RACIAL AND ETHNIC DISCRIMINATION IN THE ENFORCEMENT OF JUSTICE

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I. INTRODUCTORY REMARKS

1. Originating somewhere in the general postulation of the equal dignity of all human beings, the nondiscrimination principle is a matrix principle in the international protection of human rights, affirmed in all international and national instruments warranting the fundamental rights[1]; it imposes equal treatment for all, which implies the existence of a legal norm prescribing such equal treatment[2]. The interdiction of discrimination thus appears to be part of the international public order[3], considering that the number of international instruments consecrating it is practically unlimited[4]. Among the most important international documents ratified by Romania, besides those of a general nature, whereby states have pledged to fight discrimination, I recall here the International Convention on the Elimination of All Forms of Racial Discrimination[5], the International Convention on the Suppression and Punishment of the Crime of Apartheid,[6] the UNESCO

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[1] F. Sudre, **Drept european şi internațional al drepturilor omului**, [European and International Human Rights Law], Ed. Polirom, Bucureşti, 2005, p. 202.

[2] C. Bîrsan, **Convenția europeană a drepturilor omului. Comentariu pe articole**, [The European Convention for the Protection of Human Rights and Fundamental Freedoms. Commented article by article] Ed. All Beck, Bucureşti, 2005, vol. I, p. 889.

[3] The Court of Appeal, Paris, Balmacéda dec. of 14 June 1994, in M. Fabre; A. Gouron-Mazel, **Convention européenne des droits de l'Homme. Application par le juge français**, Ed. Litec, Paris, 1998, p. 233.

[4] For details on their content and the relation between the interdiction of discrimination and the principle of human dignity, see B. Maurer, **Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme**, Ed. La documentation française, Paris, 1999, p. 70-74.

[5] Adopted by the UN General Assembly under Resolution 2106 (XX) of 21 December 1965, entered into force on 4 January 1969 and ratified by Romania on 14 July 1970 under Decree no.345, published in the Official Bulletin no.92/1970.

[6] Adopted by the UN General Assembly under Resolution 3068 (XXVIII) of 30 November 1973, entered into force on 18 July 1976 and ratified by Romania on 14 July 1970 under Decree no.254, published in the Official Bulletin no.64/1970.

Convention against Discrimination in Education[7], the International Labor Organization's Convention on the Elimination of Discrimination in Respect of Employment and Occupation[8]. Also, all modern constitutions of states across the continents contain clauses on nondiscrimination, an additional proof of the discrimination interdiction rule's nature of a right naturally attached to any human being[9]. Finally, the interdiction of discrimination could not be absent from the most important international treaty on the fundamental human rights, the European Convention for the protection of Human Rights and Fundamental Freedoms, which contains, in its turn, a special nondiscrimination clause under art.14; the text is currently under scrutiny for a possible reformation, to the extent that Protocol no.12 to the Convention, which contains a general nondiscrimination clause, will be adopted in the near future[10].

2. Regarded from this perspective the principle of equality among people and interdiction of discrimination appears to be an essential aspect of *jus cogens*, consistently manifested as one of the state's main obligations towards the individuals under its jurisdiction[11]. It is therefore only natural that Romanian law should also include a rather detailed regulation aimed at the interdiction and suppression of discrimination, essentially provided for under art.16 of the Constitution, and further concretized in several ordinary normative dispositions, among which I recall Law no. ... on the fight against discrimination, the pertinent provisions of the Penal and Labor Codes, etc.

3. A simple overview of the complexity of the social, economic and political life will surely reveal a very high potential for the emergence of discrimination acts, which means the field of incidence of the related legal provisions is huge and

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[7] Adopted by the UN General Conference on Education, Science and Culture on 14 December 1960, entered into force on 22 May 1962 and ratified by Romania on 20 April 1964, under Decree no.149, published in the Official Bulletin no.5/1964.

[8] Adopted by the General Conference of the International Labor Organization on 26 November 1968 and ratified by Romania on 6 June 1973 under Decree no.284, published in the Official Bulletin no.81/1973.

[9] For a list of the states whose constitution includes a clause forbidding discrimination see J.-Y. Morin, **Libertés et droits fondamentaux dans la constitutionas des Etats ayant le français en partage**, Ed. Bruylant, Bruxelles, 1999, p. 715.

[10] In regard to the incidence field of art.14 of the Convention, and the reform thereof through the provisions of Protocol no.12 to the Convention, see C. Bîrsan, **Convenția europeană a drepturilor omului. Comentariu pe articole**, quoted above, vol. I, p.....; R. Chiriță, **Convenția europeană a drepturilor omului. Comentarii şi explicații**, [The European Convention for the Protection of Human Rights and Fundamental Freedoms. Comments and Explanations], Ed. C.H. Beck, Bucureşti, 2007, vol. II, p. 223-228.

[11] The Inter-American Court of Human Rights, report no.18 of 17 September 2003 on the juridical status and rights of the migrant workers in unregulated circumstances, § 54 la www.iachr.org.

regards entirely distinct aspects of social life. In the following section of this paper I shall deal with just a small part of the state's hypotheses and obligations in relation to the interdiction of discrimination, narrowing the argument to the racial or ethnic based discrimination in the enforcement of justice only. Consequently, I shall first have to determine when and under what circumstances a discrimination based on such criteria may emerge; present the area of positive and negative obligations bearing on the bodies involved in the enforcement of justice; and conclude with a few conclusions on the state of the Romanian judiciary system from this viewpoint.

II. ETHNIC OR RACIAL BASED DISCRIMINATION

4. Before any attempt to accurately determine the content of the notion of racial or ethnic discrimination, it should be noted that, within public international law, this form of discrimination was the first to attract the attention of jurists and politicians. Racial discrimination, ethnic based discrimination and sex based discrimination were, for thousands of years, part of the Western European culture, which became dominant all over the world. In fact, all these forms can be grouped together, under a type of discrimination based on elements existing from an individual's birth, which, under normal circumstances, remain unchanged throughout one's lifetime. I shall call this type of discrimination basic, since it is the oldest and at the same time most serious form of discrimination. Initially an ideal, renunciation of the basic discrimination eventually became a fundamental characteristic of any democratic society. One must not forget, in this context, the disasters provoked along mankind's history by the adoption of basic discrimination as state policy; let us recall here the Holocaust or the Armenian genocide, to name but a few. That is why, one of the first acts of any state ruled by law, which wishes to be a member of the democratic states family, has to be the firm interdiction of any form of basic discrimination. I therefore have to determine when one can speak of such a form of discrimination, to be able to determine the object of the interdiction imposed on states.

II. 1. The general definition of discrimination

5. The European Court of Human Rights has stipulated, in the attempt to avoid giving a very formal definition, that the notion of discrimination commonly refers to the cases when an individual or a group is, without objective and reasonable justification, less well treated than another[12]. In other words, in a modern outlook, in which equality among people is not necessarily the antonym of

[12] ECHR, decision in the Belgian linguistic case of 23 July 1968 at www.echr.coe.int.

discrimination, the European Court of Human Rights has correctly assumed that to differentiate does not mean to discriminate, and art.14 of the Convention does not forbid just any kind of differentiation of treatment in the exercise of the recognized rights[13]. Consequently, in order to speak about discrimination, two cumulative conditions have to be met: the existence of a differentiation of treatment and the lack of an objective and reasonable justification to explain this differentiation. In relation to the first condition, the European Court further stipulated that, in order to determine the existence of a differentiation of treatment, a comparison has to be drawn between two individuals seen in similar circumstances: a real person, in a given circumstance, and a hypothetical person, pertaining to a different group, seen in the same circumstance[14].

6. Generally speaking, such a differentiation of treatment can be considered discrimination only insofar as it lacks an objective and reasonable justification, i.e. only to the extent that the enforced differentiation of treatment does not envisage a legitimate aim and is not proportional to that aim[15]. In other words, whenever the state is able to provide an objective, reasonable justification, which is proportional to the targeted aim, it is entitled to differentiate between the treatments of various groups. In fact, daily life sees millions of cases of differentiations of treatment which do not amount to discrimination. To give a basic example, it seems quite obvious that the interdiction of the minors' vote is a differentiation of treatment with an objective and reasonable justification, and therefore does not constitute discrimination.

7. To conclude this section on the general criteria to be used in the determination of the incidence of a case of discrimination, I would only like to add that I do not think the European Court intended to include positive discrimination in the field of applicability of art.14, thus instituting a supplementary burden on the states[16], the more so since some time ago it explicitly stated that art.14 did not imply positive discrimination[17]. At the same time, however, I believe the fact must be stressed that art.14 does not forbid positive discrimination either, because, although such a measure does determine a differentiation of treatment against the interests of a group which, in relation to the group that benefits from the positive

[13] F. Sudre, **Drept european şi internațional al drepturilor omului**, quoted above, p. 208; J.-F. Renucci, **Droit européen des droits de l'homme**, Ed. L.G.D.J, Paris, 2001, p. 90-91.

[14] ECHR, Koua Poirrez v. France decision of 20 September 2003 in R. Chiriță, **Curtea Europeană a Drepturilor Omului. Culegere de hotărâri pe 2003**, [The European Court of Human Rights. Collection of Decisions Made in 2003], Ed. C.H. Beck, Bucureşti, 2007, p. 232.

[15] ECHR, decision in the Belgian linguistic case of 23 July 1968, quoted above.

[16] In the same sense, see F. Sudre, **Drept european şi internațional al drepturilor omului**, quoted above, p. 209.

[17] ECHR, Chapman v. UK decision of 18 January 2001 at www.echr.coe.int.

discrimination, is set in a disadvantaged position, such differentiation can be objectively and reasonably justified by the very conception underlying the imposition of the positive discrimination[18].

II. 2. Determination of the racial or ethnic criterion

8. Having analyzed the general criteria to be used in determining the incidence of discrimination[19], let us now see how they apply in cases of racial or ethnic based discrimination. In this field, it must be emphasized that the only prerequisite needed for the incidence of discrimination is the existence of a differentiation of treatment based on one's racial or ethnic origin, since the European Court has stated that differentiations of treatment based on racial or ethnic criteria could never be justified, racial discrimination being the most odious form of discrimination[20]. Along the same line, the European Court has also stipulated that, in the context of differentiations of treatment applied to a state's citizens and foreign nationals, only very strong reasons could lead to the acknowledgement of the compatibility with the Convention of a differentiation of treatment exclusively based on an individual's citizenship[21]; still, the Court has not excluded the possibility for states to impose differentiated treatments in this matter, particularly in relation to a person's right to enter the state's territory, vote and access positions in its public service[22].

9. Before reviewing the state's obligations, a few more remarks seem necessary. A delicate issue raised in regard to racial or ethnic discrimination is related to understanding why a statement like "gypsies are thieves" is evidently racist and must be sanctioned, while a statement like "Spaniards are thieves" is not discriminatory. The European Court has suggested a correct solution, in my view. It has stipulated, particularly under the decrees given in cases like *Nachova v. Bulgaria* and *Cobzaru v. Romania*, which I shall present further on here, that those statements are discriminatory which put a group in an inferiority position,

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[18] O. De Schutter, **The Prohibition of Disability-Based Discrimination under the Instruments of the Council of Europe**, course outline, National University of Ireland, Faculty of Law, p. 9.

[19] For more details on the general conditions, see C. Bîrsan, **Convenția europeană a drepturilor omului. Comentariu pe articole**, quoted above, vol. I, p.....; R. Chiriță, **Convenția europeană a drepturilor omului. Comentarii şi explicații**, quoted above, vol. II, p. 229-239.

[20] ECHR, Timichev v. Russia decision of 13 December 2005 in R. Chiriță, **Curtea Europeană a Drepturilor Omului. Culegere de hotărâri pe 2005**, [The European Court of Human Rights. Collection of Decisions Made in 2005], Ed. C.H. Beck, Bucureşti, 2007, p. 365-366.

[21] ECHR, Gaygusuz v. Austria decision of 16 September 1996 at www.echr.coe.int.

[22] O. De Schutter; S. van Drooghenbroeck, **Droit international des droits de l'homme devant le juge national**, Ed. Larcier, Bruxelles, 1999, p. 387.

provided that the respective group has a history of inferiority behind[23]. Consequently, a negative statement about the Roma community may sometimes look discriminatory, while a somewhat identical statement about another community will not seem to have the same nature, but remain a simple insult.

10. Notwithstanding, one must not infer that only individuals belonging to ethnic or racial groups that were discriminated in the past could be victims of discrimination. In fact, the nature and range of the discriminatory acts is rather wide, and the above statement only envisages some of them. Thus, two general categories of an individual's, or an authority's, acts can be seen as a violation of the provisions of art.14 of the Convention[24]: the *direct discrimination* acts, which consist in putting an individual in an inferiority position as compared to other individuals who are in the same circumstance, but belong to a different group[25]; and the *indirect discrimination* acts that, in their turn, are of three kinds: acts which do not create an open discrimination, and seem neuter, but which nevertheless indicate the existence of a general practice leading to the concrete setting of a racial or ethnic group in a disadvantaged position[26]; acts which do not target a certain group, but which produce effects mainly on a specific group of individuals[27]; and acts whereby a group of individuals is exempted from the enforcement of a general rule that profits the others[28].

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[23] D. Petrova, **Nachova and the Syncretic Stage in Interpreting Discrimination in Strasbourg Jurisprudence**, in "Roma Rights Quarterly" nr. 2-3/2006, p. 96.

[24] O. De Schutter, **The Prohibition of Discrimination under European Human Rights Law**, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, 2005 report, p. 16.

[25] For instance, a trader's refusal to sell a product to a Roma individual, due to the latter's ethnic or racial origin, or a mayor's refusal to discuss land leasing to a company wishing to make real estate investments due to the Hungarian ethnic origin of its shareholders.

[26] For example, such a practice was found by the European Court in a recent case of racial discrimination of the Roma in regard to school education. The Grand Chamber of the Court found that, in the Czech Republic, over half of the children learning in special schools, which provided a minimum level of education, were of Roma origin, although the Roma did not exceed 5% of the total population. Under these circumstances, although there seemed to be no open act of discrimination in relation to the given case of the plaintiff who filed the complaint, the decision to put him in a special school seeming to have a neutral justification, the Court found it was a matter of discrimination, since the Czech state was not able to explain the enormous percentage of Roma children attending these schools (Grand Chamber of the ECHR, D.H. and others v. the Czech Republic decision of 13 November 2007, at www.echr.coe.int).

[27] For instance, in such a category one could include a decision to impose higher income taxes on people with more than five children, knowing that most of such numerous families are of Roma origin.

[28] For example, by excluding Hungarians from access to higher army ranks, following an order that creates such an exception.

11. Taking into consideration this categorization, I think the above mention to the historical past can only be applied to the indirect discrimination acts, because it is only in relation to these acts that use can be made of the group's position along history as evidence of the incidence of discrimination, and not of a simple coincidence. In fact, as we shall see further on here, this seems to be the most frequent hypothesis in the Court's jurisprudence in regard to the incidence of the discrimination acts in the judiciary's activity.

III. THE STATE'S OBLIGATIONS CONCERNING THE INTERDICTION OF RACIAL OR ETHNIC DISCRIMINATION

III. 1. General obligations of the state

12. It is unanimously admitted in the European Court's jurisprudence and in the doctrine that any text of the Convention imposes on member states two types of obligations: negative obligations, namely to refrain from certain acts, and positive obligations, namely to undertake certain measures. In the following section I shall examine, separately, those bearing on the members of the judiciary.

13. Before that, however, mention must be made of the fact that the penal or contraventional sanctioning of the racist or xenophobic speeches or manifestations by no means infringes on the fundamental rights of the sanctioned individuals. The Court has already stated more than once in its jurisprudence that such speech could not benefit from the protection granted by art.10 of the Convention, which warrants freedom of speech. This is because art.17 of the Convention does not allow for the use of the freedoms protected by the other provisions of the Convention to ends contrary to it[29]. Also, the same art.17 provides that art.11 of the Convention, which warrants freedom of association, does not warrant the right to

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[29] For instance, in one case, the Court found that the plaintiff denied in his work the amplitude and gravity of the crimes against humanity perpetrated during World War II, expressed insults against the Jews and instigated his readers to hate them. Or, such a manifestation of the freedom of speech is in flagrant contradiction to the Convention's provisions, which impose a spirit of tolerance and forbid discriminatory manifestations; the Court therefore ruled that art.10 was not applicable, since it did not protect such manifestations of the freedom of speech (ECHR, Garaudy v. France decision of 24 June 2003, in R. Chiriță, **Curtea Europeană a Drepturilor Omului. Culegere de hotărâri pe 2003**, quoted above, p. 170). Similarly, the Court ruled that art.10 did not protect the individual who posted on his window a photo of the New York twin towers on fire and a message stating: "Down with Islam! Protect the British people!" since such an attack on an entire religious group could not be protected under art.17, which forbids the protection of the Convention rights in cases of actions contrary to its aims (ECHR, Norwood v. UK decision of 16 October 2004, in R. Chiriță, **Curtea Europeană a Drepturilor Omului. Culegere de hotărâri pe 2004**, [The European Court of Human Rights. Collection of Decisions Made in 2004], Ed. C.H. Beck, Bucureşti, 2007, p. 201).

set up associations with objectives that are contrary to the Convention's aims and to the pluralism of ideas that governs a democratic society[30].

III. 2. Negative obligations of the bodies that intervene in the enforcement of justice in the ECHR jurisprudence

14. The negative obligations of the state that are imposed on the judiciary consist in a series of interdictions concerning their activity. The judiciary is mainly forbidden, based on any individual's right not to be subjected to racial or ethnic discrimination, any act that may indicate the existence of racist reasons in the exercise of their activity. Consequently, the judiciary must refrain from passing any judgment justified by the ethnic or racial origin of one of the parties only, from aggravating the condition of an individual based on his origin, as well as from making any statements or affirmations indicating prejudice of a racial or ethnic character.

15. Unfortunately, as the Court's up to date jurisprudence indicates, such circumstances seem to be very frequent in the activity of the Romanian judiciary: I must stress that so far Romania is, after Turkey, the Council of Europe's member state with the highest number of convictions based on ethnic and racial discrimination in the activity of the judiciary, if we also considered the cases that ended up in amiable settlements, whereby the Romanian state admitted the existence of the discriminatory acts.

16. The first such judgment was passed in the *Moldovan and others v. Romania* case. In 1993, in the village of Hădăreni, a row broke out between three men of Roma origin and a Romanian individual, during which the son of the latter, who had intervened, was stabbed to death by one of the Roma men. The three Roma people sought refuge in a nearby house. A compact and angry mob gathered around the house. The village police commander and several cops were also among the crowd. The house was set on fire. Two of the Roma people managed to get away but they were eventually caught and lynched. The third could not get out of the house and died in the fire. The plaintiffs stated that the policemen incited the

[30] For example, art.11 is not applicable to the establishment of an association of the "Polish victims of Bolshevism and Zionism", which undertakes to abolish the privileges of people of Jewish origin and bring the persecutions of people of Polish origin to a stop (ECHR, W.P. and others v. Poland decision of 2 September 2004, in R. Chiriță, **Curtea Europeană a Drepturilor Omului. Culegere de hotărâri pe 2004**, quoted above, p. 210). Similarly, the Court ruled that art.11 did not warrant the right to establish an association aimed at instituting a Moslem Caliphate and the sha'aria law and fighting against the West (ECHR, Kalifatstaat v. Germany decision of 11 December 2006, in R. Chiriță, **Curtea Europeană a Drepturilor Omului. Culegere de hotărâri pe 2006**, [The European Court of Human Rights. Collection of Decisions Made in 2006], Ed. C.H. Beck, Bucureşti, 2007, p. 444-445).

mob to destroy and set on fire other houses belonging to the village's Roma community. The next day, thirteen of these houses were destroyed. A great deal of personal belongings was also destroyed. The Roma inhabitants of the village filed penal complaints against those involved, including six policemen. By 1995, all complaints against policemen were classified. In 1997, a trial was filed with a court against eleven of the village inhabitants. Several eyewitnesses declared that the policemen had provoked the reprisals and allowed the Romanian inhabitants to attack the Roma houses. During the trial, all the accused confirmed that the policemen had incited the mob to set the houses on fire and later tried to hide the facts. The court established that the inhabitants wanted to drive the Roma out of the village with the authorities' support. In its ruling, the court underlined that in the respective village the Roma community was marginal, and had constantly displayed an aggressive behavior ignoring and deliberately infringing on the legal norms accepted by society. Five villagers were convicted for manslaughter and other crimes and seven for other offenses. The court decreed convictions of one to seven years imprisonment. The court of appeal convicted a sixth villager for manslaughter, raised the term of one of the initial five and lowered the terms of the others. In 1999, the Supreme Court broadly maintained this solution. In 2000, two of the convicted villagers were pardoned by the president. The European Court found that the plaintiffs were aggressed due to their Roma origin. Having no competence over the arson of the plaintiffs' houses, as it had happened prior to Romania's ratification of the Convention, the Court underlined that the plaintiffs' Roma origin had had a decisive bearing on the duration and manner of the penal procedure. Since the Romanian state did not offer any justification for this, it was found in violation of art.14 of the Convention[31]. As mentioned earlier here, similar incidents led to two other circumstances in which the Romanian state admitted, by way of unilateral statements made before the ECHR, the existence of discriminatory acts on the part of the judiciary[32].

17. If under the *Moldovan and others* judgment, the Court sanctioned the fact that during certain penal procedures rulings were made on racist considerations, more recently the European court sanctioned the Romanian state for remarks of a racist nature uttered by a judiciary authority, namely a prosecutor. In this case the plaintiff showed that two policemen retained him and beat him inside the police

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[31] ECHR, Moldovan and others (no.2) decision of 12 July 2005 in R. Chiriță, **Curtea Europeană a Drepturilor Omului. Culegere de hotărâri pe 2005**, quoted above, p. 240-243.

[32] ECHR, Gergelye decision of 26 April 2007, at www.echr.coe.int; Kalanyos and others decision of 26 April 2007, at www.echr.coe.int. Mention must also be made of the fact that such statements were also made by the Romanian state in the Moldovan case, when some of the plaintiffs accepted the deal offered by the Romanian state (ECHR, Moldovan and others v. Romania (no.1) case of 5 July 2005).

precinct. The incident was witnessed by four other policemen who did not intervene. The forensic report concluded that the plaintiff's lesions were the result of his being hit with hard objects. On the same day, the plaintiff filed a penal complaint against three of the policemen. Several days later, the three policemen gave written statements denying they had beaten the plaintiff. None of the policemen mentioned in the statement that the plaintiff had had bruises or other lesions upon arriving at the precinct. Later on, the policemen changed their statements, now claiming that upon returning from the apartment search the plaintiff had presented numerous lesions. In November 1997, a prosecutor from the Military Prosecutor's Office refused to start a penal investigation claiming that the circumstances were not clear. The prosecutor nevertheless wrote in his report that both the plaintiff and his father were anti-social individuals, predisposed to violence and robberies, like so many members of their ethnic group. The prosecutor also considered that the statement given by a female witness could not be taken into account because she too was a "gypsy". The plaintiff attacked the prosecutor's resolution before the hierarchically superior prosecutor. The latter rejected the appeal, mentioning in his report that there was no evidence the policemen had beaten the plaintiff, who was anyway "a 25 year old gypsy known for constantly getting into scandals and fights". The Court found that art.14 was violated, considering the tendentious remarks of the authorities regarding the plaintiff's ethnicity. At the same time, the Court considered that, in relation to these remarks, any attempt by the plaintiff to obtain reparation for the damage done was purely illusory[33].

III. 3. Positive obligations of the bodies that intervene in the enforcement of justice in the ECHR jurisprudence

18. Like almost all other texts of the European Convention, besides negative obligations, i.e. to refrain from certain acts, art.14 imposes on states positive obligations, i.e. to take the necessary measures for a genuine and concrete protection of the warranted rights. This is because on the one hand the interdiction of discrimination imposes the adoption of certain legislative measures, and on the other hand art.14 of the Convention creates a horizontal effect, warranting each individual's right to equal treatment not just in his relations with the state but also with any other individual or institution[34]. Making abstraction of the positive obligations imposed on the legislative bodies, the sole positive obligation imposed

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[33] ECHR, Cobzaru v. Romania decision of 26 July 2007 at www.echr.coe.int.

[34] ECHR, Pla and Pucernau v. Andorra decision of 13 July 2004, in R. Chiriță, **Curtea Europeană a Drepturilor Omului. Culegere de hotărâri pe 2004**, quoted above, p. 221.

on the judiciary is that of ensuring the effective sanctioning of the discrimination acts.

19. An innovative judgment regarding this obligation was ruled not long ago by the European Court, which imposed on the Convention signatory states positive obligations of a procedural nature, bearing exclusively on the judiciary, which are compelled to launch and carry out an effective penal investigation whenever an individual credibly claims that he/she was the victim of a serious discriminatory act. In this case, two individuals of Roma ethnic origin served their mandatory military term in a division of the army charged with building apartments. They were arrested for unmotivated absences but managed to escape from the building site where they were working and hid in their grandmother's house, in a Roma quarter. Neither of them was armed. Several days later, a military police unit received intelligence on the place of their hiding, and four militaries, led by G., were sent to the house. The militaries got orders to use any means necessary for their arrest. G. was armed with a revolver and a machine gun. At seeing the military vehicle in front of the house, the two ran away. After asking them to stop, G. opened fire, and they died on the way to the hospital. A neighbor stated that several policemen had fired their guns and at a certain moment G. had pointed the gun at him and insulted him shouting: "Damn gypsies!" According to the autopsy report, the two men died from wounds provoked by machine gun shooting. The military investigation report concluded that G. acted in keeping with the military regulations and tried to protect the fugitive's life by asking them to stop and aiming at less vital areas of their body. The military prosecutor decided not to prosecute the case. The plaintiffs' appeals led nowhere. The European Court found that the authorities investigating the case were in possession of a neighbor's statement indicating that G. had made racist remarks at the time of the shooting. Regarded in light of the numerous reports on anti-Roma prejudice and attitudes in Bulgaria published so far, this statement needs to be verified, the more so since G. used fire arms against unarmed and nonviolent people. Therefore the prosecutor in charge of the investigation should have checked this information much more seriously. Under these circumstances, the Court concluded that the Bulgarian state infringed on its positive obligation to fight discrimination and racism by not undertaking an effective investigation into the possible racist manifestation that led to the death of two people[35].

20. Considering the visible similarities to Romanian law, there is no surprise in the fact that Romania was subsequently convicted, in its turn, for the violation of art.14 of the Convention for a similar issue related to the same *Cobzaru v. Romania*

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[35] ECHR, Nachova and others v. Bulgaria decision of 26 February 2004, in R. Chiriță, **Curtea Europeană a Drepturilor Omului. Culegere de hotărâri pe 2004**, quoted above, p. 12-15.

case, described above. Because the Court established that in the given case there was enough evidence to indicate that racism played a role in the bad treatment applied to the plaintiff, it found a violation of art.14, which forbids discrimination. The Court noted that in Romania, the numerous incidents in which the Roma people were victims of violence and the passive response of the authorities to these incidents were known due to the press. The Court found that the authorities did affirm they were carrying out numerous anti-racism campaigns, but, under these circumstances, they should have taken special measures to find out whether the plaintiff had been a victim of racial violence. Nevertheless, such measures were by no means taken by the prosecutors, which means the Romanian judiciary violated their procedural obligations imposed by art.14[36].

21. Thus, starting with the *Nachova* and continuing with the *Cobzaru* judgment, the European court imposed on the states a procedural task, consisting in the obligation to undertake immediate and thorough official investigations, meant to clarify the existence of a racist motive behind certain actions, particularly when undertaken by state agents. Such a solution is entirely logical. The respect states should show any individual, the need to warrant human dignity must also impose reactions against such acts. Or, if the states were allowed to treat with indifference accusations of racism, these objectives could not be fulfilled; this makes the imposition of procedural obligations, primarily on prosecutors and policemen, only natural[37]. In fact, as long as, based on art.1 of the Convention, states have pledged to warrant all individuals the effective observance of the rights stipulated in the Convention, the obligation to undertake credible investigations in regard to the violation accusations of the substantial rights stipulated in the Convention, such as nondiscrimination, appears to be a general obligation of any European state[38].

22. At the same time, although I entirely agree to all of the above, I cannot refrain from noting certain negative aspects of this jurisprudence. I remind here that, in both cases, the Court did not find the existence of discrimination in the first instance, stating that there was not enough evidence to prove the existence of a racist motive on the authorities' part. In other words, the European Court completely separated the procedural aspect from the substantial one, contenting itself with finding the existence of a procedural violation[39]. Such an attitude may

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[36] ECHR, Cobzaru v. Romania decision of 26 July 2007 at www.echr.coe.int.

[37] L. Farkas, **The Prohibition of Disability-Based Discrimination under the Instruments of the Council of Europe**, in "European Anti-Discrimination Law Review", nr. 3/2006, p. 26.

[38] I. de Jesus Butler, **The Rights of the Child in the Case Law of the Inter-American Court of Human Rights: Recent Cases**, in "Human Rights Law Review" 2005, p. p.164.

[39] This procedure is not new in the European Court's jurisprudence. Often times, particularly in regard to the violation of art.2 or 3 of the Convention, when suspecting the existence of a state act

lead, in my view, to unpleasant consequences as well[40]. First of all, such a solution may determine a lower need for the plaintiff to prove that in fact he/she was the victim of discrimination. Secondly, the finding of a procedural violation, in the absence of a violation of the substantial right, is less demeaning for a state, as the Court in fact stated several times in its jurisprudence related to the states' procedural obligations[41]. Thirdly, the finding of a procedural violation only may lead to the notion that the remedies that must be adopted by the states should concern a change in the applicable procedure, and not the taking of measures designed to prevent discrimination acts. Therefore, although the idea to impose a procedural obligation on the states seems to me a good one, I still think the violation of this obligation could and should be connected every time to the violation of any individual's substantial right not to be discriminated. It is my opinion that in the context in which the European Court admitted, under the Moldovan and others judgment, that the general attitude of the judiciary could constitute a violation of art.14, the infringement of the procedural obligation referred to in art.14 could be assimilated to such an attitude and lead to a decree identifying a discriminatory act.

IV. CONCLUSIONS ON THE ROMANIAN JUDICIARY'S OBLIGATIONS IN REGARD TO RACIAL DISCRIMINATION

23. Considering the obligations imposed by the Court's jurisprudence, but also by the Anti-Discrimination Directive of the European Council, I personally believe that Romania has lost control over the matter. Thus, in my view, based on all the reports issued by international organizations on this subject, the Romanian state in general and judiciary in particular do not seem to make any effort whatsoever to ensure the observance of these obligations and, implicitly, the warranting of each individual's fundamental right not to be subjected to discrimination. A few further considerations will undoubtedly suffice to prove this viewpoint.

24. In regard to the conviction for offenses of a racial nature, imposed both under the enforcement of the effective protection of the rights consecrated under art.14 of the Convention theory, and among the recommendations of the European Commission against Racism and Intolerance (ECRI), I think several essential

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touching on the plaintiff's right to live, but lacking sufficient evidence in this sense, the Court finds the existence of a violation of the procedural obligation bearing on the judiciary only, thus ensuring the sanctioning of the state, under assumption that the latter has enough power to dissimulate acts contrary to the Convention.

[40] In this sense, see the notes to the Nachova v. Bulgaria decision in „Harvard Law Review" 2006, p. 1912-1914.

[41] See, for example, ECHR, Labita v. Italy decision of 6 April 2000, at www.echr.coe.int.

remarks are called for. First, as the report of the Committee on the state of discrimination in Romania has showed, our state faces a rather delicate position from this viewpoint, due to the existence among the Romanian political spectrum of parties that practice xenophobia and racism as a constant feature of their political discourse. In this context, an additional problem emerges, namely the existence of parliamentary immunity, since the attempt to give a penal sanction to a political discourse of such nature will probably meet, each time, with the need to enforce the parliamentary immunity waiving procedure[42]. I think in such hypothesis the Romanian judiciary must be prepared to make use of a different type of measures in order to sanction any political deviation towards a discriminatory discourse, namely the penal responsibility of the political parties, based on art.19[1] of the Penal Code, which allows for the application of penal sanctions against these entities[43]. I thus believe that in the case of parties and associations which constantly promote such a discourse, the enforcement of a penal sanction for such acts would be a useful tool for the penal protection of the fundamental human rights, even though the law does not allow for the dissolution or suspension of the political parties' activity. In this context it is my belief that a more determined reaction is needed on the part of the penal investigation bodies, considering that the evidence of such offenses is very easily obtainable, and the requirements for the legal person's penal responsibility are not hard to meet in such hypothesis, the act being evidently committed in the name of the legal person, if not to its benefit, or in the exercise of the moral person's field of activity[44].

25. All the more so since, in keeping with Emergency Ordinance no.31/2002 penal sanctions can be enforced for acts like incitement to racial hatred, use of fascist, racist or xenophobic symbols, or promotion of the cult of personalities guilty of crimes against humanity, and of fascist ideas. Or, as ECRI remarked, these legal provisions do not seem to have attracted the Prosecutor's Office representatives' attention in any way, since the Romanian authorities allow,

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[42] S. van Drooghenbroeck, **La répression des délits à caractère raciste et négationniste en Belgique**, în P. Lambert (dir.), **Les partis liberticides et la Convention européenne des droits de l'homme**, ed. Bruylant, Bruxelles, 2005, p. 42.

[43] The solution was already adopted in Belgian law, where the judiciary system, unable to give penal sanctions to the politicians of a far right party enjoying parliamentary immunity, gave a penal sanction to the party itself for the offense of instigation to racial and ethnic hatred (Belgian High Court, Vlamms Blok decision of 9 November 2004, in "Journal des Tribunaux" 2004, p. 756-858). It must also be noted that at the time of sanctioning the respective party held over one third of the Belgian parliament's mandates, having emerged from the last legislative elections as the country's second party.

[44] For the analysis of these conditions, see F. Streteanu, R. Chiriță, **Răspunderea penală a persoanei juridice**, [Penal Responsibility of the Legal Person], second edition, Ed. CH Beck, Bucureşti, 2007, p. 390 and the following.

despite the existence of the above mentioned legal provisions, for the functioning of associations like "Noua Dreaptă" [The New Right], which openly affirms its anti-Semitism and claims descent from the Romanian legionary movement, or the publication of magazines like "Lumea legionară" [The Legionary World], not to remind the public statements and published texts of PRM (Greater Romania Party) representatives. That is why, in its latest report, ECRI imperiously asks the Romanian authorities to enforce the legal provisions that can prevent the activity of such organizations[45].

26. Actually, our penal code does include several offenses related to discriminatory activities: art.247 sets forth penal sanctions for the restriction of certain rights or for putting an individual in an inferiority position for racist or xenophobic reasons; art.317 sets forth penal sanctions for nationalist-chauvinist propaganda and incitement to race or nationality based hatred; art.166 sets forth penal sanctions for propaganda for the establishment of a totalitarian state. Under these circumstances, disregarding the stupid explanation given by the Romanian authorities to ECRI, namely that the absence of cases in which these legal provisions were enforced was due to the fact that policemen, prosecutors and judges did not know the law, I can but wonder why the Romanian judiciary system has not managed, to the best of my knowledge, to produce, during the last twenty years, any conviction based on these legal texts[46]. Despite my extremely detailed documentation attempts, I have managed to find not one individual who was tried for such acts, though it normally takes just several hours in front of the TV to identify several such offenses[47].

27. The explanations provided by the Romanian authorities are, in my view, on the verge of ridicule. I reminded earlier here that the authorities claimed the members of the judiciary did not know the legal provisions in the field. Additional explanations are that prosecutors find it difficult to identify members of the organizations promoting racism, though these organizations have headquarters, with official addresses and phone numbers, or that evidence of such acts is hard to come by. From this viewpoint, besides the fact that ECRI has been recommending

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[45] Conseil de l'Europe, European Commission against Racism and Intolerance, **Al treilea raport despre România**, [Third Report on Romania], adopted on 24 June 2005, Strasbourg, p. 9.

[46] I would like to remind that the California police system was considered to be racist because, during 2000-2003, it only investigated 314 penal files having as object racism related acts. For details, see R. Banks, **Racial Discrimination in the Criminal Justice System**, in "Ethics and the Criminal Justice System" 2004, p. 60-62. In the same sense, see also the **Race, discrimination and the Criminal Justice System** report, published at www.blink.org.uk/abpoa.htm, on the situation in the UK.

[47] In this sense, see the report drafted in 2001 by R. Weber on the implementation of the European nondiscrimination legislation at www.interights.org.

for some time that evidence in such cases should be shared, one should not forget that racism is prejudice that can be proven by the very general attitude of an individual, as results from the above mentioned ECHR jurisprudence. That is why the European Court has made it clear in several instances that the imposition by the magistrates, on an individual, of the task to prove that a certain act was in fact justified by racist motives, and not just seems to have had such justification, is an impossible evidence, which affects the effective character of the anti-discrimination protection procedural system[48].

28. Back to the Romanian judiciary's activity, I further wonder why, even after the granting of the Court's judgment, no one thought of starting penal investigation of the judge who gave the respective solution in the *Moldovan* case or the prosecutors involved in the *Cobzaru* case, given that the penal prescription terms were not met yet. The only conclusion one can draw is that either the Romanian judiciary is not interested in, and could not care less about, the enforcement of the racial or ethnic discrimination related legislation, or it is dominated by racial prejudice so strong that it does not allow for penal convictions for acts of these type. I have no idea which of the two is more accurate, or if, by any chance, they both are, but I cannot find any other explanation for the fact that, of all the fight against discrimination, our judiciary system has only understood that the magistrates are victims of a sum of salary based discriminations, resulting from judgments they themselves granted. Making abstraction of the CNCD (The National Council for Combating Discrimination)'s laudable efforts, any observer of Romanian jurisprudence in the field of discrimination would easily reach the conclusion that the most discriminated group in Romania is neither the Roma, nor any other minority, but that of the magistrates, which is inadmissible in a society claiming to be European. I do not deny that those legal provisions concerning the magistrates' salaries could be considered discriminatory, but what seems to me very worrying is that the same magistrates who considered themselves discriminated were able to pass sentences such as those in the Moldovan and Cobzaru cases...

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[48] For details see T. Ahmed; I. de Jesus Butler, **The European Union and Human Rights: An International Law Perspective**, in "The European Journal of International Law" 2006, p. 799.