

HUMAN DIGNITY IN THE CONTEXT OF DISCRIMINATION

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ABSTRACT: *The concept of human dignity allows giving up a formal approach of equality in favour of substantive equality. Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination transposes the provisions of Directive no. 2000/43/EC of the Council regarding the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin and the provisions of Council Directive 2000/78/EC on establishing a general framework for equal treatment in terms of employment and occupation. The Ordinance no. 137/2000 regulates both the formal and substantive discrimination. In analyzing the infringement of article 15 with the marginal title "The Right to Personal Dignity", the National Council for Combating Discrimination envisages bringing together two elements that form the content of the offense: the conduct (statements, gestures, attitudes) publicly manifested aiming at or intended to prejudice dignity and/ or to create an intimidating, hostile, degrading, humiliating or offensive atmosphere of a person, group of persons or of a community and the cause or the motivation with reference to the affiliation to a particular race, nationality, ethnicity, religion, social class, disadvantaged category, or the beliefs, sex or sexual orientation thereof. The Council refers to the analysis grid of the European Court of Human Rights in the matter of discrimination.*

KEYWORDS: *human dignity; discrimination; the National Council for Combating Discrimination; the European Court of Human Rights.*

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1. PRELIMINARY

Through article 1 paragraph (3) of the Constitution of Romania, the Romanian constitutional system guaranteed and raised human dignity to the rank of supreme value of the Romanian State, and article 16 paragraph (1) guarantees the right to equality: "All citizens are equal before the law and public authorities, without any privilege or discrimination". The principle of non-discrimination appears as well in article 14 of the European Convention on Human Rights which provides that the exercise of all rights and freedoms it recognizes has to be ensured without any discrimination based, especially, on

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sex, race, colour, language, religion, political or any other opinions, national or social origin, affiliation to a national minority, property, birth or any other status.

In similar terms, the principle of non-discrimination is recognized by article 2 of the United Nations International Covenant on Civil and Political Rights, article 1 paragraph 1 of the American Convention on Human Rights and by article 2 of the African Charter on Human and Peoples' rights (Bîrsan, 2005: p. 889). The United Nations International Covenant on Civil and Political Rights (article 26), the American Convention on Human Rights (article 24) and the African Charter on Human and Peoples' Rights (article 3 paragraph 1) also include the principle of equality of all people before the law. Furthermore, the Protocol no. 12 to the European Convention on Human Rights concerning the general prohibition of discrimination, adopted on June 26th 2000, provides under article 1 that the exercise of any right provided by the national law of a contracting State is assured, without any discrimination based, especially, on sex, gender, race, colour, language, religion, political or other opinions, national or social origin, affiliation to a national minority, property, birth or any other status, and that no one may be discriminated by a public authority, if it were based on one of aforementioned reasons.

2. THE RIGHT TO PERSONAL DIGNITY

In Romania, the National Council for Combating Discrimination is the state authority in the field of discrimination, autonomous, with legal personality, under parliamentary control and guarantor of compliance and enforcement of the principle of non-discrimination. Its regulatory framework is governed by the Ordinance no. 137 of August 31st 2000 on preventing and sanctioning all forms of discrimination (republished in Official Gazette No. 99 of February 8th 2007). The Ordinance transposes the provisions of Council Directive 2000/43/EC on the implementation of the principle of equal treatment between the persons, irrespective of racial or ethnic origin, published in the Official Journal of the European Communities (OJEC) no. L 180 of July 19th and the provisions of the Council Directive 2000/78/EC of establishing a general framework for equal treatment in employment and occupation, published in the Official Journal of the European Communities (OJEC) no. L.303 of December 2nd 2000.

According to article 1 paragraph (2) of the Ordinance, the principle of equality among citizens, of exclusion of privileges and discrimination in the exercise of the fundamental rights and freedoms shall be guaranteed. The Ordinance no. 137/2000 regulates both the formal and the substantial discrimination.

It is considered discrimination any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, no contagious chronic disease, HIV infection, belonging to a disadvantaged category as well as any other criteria aiming at or resulting in the restriction, prevention of recognition, enjoyment or exercise, on equal terms, of the human rights and fundamental freedoms or the rights provided by law in the political, economic, social, cultural or in any other field of public life (article 2, paragraph (1)). Are discriminatory - according to the Ordinance – the provisions, criteria or practices that are apparently neutral and that bring disadvantages to certain individuals based on the criteria set out in paragraph (1) towards any other persons, unless such provisions, criteria or

practices are objectively justified by a legitimate purpose and the means of achieving that purpose are appropriate and necessary. Any discriminatory behaviour shall entail the contravention, unless it fall under the criminal law.

The article 15 of the Ordinance ("Personal Dignity") provides: "Any public behaviour with a nationalistic-chauvinist character, any incitement to racial or national hatred, or any behaviour aiming to prejudice a person's dignity or to create a hostile, degrading, humiliating or offending atmosphere, perpetrated against a person, a group of persons or a community on account of race, nationality, ethnic group, religion, social category or appurtenance to a disadvantaged category, on account of beliefs, sex or sexual orientation shall constitute an offence, unless the deed falls under the incidence of criminal law".

The person who feels discriminated against may refer to the Council within one year from the date of the deed or from the date on which it becomes aware of having been committed, by application being entitled to request the removal of the consequences of discriminatory acts and restore the situation before discrimination.

Regarding the burden of proof, according to article 20 paragraph (6) of the Ordinance, the person concerned must prove the existence of facts which allow to be supposed the existence of a direct or indirect discrimination, and the person the complaint was filed against bears the burden of proving that the facts do not constitute discrimination. It can be invoked any evidence, including audio and video recordings or statistical data, and the decision belonging to the College Director may be appealed to the administrative contentious court, according to the law.

The acts covered by article 15 of the Ordinance shall be penalized with a fine from 400 lei to 4,000 lei, if perpetrated against an individual, respectively a fine from 600 lei to 8,000 lei, if perpetrated against a group of people or a community.

3. THE JURISPRUDENCE OF THE COLLEGE DIRECTOR OF THE NATIONAL COUNCIL FOR COMBATING DISCRIMINATION

The jurisprudence of the College director of the National Council for Combating Discrimination has not a uniform character, there are similar cases differently treated. Regarding this aspect, in the dissenting opinion to the Decision no. 170 of April 9th 2013, Haller István said that "(...) it is very difficult for the institution to have a uniform case law, so that it happens that in certain cases, the C.N.C.D. notes the discriminatory character of mentioning a politician woman's hair colour, and in other causes does not find the discriminatory nature of the allegations assigning criminal offenses to entire Roma community" and it drew the attention that "the inconsistent decisions could have an adverse effect at some point".

In many cases, the argumentation is centred on the issue of infringement of the dignity of certain individuals or groups through a differential treatment based on prejudice or stereotype. The prejudice is someone's idea that is preconceived and often erroneous and unfavourable, which is imposed by the environment or by education (NODEX, 2002). Stereotypes are incorrect generalizations about the characteristics or the attributes of a person or a group, undesirable characteristics or that some members of the group or the group do not have. It is not necessary for the generalization to have a negative connotation, but two aspects are essential: the fact that by using stereotypes is avoided an analysis regarding the actual features and capacities of an individual as well as the fact

that they result from generalizations made by others regarding its person, and not his own self-definition attempts by the inclusion in an affiliation group.

Stereotypes are dangerous as they accredit the idea that a person is less valuable than others based on undesirable characteristics that the person does not have because generalization may fail. And yet some stereotypes have negative connotations. Negative characteristics such as propensity to commit crimes, vice, lack of intelligence, which are distributed to the whole human race are falsely attributed to a target group. The prejudices and the stereotypes about the capabilities and the features of individuals or groups are often perpetuating outdated concepts deeply rooted regarding their inferior status.

It is contrary to the dignity the regulation promoting or perpetuating these features because they accredit the idea that the individuals or the groups who possess them are less valuable than others. For example, the fact that young people are inexperienced and therefore less able to occupy leadership positions. From the moment this way of perceiving the group gets spread, other persons as well will adversely treat these people out of the belief that such treatment reflects the way they deserve to be treated. The violation of these individuals' dignity results from the fact that they are denied the access to the benefits and the opportunities the others have access to based on misconceptions that the person or the group in question possess characteristics that make them less able to take advantage of those opportunities. The stereotype evoke the fact that the persons they apply to are inferior to others in a matter that is specific to the right that is denied them, or simply inferior as a human beings.

Thus, by the Decision no. 386 of 8 July 2008, the College director considered that the behaviour publicly manifested consisting in organizing a competition for the selection of candidates for local counselor for which it was established as a criterion for participation the maximum age of 45 years aimed at violating the dignity of persons over 45 years because they are considered incompatible with the function of local counselor. Likewise, by the Decision no. 186 of 20 June 2012, the College director considered that the publication "Evenimentul zilei" has harmed the dignity of female persons by publishing the article entitled "She shouts and gets angry. See the complete portrait of the woman who is in a management position". The College director held that the title induces the opinion according to which women are not able to exercise a management comparable to that of men; or, a quality management act is not related to the sex of the person who carries it, but only with professional training. Finally, by the Decision no. 20 of 4 May 2010, in connection with the statement published in the „Jurnalul Național” that "the upsurge of crimes committed by gypsies in Italy and not only, as well as the association of these facts with the Romanian people that is presented as a nation of rapists, thieves, have negative effects not only on the image of our country but on the Romanians of good faith who go abroad to earn an honest living. Paradoxical situations have been reached in which Romania no longer means for the media and the public opinion abroad the country of Nadia Comaneci, of Constantin Brancusi or of George Enescu, it is no longer the country with traditions and amazing beauties, but a country of barbarians who steal, rape, hit. And everything starts from a confusion of terms: Roma/ Romanian, terms that in other languages, such as Italian - rom/rumeno, are very similar and the differences disappear in the collective mentality, so these words are synonymous and nobody knows if the rapist is Romanian or Roma". The College director of C.N.C.D. regulated that a person's ethnicity

cannot be considered as relevant in relation to an offense, especially without taking into account their nationality (citizenship) in relation to some people and the imputation of a particular ethnic origin unlike other ethnic origins, given that they are all citizens of the same State.

In order to know if the applicant is the victim of an affront to its dignity, the Council uses a subjective-objective approach, analyzing whether the individual himself, depending on his personality and the facts of the case, felt humiliated and if differently treating a person had the effect of maintaining prejudices or stereotypes.

In the absence of express provisions in the Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination, namely the contraventions legislation, to determine the public nature of the act, in jurisprudence, the College director has used the provisions of article 152 of the old Penal Code, according to which "the act is considered committed „in public" when it occurred: *a*) in a place which by its nature or destination is always accessible to the public, even if no one is present; *b*) in any other place publicly accessible, if there are present two or more persons; *c*) in a place that is not accessible to the public, with the intent that the act should be heard or seen, and if the result was produced toward two or more persons; *d*) in an assembly or meeting of more people, except for the meetings which can be considered of a family character, because of the nature of relations between the participating people; *e*) by any means through which the offender realized that this act could reach to the public knowledge”.

The National Council for Combating Discrimination can identify and punish the acts of discrimination in the absence of victims determined as passive subjects. Not only that the judicial administrative body, the College director of the Council, may take notice, overcoming the obstacle that would be represented by the possible passivity of the victim/victims to constitute as plaintiffs, but, once notified, the College shall not be required to identify a determined victim. The victims can be considered both the social group that is discriminated: Roma, Romanians, Moldovans, each of its members as well as the society as a whole, because the facts of discrimination attack justice as social, legal value (Prisăcariu, 2013: p 50).

In this respect, the College Director, deliberative and decision-making body of the Council, decide in its Decision no. 53 of February 6, 2013 which states that "in cases of violation of human dignity through discrimination the existence of an intent is not relevant, nor of an actual victim". In this case, it was considered that the statements of the defendant of the kind "(...) Mister, rather than demanding the vote of a sect, I'd better not need any vote. My entire life I will be living imprisoned in my yard in Pipera and I do not care and do not want to be voted by any Baptist. Satanic votes from ... I do not want ... who denied Christ "- severely bring prejudice to all persons belonging to the Baptist religious cult. The College held on this occasion that the defendant by his allegations has violated the dignity of an entire community and has been repeatedly sanctioned for the discriminatory statements against several categories of people (women, minority Roma, people with a different sexual orientation, persons with disabilities) and applied a maximum civil penalty in the amount of 8,000 Lei”.

Among others, the National Council for Combating Discrimination has taken action regarding the contents of the article published in the newspaper „Gândul” of August 27, 2006, where the defendant Cosmin Nicula stated: „I am expecting Mr. A.N. to join the organization of P.S.D. Deva, as I consider he does no longer find its place in the

organization P.S.D. Sector 1. I do not think that a crow, namely M.V., can be our party spokesman. It is not right". In its judgment delivered on June 7th 2006, the College director examined whether the right of free expression of Mr. C.N. is subject to certain conditions, restrictions or penalties provided by the law, measures that are necessary in a democratic society for the protection of the reputation or rights of others. In line with the previous case law, the College director held that the use of phrases such as "Gypsies," "Roma", "gay", "AIDS person" or "crow / crows" with regard to certain individuals should be analyzed in relation to the whole context, taking into consideration the statements, articles, publications per se, the title and the content of their articles, the views of those who wrote or presented them, the way and the context they were made and their impact.

The Decisions of the College director in similar cases are as follows: the Decision no. 219 of September 2nd 2005 on the use of "gay" expression, the Decision no. 323 of November 28th 2005 on statements like "Roma (...) They embarrass us", the Decision no. 9 of January 17th 2006, the Decision no. 416 of November 28th 2007, the Decision no. 92 of May 23rd 2007 on the use of the words "Gypsy", "Gypsy woman", the Decision no. 165 of June 6th 2006, the Decision no. 222 of August 27th 2007 on the allegations on the Hungarian minority, the Decision no. 251 of June 7th 2006 on statements like "crow", the Decision no. 180 of July 17th 2007 on statements like "Roma", the Decision no. 20 of May 4th 2010 on the articles published in „Jurnalul Național” under the title ""Gypsy" instead of "Roma"" and "From Roma to the referendum", including the fragments "in 1993, Roma had not become the bogeyman of Europe" and "the word "Roma" does not have that special scent of the word "Gypsy"".

In the aforementioned case, the College Director found that the differential treatment of the persons (A.N. and M.V.), which were the object of the statement, under the created aspect, harmed the dignity of M.V. It was taken into consideration the exposure presented in the point of view submitted by the victim, according to which he was about to sue the defendant for criminal liability. By the judgment, it was retained a conduct that has the effect of violating the dignity and creating a humiliating atmosphere against a person connected by the association of its membership in ethnicity or colour. In order to decide in this manner, the College Director stated that in public, using the name "crow" has been repeatedly associated with ethnicity, race or colour of certain categories of people in a context that had the effect of creating a humiliating atmosphere. Likewise, the College director stated that in its jurisprudence it was decided that the use of such phrases violates human dignity.

The College director also noted that issues related to ethnicity, colour and national origin of Mr M.V. have been before the subject of speculations in the media, but he did not consider it necessary to justify himself. According to the National Council for Combating Discrimination each person has the right identify itself as belonging to a particular group and all the others do not have the power to consider a person as a member of an ethnic group or another. The inclusion of a person in an affiliation group, without its consent, violates its dignity, if it promotes a strongly devaluing preconception; the dignity underlies the right of a person to be presented under the appearance she wants (Dănișor, Dănișor, 2004: p 9). It should be noted that the Framework Convention for the Protection of National Minorities adopted in Strasbourg on February 1st 1995 Article 3 paragraph (1)

provides that any person belonging to a national minority has the right to freely choose whether or not to be treated as belonging to that minority and no disadvantage shall result from this choice or from the exercise of related rights. Moreover, as recalled by the College director in the Decision no. 384 of July 17th 2007, in Notice on Romania, in 2001, the Advisory Committee of the Framework Convention explicitly specifies that "The possibility to recognize himself or not within the name used to refer to that minority constitutes one of the essential aspects of this right" and "many members of the Roma minority refuse to be called Gypsies, mainly due to the pejorative connotation relating to the period of slavery "(Advisory Opinion of 2001, paragraph 21, p.7). It is also relevant the General Policy Recommendation no. 3 on combating racism and intolerance against Roma / Gypsies, whereby the European Commission against Racism and Intolerance "recommends that Member States of the European Council should ensure that the name used by various communities of Roma / Gypsy is the name by which the minorities concerned wish to be known".

Through Decision no. 384 of April 22nd 2008, the National Council for Combating Discrimination recalled that in the past 10 years, the minority denominations in this case were "Roma", "Roma and Sinti", "Roma and Travellers", "Roma, Sinti and Travellers" and these denominations initially included as well the term "Gypsy", a term that has been replaced with "Roma", as it was considered by most Roma as pejorative in the opinion of many Roma who are actively involved in national and international movements on Roma rights. The Council director confirmed that currently the official documents of the E.U., the Council of Europe, the O.S.C.E., the U.N., the organizations to which Romania is a party, use the term "Roma", Roma communities.

The motivation of the Decision no. 200 of June 6th 2006, in which has risen the question of the content of chants that are discriminatory on the basis of ethnic origin, namely "We have been and we will always be sick of Gypsies", was considered the distinction between hetero-identification ("Gypsy") and self-identification ("Roma"). I quote from the reasons of the decision: „The term „Gypsy" is used to refer to ethnic groups formed by the dispersion of commercial, nomadic or other groups in India, in the 10th century, and their mixing with Europeans and other groups during their Diaspora. (...) The term "Roma" is used because, in general, it is preferable to refer to this community in Central and Eastern Europe. The term "Gypsy" may be offensive to the Roma in Central and Eastern Europe.(...) Regarding the name "Roma" although it does not include all the groups in question, it is increasingly used in politics and has the advantage of a clear distinction to the terms imposed from outside. Moreover, this term is the self-identification of a significant number of such groups and best suits to a socio-cultural reality and to the political will of the groups in Central and Eastern Europe, which sums up 70% of the population identified as Gypsies in Europe ".

In the reasoning of its decision, the College director focused on the following aspects: 1) the term "Gypsy" may be offensive to Roma in Central and Eastern Europe; 2) the associations of the term "Gypsy" are not simply pejorative, but rather insulting; 3) the claims imputed are of instigation nature, resulting in harming the dignity of a community of people directly related to its ethnic affiliation. There prevailed the extent in which the members of a community dissociate themselves from the denomination assigned to them, the character associated with that denomination (licensing, insulting, offensive), and its

nature as well, namely to instigate regarding a community or ethnic minority (Gergely, 2011: p. 29).

Furthermore, by the Decision no. 92 of May 23rd 2007, the College director of the Council considered that it is important to clarify the results of surveys in Romania on the reporting of the majority population to the people of Roma minority. Thus, 82% of respondents believe that Roma are criminals, 70,7% believe that the Roma should be separated from other citizens, 41,4% would not accept Roma neighbours, 62,7% believe that Roma should not be allowed to travel abroad and 48,6% believe that the Roma population growth should be limited.

Furthermore, by the Decision no. 224 of April 24th 2013, the College director noted that references to primitive cops, to gypsy criminal habits and undesirable gypsy tribes do not lead to an improvement of human relations, but on the contrary, reinforce negative stereotypes towards Roma, resulting in the discrimination of Roma at school, upon employment, access to services and public places. A whole series of decisions have found that anti-Roma manifestations of the last century show that this community is extremely vulnerable often becoming the target of xenophobic manifestations and the studies in the field reveal that stereotypes deeply rooted in society cause some serious effects. For example, by the Decision no. 40 of May 5th 2010 it was noticed a violation of the applicant I.M.'s right to personal dignity, according to the article 15 of G.O. No. 137/2000, republished, by the defendant D.C.'s assertion "filthy, lazy, ugly Gypsy". As a novelty, in this case, the College director was required to apply only the warning as the sanction, the fine being prescribed within six months after the deed had been committed, as the petitions addressed to the Council director could not be settled within the period stipulated by the law, because the mandates of the members of the College director expired and the new members were not appointed by Parliament in due course.

In another case, the College director ruled on the fact that in the newspaper „Buletinul de Tecuci” no. 8 from 3rd to 10th April 2008, appeared on the first page the picture of four people, including a traditional Jew who says: "Come on guys, excuse me Madam (...) and girls! We are making a final rehearsal. If, God forbid! I am no longer Mayor, I will make 3 turns and (...) look who recognize me? Do not call me F if I'm wrong". Under the text of the image, it was written as follows: "F, A.G., I.Ț and N.G., four candidates who have not returned their watches. Nor their jewels bought with money stolen from the State" and, in the next edition, there was a picture of a person dressed in Nazi uniform, under the title "The dictator of the press", with the text: "Read in the following edition some shocking revelations about how F tried to send some journalists in the "camp". This happened while the court newspapers started making business with the Mayor". On the newspaper's website were posted images of the petitioner's son, dressed in Nazi uniform, waving a Nazi flag, and the editorial frame stated as follows: „According to the article 206 of the Criminal Code, the liability for the content of articles belongs to their authors. T marked articles shall be considered as pamphlets”. It was found that the images that are accompanied by text represent a publicly displayed behaviour, designed to create an intimidating, hostile atmosphere, directed against persons belonging to the Hebrew community, by presenting a Jew when in a stereotype manner (hat, long beard), when dressed in Nazi uniform. By the Decision no. 338 of June 4th 2008 it was found that the notified deeds are acts of discrimination and violate the dignity of persons belonging to

the Hebrew community. The decision-making body of the Council noted that the images did not contribute to any form of public debate capable of leading to a progress of human relations, instead they merely offended a community, disseminating, inciting and promoting hatred based on intolerance, while the community in question was extremely vulnerable and often the target of xenophobic manifestations.

The College director of the National Council for Combating Discrimination was called to decide on the case of a HIV-positive petitioner. This one, on February 29th 2008, presented himself to the Emergency Hospital F., in order to undergo surgery. He was released a sheet with the analysis he had to make before surgery, on which was written with red marker "HIV / AIDS infected person". When entering the surgery room, he was received by two nurses whom he had presented the analyses sheet. At that time, the nurse M.T. called her colleagues whom she said that on the department was hospitalized a person with HIV/AIDS. Upon the indication of the petitioner on the confidentiality of their discussion, he received the answer: "What did you think? You came in here to give us AIDS?" By Decision no. 614 of November 13th 2008, the Council director held that the discrimination does not occur per se, only in the form of legal provisions and practices, but as well as behaviours that create an impact on the environment in general, ranging from physical violence to remarks or statements with racist, sexist, xenophobic character, to general ostracism. This form of discrimination physically or emotionally violates the dignity of persons belonging to a minority or another. Upon pronouncing the judgment in question, the Council director took into account the provisions of various laws. Thus, there were considered the provisions of article 21 of Law no. 46/2003 on the rights of the patient, according to which "All information on patient's condition, the results of the investigations, the diagnosis, the prognosis, the treatment, personal data are confidential even after his death"; the provisions of article 8 of Law no. 584/2002 on measures to prevent and combat AIDS disease and protect the people infected with HIV, according to which „Keeping the confidentiality of data about persons infected with HIV and AIDS is required for: a) the employees of the health network"; article 16 of Law no. 307/2004 on the profession of nursing and midwifery profession which states that "in the profession exercise, the nurses and midwives must respect human dignity". It was also taken into consideration article 17 of Law no. 307/2004 on the profession of nursing and midwifery profession ("nurses and midwives are bound by professional secrecy, except as provided by law"), the Code of ethics and professional conduct of nurses and midwives in Romania which provides in article 13 that "the nurse / midwife, in its profession exercise, shall not make any discriminations based on race, sex, age, ethnicity, national or social origin, religion, political choices or personal antipathy against patients". It was found that the act constitutes harassment on the basis of HIV infection. The College director noted that in the case of HIV, the respect for the confidentiality is not only the respect for a person's right to privacy, but also the avoidance of stigmatization of the patient based in most cases on stereotypes and prejudices. Acting as it was presented, the defendant created a hostile or offensive environment, determined on account of knowing the petitioner's status of HIV-positive person, which had the effect of violating his dignity, from his own perspective. In a recent case, the complainant indicated that the defendant has created on the Internet a profile with her name where it was stated that she would be infected with HIV. By Decision no. 8 of January 16th 2013, it was decided that such information should not be publicly posted even if is true and it aimed at violating the dignity, creating an

atmosphere of intimidation, humiliation, offense against the petitioner, about assigning HIV infection, the College director applying a fine of 2,000 Lei.

From the point of view of the Council director, the right of not being discriminated is one of the fundamental rights in a democratic society, the right to equality being a right with immediate application and not a gradual one. As noted by the National Council for Combating Discrimination in its jurisprudence, the discrimination itself is an affront to human dignity; the discriminatory treatment has the effect of humiliation, degradation or interference with the dignity of the discriminated person, particularly when this treatment is publicly manifested and treating someone less favourably because certain inherent criteria suggests firstly contempt or lack of respect for his personality.

In taking its decisions, the Council director takes into consideration the provisions of article 30 of the Constitution of Romania which guarantees the freedom of expression, but it also provides the limits for this freedom: „(6) Freedom of expression shall not be prejudicial to the dignity, honour, privacy of the person nor the right to their own image; (7) Any defamation of the country and of the nation, any instigation to a war of aggression, national hatred, racial, class or religious hatred, incitement to discrimination, territorial separatism, or public violence and obscene conduct contrary to morality are prohibited by law”.

Within its reasoning, the Council director underlines as well the fact that the International Covenant on Civil and Political Rights - ratified by Romania on December 9th 1977 provides in article 19 paragraph 3 that "the exercise of the rights referred to in paragraph 2 of this article (right to freedom of expression) implies special duties and responsibilities. Consequently, it may be subject to certain restrictions, that must specifically be set by law and that are necessary: a) for the respect of the rights or reputation of others; b) to protect national security, public order, public health or morals”.

In a consistent jurisprudence, the National Council for Combating Discrimination refers to solutions drawn from the European Court on Human Rights practice in the matter of discrimination. The European Court showed that a difference in treatment becomes discriminatory when it lacks an objective and reasonable justification, that does not pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued.

The Council director of the Committee considers it to be necessary to establish the boundary between freedom of expression and the right to dignity. The National Council for Combating Discrimination takes into account the extensive jurisprudence of the European Court of Human Rights. No preference shall be given a priori to the right of freedom of speech or to the right to dignity, but it shall be taken into consideration the particular case. On many occasions, the deliberative and the decision-making body of the Council referred to the analysis scheme of the European Court of Human Rights, with the three aspects considered: the legality of restricting freedom of expression (the existence of a juridical norm that provides restriction, norm that must meet the requirements of accessibility, accuracy and predictability); the legitimacy and the necessity of restriction in a democratic society (essentially, the proportionality to the aim pursued).

Regarding the legality of the restriction, the legal basis is the article 15 of Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination and the legitimacy of the restriction is the need to protect the rights of the others. The Council

pays particular attention to the analysis of the need to restraint in a democratic society, retaining from the relevant jurisprudence of the European Court, a set of principles whose content is textually resumed in a consistent practice. In the following we will review them in turn. It was noticed that:

a) the freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions of social progress and individual self-realization;

b) the freedom of expression aims not only at the information or the ideas favourably expressed or deemed to be harmless or indifferent, but also those that offend, shock or interfere with the State or any part of the population, these being the demands of pluralism, tolerance and understanding, without which there can be no democratic society; the freedom of speech has exceptions as well, but they must be strictly interpreted, and the need for any restrictions must be convincingly established;

c) the freedom of expression involves duties and responsibilities, among other things, being legitimate to include an obligation to avoid as far as possible the expressions that merely offend others, degrade or constitute an interference with their rights, which in this way do not contribute to any form of public debate capable of leading to the progress of human relations;

d) the duties and the responsibilities of freedom of expression has particular significance in situations of conflicts or tensions, and a particular care should be exercised on the press use of the language promoting hate or violence;

e) the tolerance and the respect for human dignity is the foundation of democracy and pluralist society, therefore it is necessary in democratic societies to sanction or even prevent all forms of expressions that disseminate, incite, promote or justify hatred based on intolerance, provided that any formality, condition, restriction or penalty imposed to be proportionate to the legitimate aim relied on;

f) the article 17 of the Convention prevents the totalitarian groups to exploit in their own interest the principles which were stated as the purpose of these groups is to destroy the rights and the liberties, and this provision also refers to political activities;

g) the abuse within the freedom of expression is not compatible with the democracy and the human rights and violates the rights of others;

h) certain concrete expressions represent a hatred language which can offend individuals or groups of individuals, and these expressions do not enjoy the protection of article 10 of the Convention;

i) the vehement attacks against religious and ethnic groups are incompatible with the values proclaimed and guaranteed by the Convention, namely the tolerance, social peace and non-discrimination;

j) it can be invoked the necessity of restricting the freedom of expression where there is an urgent public need, and the States have some discretion as to the existence of the need, but this assessment is completed with the European supervision of both the legislation and the application of the legislation by independent courts. In addition, the European Court is empowered to provide interpretation to what extent the restriction or the sanction is compatible with freedom of expression;

k) in exercising supervision, the Court analyzes the content and the context of the statements in question, and the restriction must be proportionate to the legitimacy of the restriction and the authorities must justify their relevance and sufficiency. Any formality,

condition, restriction or penalty imposed, regarded as necessary in a democratic society to sanction or even prevent discrimination, should be proportionate to the legitimate aim pursued;

l) the Convention does not leave much space to restrictions on political speech or speeches touching the general interest. The permissiveness on criticism towards the government should be more marked than for private citizens, even politicians, and in a democratic system, the government's actions must closely be watched not only by administrative and judicial authorities but also by public opinion, the dominant position occupied by the government recommending it not to use criminal sanctions, as it has other opportunities to respond to attacks and unjust criticism. The competent authorities of the state have sufficient possibilities to adopt, in their capacity as guarantors of public order, appropriate punitive measures without making them excessive, however, if the statements inciting to violence against persons or officials or against a segment of the society, the State authorities enjoy a wider appreciation when examining the legitimacy of restricting freedom of expression;

m) the freedom of expression is particularly important for politicians or for persons elected as representatives of the electorate, which must draw their own attention to their concerns so that the restriction of the freedom of expression for the opposition politician or for a member of the Parliament calls for a more thorough examination from ECHR;

n) without any doubts, the freedom of political speech is not absolute in nature, the States may introduce restrictions and sanctions, the European court playing the final role to analyze the compatibility of these measures with the freedom of expression;

o) media plays an essential role in a democratic society and, although it must not go beyond certain limits, such as the national security, the territorial integrity, the threats of violence, the prevention of disorder and crime, the respect of the reputation and the rights of others, the need to prevent the transmission of confidential information, it has the task, in a manner consistent with its obligations and responsibilities, to provide information and ideas of public interest, particularly in political matters, including those that divide society, and those presenting justice. The freedom of media is one of the best ways to create an opinion regarding the ideas and attitudes of the political leaders and the journalistic freedom covers the possible recourse to a degree of exaggeration, or even provocation; *p)* media has not only the right but also the obligation to provide public information in accordance with the public right to receive such information;

r) it is not protected only the information itself, but also the form in which it appears to the public opinion;

s) setting out punishments is basically a matter for the national courts, but the European Court however considers that the punishment of imprisonment for media offense is compatible with the freedom of expression of journalists, only in exceptional circumstances, especially when other fundamental rights have been seriously harmed, particularly in case of using hateful speech or incitement to violence;

t) in the jurisprudence of the European Court of Human Rights, the ethnic discrimination is so serious that in some situations it may be invoked article 3 of the European Convention on Human Rights. In the case of East African Asians, where there have been judged the grouped applications of the U.K. citizens, of foreign origin, residents in East Africa, who were refused the entry in the U.K., it was concluded that "a

special importance should be given to racial discrimination and publicly differentiate a group of people in terms of treatment based on race may, in certain circumstances, constitute a special form of affront to human dignity” and „to constitute degrading treatment in circumstances in which the differential treatment based on other criteria, such as language, would not raise such problems” (The Case of East African Asians, application 4715/70, 4783/70 and 4727/70, Report of the Commission of 14 December 1973).

4. HUMAN DIGNITY FROM THE PERSPECTIVE OF THE NATIONAL COUNCIL FOR COMBATING DISCRIMINATION

Finally, the College director has recently taken into consideration this aspect in Decision no. 508 of November 26th 2012. It was considered that human dignity along with freedom are two goals for which the fundamental human rights were imposed. On this occasion, the College director noted that „dignity represent an absolute value, inherent to the human being, by virtue of which it is entitled to demand respect from others and is forced, in its turn, to pay respect”. It was also considered that „human dignity is the intrinsic value of the human being, which is the foundation of its civil or political rights. From the perspective of the human dignity, the existential value of the human being is not a mere justification of fundamental rights, it entitles the holder to respect, the latter being not a mere argument, but an obligation. The dignity is founded on respect and constitutes both a ground and the aim for the fundamental rights”. It is a right that exists beyond every human condition, and it has to be recognized and respected regardless of the physical, mental or social condition.

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