

EXECUTAREA HOTĂRĂRILOR CURȚII EUROPENE A DREPTURILOR OMULUI

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REZUMAT:

Articolul 18 alineatul 1 din Tratatul de funcționare a Uniunii Europene interzice orice formă de discriminare pe motive de naționalitate sau de cetățenie, indiferent dacă aceasta este directă sau indirectă, iar punerea sa în aplicare se poate face fie în cadrul relațiilor dintre state, și/sau în relațiile cu persoane private. Mai mult decât atât, potrivit unei jurisprudențe constante, drepturile fundamentale fac parte integrantă din aceste principii și Curtea de Justiție a Uniunii Europene garantează respectarea acestora.

Cuvinte cheie: drepturile omului, principiile democratice, generații, nediscriminare, cetățenia, naționalitatea

RÉSUMÉ:

L'article 18 alinéa 1 du Traité de la fonction de l'Union européenne interdit tout type de discrimination fondée sur des raisons de nationalité ou la citoyenneté, indépendamment si cela est directe ou indirecte, et sa mise en œuvre peut se faire dans la relation entre les États et / ou dans la relation avec des personnes privées. En outre, selon une jurisprudence constante, les droits fondamentaux font partie intégrante de ces principes et la Cour de justice de l'Union européenne garantit leur conformité.

Mots-clés: droits de l'homme, des principes, des générations, la non-discrimination, la citoyenneté, la nationalité

The citizens' equality in the exercise of their rights is a principle provided by all the documents and instruments devoted to human rights. Thus, the first major UN document devoted to human rights, the United Nations Universal Declaration of Human Rights (10 December 1948), stipulates in its Article 2 that „Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

As far as the European regulations are concerned, the European institution that almost exclusively covered, until mid 1970s, the western human rights standards was the Council of Europe. As a matter of fact, its regulations substituted in this respect the exigencies of the European Economic Community. Also, after the 70s and prior to the Treaty of Maastricht of 1992, which introduced the revolutionary concept of European citizenship¹, the EEC dealt (through secondary legislation) with such issues as combating discrimination and promoting equality of opportunities only for the inhabitants of the EU space (although the Treaty of Rome of 25 March 1957, by which the Economic European

Community was founded, stipulated in Article 7: „Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited”²).

It was only after the Treaty of Amsterdam that the issue of discrimination began to be clearly defined in the amendment Treaties. So, based on Article 13 (according to the new numbering), of Treaty establishing the European Community, which stipulates: „Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

The European Council Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950 stipulates in Article 14: „The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or

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¹ A se vedea Irina Moroianu Zlătescu, *Mecanisme politice și administrative de garantare a drepturilor omului*, în Administrația și puterea politică. Tendințe și evoluții în spațiul public european, Ed. Comunicare.ro, București, 2013, p. 231 și urm.

² Traducerea în limba română este: „În domeniul de aplicare a prezentului tratat și fără a aduce atingere dispozițiilor speciale pe care le prevede, se interzice orice discriminare exercitată pe motiv de cetățenie sau naționalitate”. Versiune publicată în J Of., numărul C 83/56 din 30 martie 2010.

social origin, association with a national minority, property, birth or other status”, a wording taken up and updated by the Treaty of Amsterdam.

Such concepts as discrimination and combating discrimination are stipulated in our national legislation, especially the Constitution³ and the laws and ordinances that have been subsequently adopted. According to the Constitution, the international and the regional treaties on human rights signed by our country are part of the domestic legal order and the issue of combating discrimination and promotion of the principle of equal opportunities are no exceptions.

The creators of the international modern law on human rights, the great thinkers of the UN Charter and of the Universal Declaration of Human Rights⁴, assumed the more than bold goal to remove the main forms of discrimination, in about 100 years.⁵ This objective is of utmost importance since the entire history of mankind, from the appearance of the first human settlements down to the modern and contemporary times, manifestations of discrimination have abounded.

We believe that the provisions of the Universal Declaration of Human Rights in this field (Article 2 „Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”) has been enriched „on the fly” with new dimensions leading the way to many „generations”⁶ of regulations on combating discrimination. This fundamental document

represents the starting point for defining and prioritizing the main categories of regulations on discrimination⁷.

In terms of the European system of human rights, there also are other key documents, which complement and develop both old and new generations of rights regarding discrimination, such as: the European Convention on Human Rights⁸ of the Council of Europe⁹ which provides in its Article 14: „the exertion of rights and freedoms recognized by the present Convention must be ensured irrespective especially of sex, race, color, language, religion, political opinions or any other opinions, irrespective of national or social origins, belonging to a national minority, fortune, birth or any other status”¹⁰.

The Charter of Fundamental Rights of the European Union¹¹ stipulates under Title III „Equality” (Article 21) that the European Union is fighting against „Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

It is worth mentioning that the Treaty on the Functioning of the European Union (TFEU) stipulates in Article 18 Para 1 (former Article 12 of TEC) as an elementary principle of EU law, the general prohibition of discrimination on grounds of nationality¹². This provision is embodied in various other provisions of the same Treaty.

The text and the conditions of the implementation of Article 18 of TFEU have an impact on the national law. It should be stressed that this article is applied only in cases of unequal treatment. This should not be mistaken for a mere

³ See Irina Moroianu Zlătescu, *Constitutional Law. Romania*, Ed. Kluwer, London, 2013, p. 3 et seq.

⁴ John P. Humprey, Emile Giraud, Eleonor Roosevelt, Sir Hersch Lauterpacht, Charles Malik, René Cassin – also see the documents presented at the International Colloquium organized by IRDO on 28.11.2003 under the theme: *The Artisans of Modern Thinking on Human Rights (Artizanii gândirii moderne a drepturilor omului)*, IRDO Review No.. 4/2003.

⁵ A conclusion drawn from the analysis of the summits sessions of the UN on the Universal Declaration of Human Rights and the Millennium Declaration.. See Irina Moroianu Zlătescu, Mihaela Muraru Mândrea, *Equality, Nondiscrimination and Good Governance (Egalitate. Nediscriminare Buna guvernare)*, Ed. IRDO, București, 2008, p. 32.)

⁶ See Vasak, rédacteur général, *Les dimensions internationales des droits de l'homme*, UNESCO, Paris, 1978, p. VII et seq.

⁷ See Irina Moroianu Zlătescu, *Protection against racism and discrimination*, Ed. IRDO, București, 2011, p. 25 et seq.

⁸ Known under the name of the Convention for the protection of human rights and of fundamental freedoms adopted on 4 November 1950.

⁹ Artisans: Winston Churchill, Pierre-Henri Teitgen, Edouard Herriot, etc. See *The Artisans of Modern Thinking on Human Rights (Artizanii gândirii moderne a drepturile omului)*, „Drepturile Omului”, nr. 4/2000.

¹⁰ See Irina Moroianu Zlătescu, Victor Dan Zlătescu, *Human Rights in Action (Drepturile Omului în acțiune)*, Ed. IRDO, București, 1994, p. 75. et seq.

¹¹ Launched at the European Council in Nisa 2000 it became an official document of the European Union on the occasion of the signing of the Lisbon Treaty of 13 December 2007.

¹² The Romanian translation refers to „discriminare exercitată pe motiv de cetățenie sau naționalitate”.

inconsistency of two national regulations. One should also bear in mind that Article 18 Para 1 only applies if it does not violate the special dispositions.

A number of other provisions have taken over and embodied the nondiscrimination principle based on citizenship or nationality. Obviously, in cases when the special provisions take into account the objectives of Article 18 Para 1 of the Treaty, this article is no longer applied. However, the exact importance of this limitation is not very clear and the case law is not always constant.

According to the meaning we attach to the term, „special provisions” can be any other legal provisions that take into account the criteria of nationality and which contain the prohibition of discrimination, and we are hereby especially referring to the fundamental freedoms. In so far as a special provision is applied, one cannot resort to Article 18 Para 1 of TFEU.

It is also noteworthy that this Article forbids any discrimination on reasons of nationality and citizenship irrespective whether this is direct or indirect. The interdiction cannot be invoked unless it pertains to „the field of the implementation of Treaties”¹³.

A link with the EU Treaty’s situation is required, especially if we consider that the manner of determining the scope of the Treaties is controversial considering that the problem is addressed by the Court of Justice of the European Union (CJEU) from case to case, based on the development of practice.

Of course, according to settled case-law, the fundamental rights form an integral part of the principles of law, the compliance of which is ensured by the Court of Justice of the European Union. The Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by the international instruments for the protection of human rights to which the Member States have collaborated or joined.

Although at first the Court of Justice of the European Union refused to examine, for example,

¹³ See Astrid Epiney, Robert Mosters, Sarah Progin-Theuerkauf, *Droit européen II. Les libertés fondamentales de l’Union européenne*, Stampfli Éditions SA, Berne, 2010, p. 7 et seq; A se vedea Irina Moroianu Zlătescu, *Drept European*, Ed. Pro Universitaria, București, 2012, p. 11 et seq.

the validity of EU acts on the fundamental rights protected by the Constitution of the Federal Republic of Germany, as it was required by the petitioners (in 1959 and 1960), it had to change, over time, the modality of addressing issues of fundamental rights on the grounds that reference to such rights protected by a national constitution would present a danger of disruption to the Community legal order still in the process of shaping.¹⁴

Time has shown that the development of a system of fundamental rights protection in Europe is an integrating factor and an element of legitimacy of new institutions and agencies. It is the reason why the Court decided at some point that „fundamental rights form an integral part of the general principles of law which the Court shall ensure compliance” and that „the protection of these rights is fully inspired from the constitutional traditions common to the Member shall be provided within the structure and objectives of the Community”.

Thus, by the praetorian way the gap in the Treaties was remedied. At the same time, new perspectives arose for a considerable development in the activity of both European institutions and Member states, and even in the jurisprudence of the Court.

As time passed, the Court of Justice of the EU has progressively developed its case law thus issuing a European catalog of principles and fundamental rights, which, although not exhaustive, includes a number of rights such as the principle of equality in its different aspects, freedom of movement of workers and employees, the independent, religious freedom, freedom of expression and information, protection of privacy, inviolability of private homes, the respect of the right to defense during repressive procedures, no retroactivity of criminal laws, the right to legal appeal, the right to ownership and economic initiative, freedom of association and trade union rights.

One such principle is that of equality that finds multiple expressions in the European law, whether it relates to the prohibition of discrimination on grounds of nationality, sex, pay, between producers

¹⁴ See Irina Moroianu Zlătescu, *Human Rights – a System in Evolution (Drepturile Omului – Un sistem în evoluție)*, Ed. IRDO, București, 2008, p. 120.

and consumers, according to the origin of products within the European public functions.

Equal treatment between EU citizens, which prohibits any discrimination based on nationality lies at the main foundation of the European legal order. It is a basic principle for the functioning of the common market, i.e. that area without internal frontiers in which the free movement of persons, goods and capital between Member States is ensured.

The prohibition of discrimination also refers to other specific situations such as the free movement of migrant workers in terms of access to different forms of schooling, vocational training, the employment, the provision of services, cultural organizations, sport, travel, healthcare, travel, etc.

Article 18 Para. 1 of the TFEU addresses primarily the EU Member States and EU bodies. Of course, the question is whether this provision can be invoked by individuals. European jurisprudence is still not consistent on this issue.

Indirect discrimination can be justified on objective grounds. In addition, it has to respect the

principle of proportionality. The problem of knowing whether the provisions of the TFEU represent a relative or an absolute prohibition of discrimination and also the need to know to what extent a justification is possible in the case of direct discrimination are controversial subjects both in case law and in legal literature.¹⁵

A coherent judicial practice supported by the doctrine, would, we believe, contribute to the promotion of new regulations or to the modification of existing ones, in order to protect and promote human rights in Europe.

Obviously, according to the Paris Principles on the establishment of national institutions for the promotion and protection of human rights, the national institutions for human rights play a significant role in ensuring a better understanding by the public institutions, NGOs and individuals of the human rights issues and of the way they are ensured in different countries, in compliance with the provisions of the international covenants and treaties to which the State is a party.

¹⁵ See ECCJ case C-456/02 (Trojani) in Recueil 2004, p. 7573; EC CJC Case C-11/06 și C-12/06 (Morgan) in Recueil 2007, p. I – 9161.