*

Keywords: regulation of non-discrimination, Romanian constitutions, International Bill of Human Rights, highlights of Romanian doctrine, jurisprudence.

1. Preliminary considerations.

The object of study and of the scientific approach will be circumscribed to the scientific analysis of its five great parts, i.e.: 1. Identifying the constitutional norms regarding non-discrimination in the Romanian Constitutions. 2. Identifying the norms regarding non-discrimination in the International Bill of Human Rights. 3. Romanian doctrinal landmarks on non-discrimination. 4. Jurisprudence of the Constitutional Court regarding non-discrimination (Selective aspects). 5. Conclusions.

At the onset of this study, it is imperative to specify that in its contents, the International Charter of Human Rights gathers the

following set of five documents: [1] a) the Universal Declaration of Human Rights. . b) The International Covenant on Economic, Social and Political Rights. c) The International Covenant on Civil and Political Rights. d) The Optional Protocol to the International Covenant on Civil and Political Rights. e) The second Protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty.

As concerns the evolution of ideas regarding the elaboration of an International Bill of Human Rights, we specify as follows:

1. The idea of the elaboration of a Declaration of human fundamental rights,

(Bill of Rights) was brought up at the Conference of the United Nations regarding the International Organization, held in San Francisco, between April-June 1945, at 26 June 1945 when the UN Charter was adopted.

2. The Economic and Social Council set up the Commission on Human Rights, under art. 68 of the Charter, by resolution 5(1) of 16 February 1946, and authorized it to present proposals, recommendations and reports on *an international declaration of human rights*.

3. At the second session, held in Geneva, the between 2 - 17 December 1947, the Commission on Human Rights decided that the expression *International Bill of Human Rights* should apply to all the documents in preparation, i.e. to one declaration on human rights, a convention or a covenant on human rights and enforcement measures. For this study, we will mention the following documents of the Charter, which contain regulations on non discrimination, respectively, *Universal Declaration of Human Rights*, *The International Covenant of Civil and Political Rights* and *the International Covenant of Economic, Social and Cultural Rights*.

The two Covenants in the UN system are called *Covenants of Human Rights*.

In our opinion, the study is important for the constitutional doctrine in the matter, for the doctrine of human rights and for the doctrine of international law of human rights, because by this scientific approach, we intend to determine, in a diachronic and selective approach a complex and complete but not exhaustive reflection, of the current sphere regarding non discrimination in the area of study.

From the point of view, of full but not exhaustive coverage, of the sphere regarding non discrimination, a diachronic and selective approach of the current trends on non discrimination

Even if the regulation and theorization of *non discriminations* goes back in time, to *the first UN documents and to the first*

Romanian constitutions, the theoretical interest for resuming it is determined by the fact that in the exiting specialized literature not enough attention has always been given at least to the three aspects, normative, theoretical and jurisprudential regarding *the regulation of non discrimination*, analyzed in this study.

2. Identifying the constitutional norms on non discrimination in the Romanian Constitutions.

In this paragraph, we intend to identify the constitutional norms in the area of study because, in our opinion, these norms in the Romanian constitutions set *the constitutional principles* referring to *non discrimination*, which will be later developed into *the laws adopted by the parliament in various fields*, where the observance of the constitutional principle of *non discrimination* is imperative.

2.1. From the systematic analysis of the normative contents of *the Developer Status of the Convention of 7/9 August 1858*[2] which in our opinion, subject to art. XVII, may be considered a Constitution, contains no provision on non discrimination.

2.2. The systematic analysis of the normative contents of *the Romanian Constitution of 1866*, [2] shows that it sets no criterion of non discrimination.

2.3. The systematic analysis of the normative contents of *the Constitution of Romania of 1923*,[2] shows that this is the first Romanian Constitution which regulates the following criteria of non discrimination, in the contents of art. 5 of Title II entitled On the Rights of the Romanians: "The Romanians, regardless of *ethnic origin, of language or of religion*, enjoy freedom of conscience, freedom of education, freedom of the press, freedom of meetings, freedom of association and all the liberties and rights set by the laws".

2.4. The systematic analysis of the normative contents of *the Constitution of Romania of 1938*[2] shows that it regulates the following criteria of non discrimination,

in the contents of art. 4 art. 5 and art. 6 of Chapter I Title II, entitled "On the Debts of the Romanians" having the following contents:

2.4.1. Art.4 paragraph (2): "All Romanians, regardless of *ethnic origin and religion*, are liable to: deem Homeland as the most important ground of their meaning in life, to sacrifice for defending its integrity, independence and dignity; to contribute by their work to its moral ascension and economic growth; to fulfil faithfully public task sunder the laws and willingly contribute to the completion of public tasks, without which the being of the State cannot live".

2.4.2. Art. 5: "All Romanian citizens, regardless of *ethnic origin and religion*, are equal before the law, owing respect and obedience. Nobody can deem to be free of his/her civil or military, public or private, duties on the grounds of his/her religious beliefs or of any other kind.

2.4.3. Art. 6: "In the Romanian State no distinction of *social class* is admitted. The privileges in setting the taxes are stopped. Tax decrease or increase cannot be general and established by laws".

The systematic analysis of the normative contents of the three above-mentioned articles shows the nomination of the following criteria of non discrimination: *ethnic origin, religion and social class*.

2.5. The systematic analysis of the normative contents of *the Constitution of 1948*[2] shows that it regulates the following criteria of non discrimination, in the contents of art. 16 of Title III, entitled "Fundamental rights and duties of citizens" having the following phrasing: "All citizens of the People's Republic of Romania, regardless of *sex, nationality, race, religion or level of culture*, are equal before the law".

The criteria of non discrimination set by the mentioned text are the following: *sex, nationality, race, religion or level of culture*.

2.6. The systematic analysis of the

normative contents of *the Constitution of 1952*[2] shows that it regulates to following criteria of non discrimination, in the contents of art. 81 Chapter VII, entitled "Fundamental rights and duties of citizens" having the following phrasing:

2.6.1. Art. 81 paragraphs (1): "The working people, citizens of the People's Republic of Romania, regardless of *nationality or race* are assured full equality of rights in all domains of economic, political and cultural life".

2.6.2. Art. 81 paragraphs (2): "Any direct or indirect restriction of the rights of the working people, citizens of the People's Republic of Romania, setting direct or indirect privileges on the *gerunds of race or nationality* to which citizens belong, any manifestation of chauvinism, racial hatred, national hatred or nationalist chauvinist propaganda shall be punishable by law".

The criteria of non discrimination set by the mentioned texts are the following: *nationality and race*.

2.7. The systematic analysis of the normative contents of *the Constitution of 1965, as republished* [2] shows that it regulates the following criteria of non discrimination, in the contents of art. 17 of Title II, entitled "Fundamental rights and duties of citizens" having the following phrasing:

2.7.1. Art. 17 paragraphs (1): "The citizens of the People's Republic of Romania, regardless of *nationality, race, sex or religion*, are equal in rights in all domains of economic, political, legal, social and cultural life".

2.7.2. Art. 17 paragraph (2): "The State guarantees equality of rights of all citizens. No restriction of such rights and no distinction in exercising such rights on the grounds of *nationality, race, sex or religion* are allowed".

2.7.3. Art. 17 paragraph (3): "Any manifestation with the purpose of establishing such constraints, the nationalist chauvinist propaganda, incitement of *race or national hatred*, shall be punishable by law".

The criteria of non discrimination set by the mentioned texts are the following: *nationality, race, sex, religion*.

2.8. The systematic analysis of the normative contents of *the Constitution of Romania of 1991*[3] shows that it regulates the following criteria of non discrimination, in the contents of art. 4 paragraph (2) having the marginal phrasing *People's unity and equality between citizens*, in the contents of Title I, entitled "*General principles*" having the following phrasing: "Romania is the common and indivisible homeland of all its citizens, regardless of *race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin*".

The criteria of non discrimination set by the above-mentioned text is, in our opinion the most complete and includes all the criteria of non discrimination phrased in the international and European documents in the line of human rights, existing at the time of elaborating the Constitution.

2.9. The systematic analysis of the normative contents of *the Constitution of Romania of 2003*[4], the republished edition of the Constitution of Romania of 1991, shows that it regulates the same criteria of non discrimination in the contents of the Constitution of Romania in the contents of the Constitution of Romania of 1991, in the contents of art. 4 paragraph (2) also, having the marginal phrasing *People's unity and equality between citizens*, in the contents of Title I, entitled "*General principles*" with the following phrasing: "Romania is the common and indivisible homeland of all its citizens, regardless of *race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin*".

The criteria of non discrimination set by the above-mentioned text is, in our opinion, the most complete and includes all the criteria of non discrimination phrased in the international and European documents in the line of human rights, existing at the time of the revision of the Constitution.

2.10. The systematic analysis of the normative contents of the *Draft Law for the revision of the Constitution of Romania* [5] sets forth at point 5 the following: article 4, paragraph (2) is amended and has the following contents: (2) "Romania is the common and indivisible homeland of all its citizens. Any discrimination based on *sex, colour, ethnic or social origin, genetic feature, language, faith or religion, political or any other opinion, belonging to a national minority, wealth, birth, disabilities, age or any other situation* is forbidden".

We find that art. 4 paragraphs (2) were rephrased and new criteria of non discrimination were introduced, among which: colour, genetic feature, creed, and political opinion or of any other kind, any other situation, which in our opinion will be discussed in the Constituent Assembly.

3. Identifying the norms regarding non-discrimination in the International Bill of Human Rights

As mentioned in the introductory part of this study, we will indicate only the following documents of the Bill which include regulations regarding non discrimination, i.e., *Universal Declaration of Human Rights, The International Covenant of Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights*.

Romania signed the two covenants on 27 June 1968. These covenants were ratified by the Decree of the State Council nr. 212 of 31 October 1974, as published in the Official Journal nr. 146 of 20 November 1974.

3.1. Identifying the norms regarding non discrimination in the contents of the *Universal Declaration of Human Rights* [6] The systematic analysis of the normative contents of the *Universal Declaration of Human Rights* shows that it regulates the following criteria of non discrimination, in the contents of art. 2 paragraph (1), with the following phrasing: "Every human may

avail himself/herself of all the rights and liberties proclaimed in this declaration with no distinction whatsoever, such as the distinction of *race, colour, sex, language, religion, political or any other opinion, national or social origin, wealth, birth or any other circumstances*. Moreover, no distinction is made for political, legal or international status of the country or territory to which the person belongs, either this country or territory is independent, under guardianship, non autonomous or subject to any other limitation of sovereignty".

The criteria on non discrimination set forth by the mentioned text are the following: *race, colour, sex, language, religion, political or any other opinion, of national or social origin, wealth, birth or any other circumstances*.

3.2. Identifying the norms regarding non discrimination in the normative contents of the *International Covenant on Civil and Political Rights* [7]

The systematic analysis of normative contents of the *International Covenant of Economic, Social and Cultural Rights* shows that it regulates the following criteria of non discrimination, in the contents of art. 2 paragraph (2), under the following phrasing: "The State Parties to this covenant hereby undertake to guarantee that the rights set forth in therein shall be exercised *without any distinction, in particular of race, colour, sex, language, religion, political or any other opinion, of national or social origin, wealth, birth or any other circumstance*".

The criteria of non discrimination set forth by the above-mentioned text are the following: *race, colour, sex, language, religion, political or any other opinion, of national or social origin, wealth, birth or any other circumstance*.

4. The highlights of Romanian doctrine on the non-discrimination

4.1. A first opinion [8] mentioned for this study refers to the *concept of non*

discrimination.

The author makes the following remarks on the concept of non discrimination:

1. Due to the close relationship between equality and non discrimination, practically there is no equality in pure form and non discrimination in pure form. We are considering here the specifications made by the working group which elaborated the Universal Declaration of Human Rights and according to which „*art. 2 set forth the fundamental principle of equality and non discrimination*”.

In the case of strict equality, *equality is identified with non discrimination*, but in the case of relative equality not any discrimination is an inequality and vice versa, not any inequality is discrimination.

2. *Anything identified the non discrimination as a constitutional value which guarantees the citizens equality before the law and public authorities it results that its breach may be petitioned both before the courts, directly, and the normative act has an inferior legal force to the law, as well as under the form of exception of unconstitutionality*, before the Constitutional Court, when forbidden or arbitrary discrimination is included in the law.

3. Non discrimination represents also *an additional guaranteed under the form of prohibition of arbitrary discriminations*, which is binding both for the legislator and for public administration. Thus, it is up to the Constitutional Court to investigate and find the arbitrary discriminations.

4. *The constitutional text itself contains discriminations which are prohibited and discriminations that should be considered in the law-making process*. The jurisprudence of the Constitutional Court shows that the *text of art. 16 are sufficient for the relative variant of the principle of equality*.

4.2. The second opinion [9] mentioned for this study refers to the *concept of non discrimination*.

1. There is only one reference in Romanian

doctrine to this issue, where it is mentioned that „concerning the constitutional principle of equality, it may take two forms: *either a principle of non discrimination* or the requirement of relative equality, of treatment”.

2. Art. 4 paragraph (2). of the Constitution *sets the criteria of non discrimination, thus guaranteeing a strict equality between citizens*. In this respect, certain authors say that, „the principle of non discrimination appears as an improved form and, certainly, more realistic of the principle of equality”

3. In Romanian legal literature there is only one doctrinal reference where non discrimination is considered as a limit of the constitutional principle of equality „We either consider it under the form of an objective principle as of right, or we analyse it in the context of fundamental rights, the constitutional principle of equality is not absolute. *It has limits which give him a particular configuration.*”

5. Jurisprudence of the Constitutional Court on non discrimination. (Selective aspects)

5.1. *The decision of the Constitutional Court nr. 408/2016 regarding the exception of unconstitutionality of the provisions of art. 850 paragraph (2) Code of civil procedure, as republished in the Official Journal of Romania, Part I, nr. 683 of 2 September 2016.*

The Constitutional Court was notified by the Chişineu-Criş County Court of the exception of unconstitutionality of the provisions of art. 850 paragraph (2) Code of civil procedure, an exception raised by the company Cosmo-Rom - S.R.L. of Socodor, Arad county, in a matter having as object the settlement of an appeal against enforcement requesting the cancellation of the adjudication act, of the minutes of the real estate public auction and continued prosecution from the cancelled act.

As for the criticism of unconstitutionality formulated in relation with, art. 16 of the Constitution, referring to the equality

before the law, the Court finds that the criticized legal texts bring no prejudice to this constitutional principle, as they apply to all in the situation provided by the hypothesis of the legal norm, with no discrimination on arbitrary grounds, while any of the chirographic creditors may deposit their debt in the account of the price.

5.2. *Decision of the Constitutional Court no. 47/1994 regarding the constitutionality of certain provisions of Law on war veterans, as well as certain rights of the disabled and war widows on the unconstitutionality of the specification "if they did not fight against the Romanian army" in art. 2 (b) of Law on war veterans, as well as certain rights of the disabled and war widows ", as published in the Official Journal of Romania, Part I, no. 139 of 2 June 1994.*

The Constitutional Court was notified on 7 April 1994, by 55 deputies on the unconstitutionality of the specification "if they did not fight against the Romanian army "in art. 2 (b) of Law on war veterans, as well as certain rights of the disabled and war widows".

Art. 4 paragraphs (2) of the Constitution is less frequently met in the jurisprudence of the Court due to the fact that its intervention is actually not necessary.

Finally, the Court decides the following:

1. Article 2 (b) of the Law on war veterans, as well as certain rights of the disabled and war widows, referring to those who were necessarily conscripted or called up, in unconstitutional concerning the condition " if they did not fight against the Romanian army ".

2. Article 2 (a) and (c), as well as article 7 (b) thesis 1 of the law are unconstitutional concerning the definition of the capacity of war veterans. During the review procedure, their correlation is required to assure the observance of the principle of equality of rights of citizens.

6. Conclusions.

Considering the above-described, we point out the following ideas:

6.1. The aim of the study referring to *Reflections on the regulation of non discrimination in the Constitutions of Romania and in the International Bill of Human Rights - Selective aspects* was in our opinion achieved.

6.2. In our opinion, the analyzed domain is important for the constitutional doctrine in the matter, for the doctrine of human rights and for the doctrine of the *UN activities in the domain of human rights*.

6.3. The regulations on non discrimination in the Romanian constitutional system and

in the *International Bill of Human Rights* were successively identified.

6.4. The four parts of the study may be considered a contribution to the extension of research in the matter of non discrimination, in accordance with the current trend.

6.5. Moreover, we specify that the above study opens a complex and complete view, but not exhaustive, in the analyzed domain.

6.6. The key-scheme proposed, considering the selective approach of the identification of non discrimination may be multiplied and extended for other studies in the matter.

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