

**COMBATING GENDER DISCRIMINATION IN ROMANIA: THE
INTERPRETATION OF THE LAW BY THE NATIONAL COUNCIL
FOR COMBATING DISCRIMINATION (CNCD) AND ITS
INSTITUTIONAL DESIGN**

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Abstract

This study addresses the topic of gender discrimination in Romania. It departs from the analysis of eleven decisions of the National Council for Combating Discrimination (CNCD) in cases of gender discrimination, decided between 2006 and 2009. By analyzing the case decisions, the study finds that the interpretation of gender discrimination given by the CNCD relies exclusively on existing laws and precedents. Subsequently, starting from the low number of cases found, the study explores the reasons for this situation through the collection and analysis of five expert interviews. It finds three categories of causes for this state of affairs. Finally, the research concludes that the establishment of CNCD, and of other institutions with competences in the field of gender equality, has been primarily a political act of complying with EU standards. There are two consequences of the lack of grassroots support for the establishment of the CNCD and they are hampering its activity. Firstly, the institutional design of this authority and other institutions leads to overlaps in competence and gaps in authority. Secondly, the CNCD lacks the popular and political support for its activity in the field of discrimination in general and gender discrimination in particular.

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Introduction

The topic of gender discrimination has been on the political agenda in Romania for the past decade. In view of addressing the legislative gap in this area, the government adopted Ordinance 137/2000 for the prevention and combating of all forms of discrimination and Law 202/2002 for Equality of Chances between Women and Men. Moreover, it established the institutional framework for promoting gender equality by creating the National Agency for Equality of Chances between Women and Men and for investigating and sanctioning case of gender-based discrimination: the National Council for Combating Discrimination (CNCD). This research explores the process of sanctioning gender-based discrimination by the CNCD in Romania. This topic is relevant because the efficiency of legal efforts to combat gender inequality in Romania, as well as in other countries which have adopted such legislation since the early 2003, is highly dependent on the activity of the national anti-discrimination authority. Therefore, the first part of this research will analyze the interpretation of gender given by CNCD in the existing cases of discrimination.

While examining the existing case decisions on this topic, this research will show that from 2006-2009 CNCD has passed only 11 decisions on cases of gender discrimination (one of them being wrongfully classified as gender discrimination). Therefore, according to the statistics of CNCD 2-3 cases of gender discrimination have been filed annually. While gender-based discrimination cases tend not to be extremely numerous, especially in countries in which the non-discrimination bodies are relatively recently established, this number is low, even compared to countries with a similar institutional past, such as Hungary. The Hungarian Equality Authority has decided upon six complaints of gender discrimination in 2009 (of them being on the ground

of pregnancy/motherhood)¹. Therefore, the second part of this research aims to explore the factors leading to the limited number of gender-based discrimination case decisions released by CNCD.

Hence, the aim of this study is twofold: first to analyze the interpretation of gender discrimination given by CNCD in the existing cases of discrimination; and secondly to identify the causes for the low number of cases reported to CNCD. In doing the latter, the research also explores the alternative institutional tracks for reporting such cases and the possible administrative decisions of the Council which provoked a misleading grouping of existing cases of gender discrimination. Firstly, the research will argue that CNCD is basing its decisions on established legal reasoning and precedents as well as the national and international legal framework for combating discrimination. Thus, this institution does not bring a new interpretation of gender discrimination. Secondly, given the low number of cases involving gender discrimination discussed up to now by the CNCD, the research will argue that there are various levels and steps in the process, in which potential cases of discrimination are lost.

Some of the reasons for the current number of cases confirm the findings of previous studies. This is the case for the reluctance of victims, especially of women, to assume publicly acknowledges the discriminatory conduct. However, other reasons for the low number of cases have not been previously documented in the literature: they are particular to the Romanian context. This is the case, for the “hyperactivity” of magistrates in reclaiming their rights which determines the self-censoring of the visibility of the Council, which in turn decreases the chances that victims of discrimination will be aware and trustful of council and file petitions. Finally, one of the key arguments of this research states that the factors hindering the activity of CNCD result

¹ Egyenlő Bánásmód Hatóság (Equality Authority in Hungary), <http://www.egyenlobanasmod.hu/index.php?g=cases.php>. Retrieved 10.5.2010.

from the circumstances of its very establishment. This study infers from that data that that CNCD has been created primarily as a requirement of the EU accession, and devoid of genuine political and popular support. This finding confirms the conclusions of other authors, who mention the risk that such antidiscrimination authorities could be used by governments as a means to simulate real political interest and action related to a certain topic, in this case, the antidiscrimination project.

This study bases its findings on the eleven case decisions of CNCD in matters related to gender discrimination and on five expert interviews, conducted with professionals from the field of gender discrimination in Romania. The first chapter presents the academic and legal resources relevant to the topic of this study, namely: discrimination and its legal framework, gender equality, sexual harassment, sexist speech, (un)equal access to public services/ benefits and to professional development, and characteristics and limitation of antidiscrimination agencies. The second chapter includes the analysis of the eleven decisions in cases of gender discrimination discussed by the CNCD. Lastly, the third and last chapter analyzes the reasons for the low number of gender discrimination cases decided by the CNCD between 2006 and 2009 by examining the data provided by the five expert interviews.

Chapter 1. Methodology

The data collection for this study took place from the 15th of November 2009 and 30th of April 2010, as part of my MA requirements at the Central European University, Budapest, Hungary. Two types of data have been collected for this research. The first type of data consists of case decisions while the second type consists of five semi-structured expert interviews.

The decisions of the National Council for Combating Discrimination refer to cases of gender discrimination decided from 2006 to 2009. Eleven such decisions have been obtained in December 2009 after filing a petition to this institution, according to the legal procedure. These decisions have been coded and a list of the argumentations and laws cited was drafted. This list was developed into themes which have been included in the analysis of the case decisions, presented in chapter I of this study.

Firstly, for an accurate analysis, the decisions have been grouped into three major categories, according to the type of discrimination discussed. Secondly, in order to understand the argumentation of the members of CNCD in decisions belonging to each of the three categories, a series of tags have been assigned to each case. The reference to any particular regulation or legal precedent corresponded with a specific tag. Any rationale of justification encountered also translated into a particular tag. All tags were then compiled into a table, which allowed for the comparison of references made in different cases from each of the three categories.

The second type of data, consisting of five expert interviews, obtained in April 2010. The experts in the field of gender equality who were interviewed were: (1) Mr. Istvan Haller (member of the National Council for Combating Discrimination - CNCD), (2) Ms. Mota

(President of the National Authority for Equality of Chances b/w Women and Men - ANES) and Mr. Ovidiu Anemtoaicei (Counselor at ANES),⁽³⁾ Ms. Irina Sorescu (President of the Center Partnership for Equality - CPE), (4) Mr. Bogdan Draghici (President of Association for the Antidiscrimination of Fathers - TATA), and (5) Ms. Laura Grunberg (ANA- Society for Feminist Analyses). The first three interviewees listed above are representatives of state institutions (CNCD and ANES) while the latter three are members of the civil society. Two of the NGOs, the CPE and ANA are women's rights organizations, the second being temporarily suspended after 14 years of activity. The third NGO, TATA, is an association advocating in favor of fathers' rights interest, especially in divorce or custody cases, as well as other matters.

The five interviewees were contacted by phone or email and asked to participate in this study, without any previous acquaintance. The five semi-structured interviews have been conducted face to face, usually in the office of the interviewee. Each interview lasted between 40 minutes and one hour and 12 minutes. Their recording, transcription and translation from Romanian into English has been performed by the author. Each of the transcribed interviews was subsequently coded and then the relevant themes encountered in the interviews, were selected. Subsequently, there followed the analysis of the interviews, which is presented in chapter II of the study.

Some of the relevant questions which led to the data supporting the argument of this research were slightly different depending on whether the interviewee was a representative of the governmental or nongovernmental sector. Yet, there was a number of common questions between the two, such as: "Which are the most encountered forms of gender discrimination in Romania today?"; "Which are, in your opinion, the reasons for the small number of gender based discrimination decided by the CNCD?", "What are the key obstacles encountered by victims

which may prevent them from reporting a case?"; and others. In addition to these common questions, the state representatives have also been asked: "What has your institution done to increase its visibility?" "What has your institution done to support NGOs working in this field?" "Why do you think there are so few ex-officio actions?"; "Why are many of the CNCD decisions not made public on the website?". Members of the civil society have also been asked: "How do you see the role of the NGO-s in initiating legal proceeding?"; "Has your NGO been working on (other) potential or actual CNCD matters and if not, which are the reasons for such a small number of cases reported?" "Do you have any suggestion for the improvement of the current situation in the number of complaints?".

All the interviewees were glad to contribute to this study and were very open to discussion. I have only paused the recorder on several occasions due to side-discussions, the need to allow some time for thinking to the interviewee or due to external noise factors. The representatives of ANES and CNCD were especially helpful by also bringing statistics and cases to the table in order to support their statements and provide me with a clear picture of the situation. The members of the civil society were equally helpful by explaining the activity of their organization and, in some cases, by offering to connect me with other experts in the field. All the respondents were assured that they will have the opportunity to read and review the transcript of the interview before it being analyzed.

Chapter 2. Academic and Legal Resources

2.1. A legal perspective on gender discrimination from Europe to Romania

During the last decade, significant new anti-discrimination legislation has been enacted at the European Union level.² EU directives currently distinguish between direct and indirect discrimination. A definition of direct discrimination is: “A person discriminates against a woman if ...on the grounds of her sex he treats her less favorably than he treats or would treat a man”³. A key concept in defining direct discrimination is that of “less favorable treatment”⁴ elaborated by the European Court of Justice.

Indirect discrimination on the other hand is defined by the EC Directive on the Burden of Proof as:

*an apparently neutral provision, criterion or practice [which] disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors, unrelated to sex*⁵

The importance of defining and enforcing the concept of indirect discrimination has also been remarked by other authors who maintained that the mere prohibition of unequal treatment perpetuates existing structural inequalities masked under apparent neutrality⁶. As a complement to direct discrimination, The European Court of Justice also defined indirect discrimination

² European Council Directive 2000/43/EC of 29 June 2000 Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and European Council Directive 2000/78 of 27 November 2000 Establishing a general framework for equal treatment in employment and occupation, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc32000L0078&lg=EN, Retrieved 02.03.2010

³ Sex Discrimination Act 1975, s. 1(I)(a) quoted in Sandra Fredman, *Discrimination Law*, Oxford [England] ; New York : Oxford University Press, 2002, 94

⁴ Fredman, *Discrimination Law*, p. 94

⁵ Article 2.2 of Directive (EC) 97/80/EC on the burden of proof in cases of discrimination based on sex.

⁶ I.M. Young, *Justice and the Politics of Difference* Princeton: Princeton University Press, 1990 p. 45, Sandra Fredman, “Equality: A new Generation?” *Industrial Law Journal*, Vol 30, No 2, 2001, p. 153.

which was later encapsulated into the Directives 2000/43/EC 2000/78/EC.⁷ The aim of these directives is twofold: firstly to transform the interpretation of equality from its formal understanding to substantive equality; secondly to ground the justification of equality not only on economic efficiency but also on human rights principles.⁸ Moreover these directives also address the topic of direct discrimination. Such international developments, compounded by the expansion of the European Union to the East, have determined countries in Eastern and Central Europe to develop anti-discrimination legislation and authorities.

In Romania, discrimination is prohibited by Ordinance 137 (republished) for the prevention and combating of all forms of discrimination⁹, which targets both direct and indirect discrimination. It defines discrimination as “any differential treatment, exclusion or restriction [of a person]” on the basis of certain characteristics. These characteristics, also known as grounds of discrimination, mentioned by Ordinance 137 are “race, nationality, ethnicity, language, religion, social status, personal convictions, sex, sexual orientation, age, disability, non-contagious incurable illness, HIV infection, or belonging to an underprivileged category”. The list is not exhaustive.¹⁰

Furthermore, Law 202/2002 for Equality of Chances between Women and Men¹¹ specifically targets gender discrimination. One of the specific forms of gender discrimination,

⁷ Noreen Burrows and Muriel Robison, “An Assessment of the Recast of Community Equality Laws” *European Law Journal*, Vol. 13, No. 2, March 2007, p. 188.

⁸ Dagmar Schiek, “A New Framework on Equal Treatment of Persons in EC Law? Directives 2000/43/EC, 2000/78/EC changing Directive 76/207/EEC in context”, *European Law Journal*, Vol 8, No 2, Jun 2002, pp 290-314.

⁹ Ordinance 137 (republished) for the prevention and combating of all forms of discrimination ([http://www.equalrightstrust.org/ertdocumentbank/Ordinance_No_137_of_2000-_ENGLISH%20\(Romania\).pdf](http://www.equalrightstrust.org/ertdocumentbank/Ordinance_No_137_of_2000-_ENGLISH%20(Romania).pdf)), Retrieved 15.02.2010.

¹⁰ Art 2, p. (1) of Ordinance 137.

¹¹ Law 202/ 2002 for Equality of Chances between Women and Men (http://legislatie.resurse-pentru-democratie.org/202_2002.php, Retrieved 28.02.2010.

sexual harassment, is also incriminated by Art. 203¹ of the Romanian Criminal Code¹². Moreover, Romania is part of the Convention for the Elimination of All forms of Discrimination against Women (CEDAW).¹³ However, while these legislative tools are comprehensive, as Petrova notes, “procedural guarantees and remedies for discrimination are underdeveloped in most jurisdictions and the implementing legislation is weak or utterly absent in most countries.”¹⁴

In Romania, the institution invested with the authority of deciding on the administrative side of cases of discrimination is the National Council for Combating Discrimination (CNCD). This institution is an autonomous collegial body established by Ordinance 137 and invested with the authority of judging case of discrimination. Through the way it is regulated, the council fulfills the recommendations of the Council of Europe’s regarding the national equality bodies, in the areas of: (1) “statutes establishing specialized bodies”, (2) “functions and responsibilities”, (3) “administration and functioning”, (4) “independence and accountability”, (5) “accessibility”¹⁵ CNCD is: (1) legally established by Ordinance 137, (2) “guarantees the enforcement of the principle of non-discrimination”, (3) “led by a president, having the rank of secretary of state, elected by the member of the council of directors, for a mandate of 5 years”, (4) “an autonomous state authority in the field of discrimination, with legal capacity, under Parliamentary control”¹⁶, (5) any interested person can file a discrimination complaint, during the first year after the

¹² Art. 203¹ of the Romanian Criminal Code regulating sexual harassment
(http://www.avocatnet.ro/UserFiles/articleFiles/cp-versiune%20actualizata_04101703.htm, Retrieved 28.02.2010.

¹³ Convention for the Elimination of All forms of Discrimination against Women (CEDAW).
(<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> , Retrieved 28.02.2010. .

¹⁴ Dimitrina Petrova, “Implementing anti-discrimination legislation and the human rights movement” , *Helsinki monitor*, 2006, no 1.p. 22.

¹⁵ ECRI General Policy Recommendation N°2: Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level , Adopted by ECRI on 13 June 1997
http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N2/Recommendation_2_en.asp#To
pOfPage, Retrieved 28.02.2010.

¹⁶ ART. 16 of Ordinance 137.

incriminated deed has occurred¹⁷, “the council exercises its mandates as a result of the complaint of a natural or legal person, or *ex officio*”.¹⁸

Authors have analyzed the particularities and limitations of the design of agencies specialized in enforcing antidiscrimination law. These special features have been related to obstacles and advantages encountered in enforcing equality. The characteristics which are identified by the literature as providing an advantage to anti-discrimination agencies as opposed to regular courts or government departments are: (1) the specialized character of the former as opposed to the central government and the court system¹⁹; (2) the autonomous character of anti-discrimination agencies which often act as “‘insulators’ between government of the day and the public”²⁰; (3) such equality agencies are often seen as more objective in their recommendations and reasoning as a consequence of their independence.²¹ With regard to the second characteristic of the anti-discrimination agencies, that of autonomy, authors observe two advantages, namely that the authority can check the compliance of the government with the equality legislation and in the meantime, the same agency can afford a progressive stance with which the same government may not wish to associate itself due to fear of negative public response.²²

Nevertheless, these agencies are sometimes criticized and labeled as “slow ... inefficient, unfair, predictable, corrupt, ill-managed... unresponsive to changes in political opinion, and of lacking ... specialist skills and knowledge.”²³ A final concern expressed by authors in regard to these agencies is the risk that governments may use these agencies as a false evidence of political

¹⁷ ART. 20 of Ordinance 137.

¹⁸ ART. 19(2) of Ordinance 137.

¹⁹ Peter Rodrigues, “The Dutch Experience of Enforcement Agencies: current issues in Dutch anti-discrimination law” in Martin MacEwen (ed.) *Anti-discrimination law enforcement: a comparative perspective*, Aldershot : Ashgate, c1997, p. 55.

²⁰ Martin MacEwen, “Introduction” in Martin MacEwen (ed.) *Anti-discrimination law enforcement: a comparative perspective*, Aldershot : Ashgate, c1997, p 7.

²¹ Rodrigues, “The Dutch Experience of Enforcement Agencies”, p 58.

²² MacEwen, “Introduction”, p. 7-8.

²³ MacEwen, “Introduction”, p. 8.

interest in an issue which is of public concern. This critique is well expressed by the following statement:

*Agencies may also be used as part of the government's repertoire of illusion from its box of magic tricks to disguise its real concerns, for example giving the impression of taking firm action on an issue of public concern by referring to its agency.*²⁴

This risk can be particularly relevant in countries which are new members of the European Union and which have established these equality agencies in compliance with the EU standards as opposed to following a gradual increase in grassroots interest for the topic of anti-discrimination. In view of the accession of the EU, the Romanian government enacted two different laws prohibiting gender discrimination, over a period of only two years. The first regulation was Ordinance 137/2000 for the prevention and combating of all forms of discrimination, on all grounds, including gender, followed by Law 202/2002 for Equality of Chances between Women and Men. Moreover, each of these laws establishes its own institution, invested with accomplishing the mission of its constitutive law. Ordinance 137/2000 established the National Council for Combating Discrimination (CNCD), while Law 202/2001 establishes the National Agency for Equality of Chances between Women and Men.

2.2. A feminist Perspective on the Concept of Gender Equality

This research is centered on the topic of combating gender discrimination in Romania, in view of achieving a greater degree of gender equality. In discussing the concept of gender equality one can refer to the key feminist views on the topic. This concept has been intensely discussed in feminist circles, historically dividing authors into those who advocated the equality of women as sameness to men and those arguing for equality as difference. This debate has been

²⁴ MacEwen, "Introduction", p 8

crucial in shaping the feminist discourse since the late nineteenth century, and has impacted subsequent legal developments. Within this dispute, the first opinion, advocated equality as sameness and focused on achieving equality between women and men, expressed for instance in the right to universal suffrage, stressing the similarities between sexes. Conversely, the second view claimed citizenship for women on the basis of their “difference” as compared to men. Their argument stressed the different type of contribution, which women convey to the state, which is generally centered on motherhood.²⁵ Yet, both of these solutions for achieving women’s emancipation have their shortcomings which are well documented in the feminist literature. Equality as sameness has been historically biased against women given that norm had been molded after the male subject.²⁶ On the other hand, the position emphasizing the importance of the differences between women and men has often led to further discrimination against women, reinforcing their unequal status in society.²⁷

Subsequently, some feminist authors have discussed the concept of gender equality, by questioning the seemingly neutral standard to which women are held against. It has been pointed out that this standard is a “male standard”. As MacKinnon notes, “man has become the measure of all things”, which disadvantages womankind and women as a group even if some of them succeed in adopting the male standard.²⁸ Furthermore, even if we theorize sex or gender equality as an equivalence between the two sexes²⁹, it is the men’s specific characteristics (or traits

²⁵ Ida Blom, “Voluntary Motherhood 1900-1930: Theories and Politics of a Norwegian Feminist in an International Perspective” in Gisela Bock, Susan James (eds.) *Beyond Citizenship, Equality & Difference*, London: Routledge, 1992, pp 17-20.

²⁶ Editor’s Introduction in Gisela Bock, Susan James (eds.) *Beyond Citizenship, Equality & Difference*, London: Routledge, 1992, p. 3

²⁷ Editor’s Introduction, in *Beyond Citizenship, Equality & Difference* p. 3.

²⁸ Catherine A. MacKinnon, “Difference and Dominance: On Sex Discrimination” (1984) in K.T. Bartlett & Rosanne Kennedy ed., *Feminist Legal Theory*, Boulder: Vestview Press, 1991, p.81.

²⁹ MacKinnon, “Difference and Dominance: On Sex Discrimination”, p 83

traditionally associated with masculinity) that are most valued in society, and not women's.

MacKinnon exemplifies this argument by claiming:

*Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family...their image defines god, and their genitals define sex.*³⁰

Hence, the efficiency of the very concept of gender equality in improving women's status has been sometimes contested. Certain authors have argued that women's potential benefits from this concept are only due to their conformance with the male norm.³¹ Moreover, it has been claimed that the use of such concept will only benefit certain women and not all women. Nevertheless, despite the criticism, this research relies on this concept as well as on its opposite – gender discrimination, in analyzing the way in which members of the CNCD interpret the latter. Gender inequality can be manifested in various forms, three of which will be discussed in this study. These three forms are: unequal access to public services, sexist speech, and sexual harassment at the workplace. Thus, prior to discussing the interpretations of gender discrimination by CNCD a discussion of the main topics in the literature on discrimination is pertinent.

2.3. Sexual Harassment (at the workplace)

Sexual harassment has been one of the main topics in feminist legal research in the past 20 years. First it developed and has been defined in the case-law of the US Supreme Court, as occurring in two types: quid pro quo and hostile environment. In the case of quid pro quo harassment, the conduct “involves sexual threats or bribery that are made a condition of

³⁰ MacKinnon, “Difference and Dominance: On Sex Discrimination”, p p.84.

³¹ MacKinnon, “Difference and Dominance: On Sex Discrimination”, p. 82.

employment or used as the basis for employment decisions.”³² Hostile environment on the other hand is a form of harassment which “captures those [sexual] behaviors, such as sexual jokes, comments, and touching, that interfere with an individual's ability to do her/his job or that create an "intimidating, hostile or offensive working environment”³³. Naturally, both variations of sexual harassment have the effect of diminishing the self-confidence, interest in one's job and ability to perform that job of the person harassed. While men can become victims of sexual harassment too, it is often women who are targeted, since harassing presupposes formal or informal social power over the victim and this is typically the position of men rather than women. As some authors conclude, sexual harassment has often been employed to remind women that they do not belong to the workplace or to specific professions, traditionally associated with men's work.³⁴ Therefore, one of the key acknowledged effects of sexual harassment is act as a “serious disincentive for women to enter and remain in nontraditional jobs”³⁵

In the last decade, Romanian law has recognized sexual harassment both as a felony and a crime. As a felony, the act of harassment (also on the basis of gender) is defined and prohibited by Ordinance 137 as follows:

*It shall be considered harassment, and subjected to administrative penalty, any conduct, which, on the basis of race, nationality, ethnicity, language, religion, social status, belief, gender, sexual orientation, belonging to an underprivileged category, age, disability, refugee or asylum status, as well as on other grounds, creates an intimidating, hostile, degrading or offensive environment [for the victim].*³⁶

³² Sandy Welsh, “Gender and Sexual Harassment” *Annual Review of Sociology*, Vol. 25 (1999), pp. 169-190, p. 170.

³³ Welsh, “Gender and Sexual Harassment”, p. 170.

³⁴ Barbara Reskin, Irene Padavic *Women and Men at Work*. Thousand Oaks, CA: Pine Forge, 1994.

³⁵ Andrew Koppelman, *Antidiscrimination law and social equality*, New Haven, Conn : Yale University Press, 1996 p. 251.

³⁶ Art. 1, Paragraph 5 , Ordinance 137 (republished) for the prevention and combating of all forms of discrimination.

Therefore, according to this legal definition both forms of sexual harassment, *quid pro quo* and hostile environment, are punishable. This is the legal basis on which the cases of sexual harassment analyzed by this study have been filed. It is important to note, however, that this ordinance only regulates administrative offences; and therefore cannot be about criminal sanctions.

As a crime, sexual harassment is defined by the criminal code as: “The harassment of a person by threat or compulsion for the purpose of obtaining satisfaction of a sexual nature, by a person who abuses his/ her authority or influence conferred by his/her position at the workplace”³⁷. The punishment for this crime is imprisonment between 3 months and 2 years or criminal fine.³⁸ However, this research does not include any criminal cases, thus will only discuss administrative law cases.

While sexual harassment has been prohibited relatively recently in Romania, this conduct is by no means an isolated occurrence. According to a study performed by the Center for Partnership and Equality on Romania in 2003, “4.7 percent of the population said that someone close to the respondent had been a victim of sexual harassment over the previous two years”³⁹ and “11.4 percent of the population revealed that they have experienced at least one type of sexual harassment in their lifetime”⁴⁰.

This paper will focus on the interpretation provided in the two sexual harassment cases filed in Romania before the CNCD. It will discuss the argumentation provided by the members of the council, their decision and the sanction applied, when discrimination is found. With regard

³⁷ Art. 203¹ of the Romanian criminal Code regulating sexual harassment
http://www.avocatnet.ro/UserFiles/articleFiles/cp-versiune%20actualizat_04101703.htm, Retrieved 1.03.2010

³⁸ Art. 203¹ of the Romanian Criminal Code.

³⁹ Center for Partnership and Equality, *Equal Opportunities for Women and Men: Monitoring law and practice in Romania*, 2005, p. 23.

⁴⁰ CPE, *Equal Opportunities for Women and Men*

to factors determining whether a sexual harassment case will be accepted or dismissed Welsh, Dawson and Nierobisz whose research focused on complaints filed before the Canadian Human Rights Commission (CHRC) from 1978 to 1993, identified two categories of features. They concluded that both legal factors as well as extra legal factors have a decisive influence on the resolution of a case of sexual harassment. The category of legal factors comprises the “degree of harassment, whether the complainant experienced psychological distress and whether the complainant experienced loss of employment”⁴¹, while extra legal factors refers to “the harasser-complainant relationship, the complainant's work status and occupation, and characteristics of the employing organization”.⁴²

2.4. Sexist speech

*Words and images are how people are placed in hierarchies, how social stratification is made inevitable and right, how feelings of inferiority and superiority are engendered and how indifference to violence against those on the bottom is rationalized and normalized.*⁴³

The concept of sexist speech discussed in this study is distinct from the topic of sexual harassment presented above. It does not refer to the conduct associated to the hostile environment type of harassment but to the speech typically encountered in the public sphere and mass communication, which generally refers to women as a group (or to subgroups). Thus, the form of sexist speech encountered in the cases analyzed by this research has a particular role in defining and redefining women's status in society.

⁴¹Sandy Welsh, Myrna Dawson, Annette Nierobisz “Legal Factors, Extra-Legal Factors, or Changes in the Law? Using Criminal Justice Research to Understand the Resolution of Sexual Harassment Complaints”, *Social Problems*, Vol. 49, No. 4 (Nov., 2002), pp. 605-623, University of California Press on behalf of the Society for the Study of Social Problems, P. 613.

⁴² Welsh, Dawson, Nierobisz “Legal Factors, Extra-Legal Factors, or Changes in the Law?”, P. 615.

⁴³ Catharine A. MacKinnon, *Only words*, Cambridge, Mass.: Harvard University Press, 1993, p. 31.

Sexist (as well as racist) speech has also been forcefully debated in the literature. The classical debate occurs between supporters of restrictions of freedom of speech and advocates of unlimited freedom of speech. The first view argues in favor of prohibiting some or any kind(s) of speech which is offensive to certain groups, which have been traditionally discriminated against. The other opinion opposes censoring any kind of speech by emphasizing the supremacy of freedom of expression. Koppelman, who relies on the example of the US, discusses the tension between liberalism's classical tendency to favor state's neutrality and non-intervention in private life and in shaping culture, on one side and the anti-discrimination project which aims for social transformation, on the other side.⁴⁴ While the ideal of anti-discrimination is certainly worth pursuing, its implications for liberalism and for freedom of speech are complex and sometimes irreconcilable. Koppelman claims that liberalism is not entirely morally empty and is therefore compatible with the antidiscrimination project because the latter relies on the presumption that all citizens have the right to an equal protection by the state.⁴⁵

The opinion arguing for prohibition supports the opinion that citizen's equal protection under the law would require forbidding certain speech directed against historically underprivileged groups. This argument maintains that allowing this form of speech will simply perpetuate the status quo. As judges concluded in a Seventh Circuit court decision also cited by Koppelman: "[d]epictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets"⁴⁶. In sum, as the author concludes, the case for prohibiting certain speech

⁴⁴ Koppelman, *Antidiscrimination law and social equality*, p. 177.

⁴⁵ Koppelman, *Antidiscrimination law and social equality*, pp. 180-182.

⁴⁶ Koppelman, *Antidiscrimination law and social equality*, p. 233

which is offensive to women of other historically disadvantaged groups is based on the claim that it produces “physical harm, psychic harm and damage to the groups/s status”⁴⁷

It is important to confront this argument with the existing objective realities in Romania. Given that the cases of sexist speech discussed in this research convey a message about women’s ability to enter the political life and to occupy positions of authority, an evaluation of the gender relations in this field is illustrative. While gender equality remains a declared goal of the government, women’s equality in the public space is still far from being achieved. With regard to women’s equality in the public space, The National Agency for Equality of Chances between Women and Men (ANES) reported that in 2007, only 27,8% of the first level positions (junior minister) in the executive body were women and 41,9 % in the second level of authority⁴⁸. None of the ministerial positions were held by women in 2008 and there were four (19%) female ministers in 2009.⁴⁹ In the Parliament women represented 9,48% of the Senators and 10,54% of the members in the Chamber of Deputies in the 2004-2008 legislature⁵⁰. Currently, the 2008-2012 legislature has 5,83% female senators and 11,3% women in the chamber of Deputies.⁵¹ While women’s under-representation may have multiple causes, sexist speech undermining this group’s authority and ability to govern is likely to contribute to the maintaining of the current situation. Thus, when “free speech corrodes the very foundations of democracy”⁵² because it prevents the voice of certain groups from being equally heard in the political process, banning certain speech seems necessary and inevitable.⁵³

⁴⁷ Koppelman, *Antidiscrimination law and social equality*, p. 235.

⁴⁸ National Agency for Equality of Chances between Women and Men (ANES), *Participation in decisions-making at the national level in the central and local administration*, <http://www.anes.ro/index.php?page=statistici>, Retrieved 1.03.2010.

⁴⁹ ANES, *Participation in decisions-making at the national level in the central and local administration*.

⁵⁰ ANES, *Participation in decisions-making at the national level in the central and local administration*.

⁵¹ ANES, *Participation in decisions-making at the national level in the central and local administration*.

⁵² Koppelman, *Antidiscrimination law and social equality* p. 257.

⁵³ Koppelman, *Antidiscrimination law and social equality* p. 257.

The opposing camp argues that state neutrality towards its citizens implies allowing each person an equal right to freedom of speech with no special protection for individuals belonging to privileged or underprivileged groups. This view is upheld by the supporters of the classical understanding of First Amendment guaranteeing freedom of speech in the US. Its equivalent, Article 30, of the Romanian Constitution, on the freedom of speech states: “(1) the freedom of expressing one’s thoughts, opinion or beliefs and the freedom of creation of any kind, by means of speech, writing, images, sounds, or other means of communication, are inviolable; (2) any type of censorship is prohibited”⁵⁴. Moreover, the very Ordinance 137, the main act regulating anti-discrimination on all grounds, including gender, in Romania is not aimed to restrict freedom of speech. Article 2, p 8 states: “The provisions of the present ordinance cannot be interpreted as restricting freedom of speech and the right to a personal opinion and access to information”⁵⁵.

There are a series of arguments supporting absolute freedom of speech. One of the main claims, grounded in US jurisprudence is that “the appropriate antidote to speech with which we disagree, or which offends us, is more speech”.⁵⁶ This argument is particularly supported by research assessing the level violent attitudes toward women, on the part of men exposed to violent pornography. The laboratory tests concluded that pornography only determined a temporary increase in viewer’s aggressive attitudes related to women, and that exposure to “non-violent sexually-explicit materials actually reduces aggression”.⁵⁷ Given the analogy between pornography, especially violent pornography, and sexist speech it is often argued that stereotypical attitudes which discriminated against women will not disappear or be reduced by

⁵⁴ Article 30 of the Romanian Constitution, on the freedom of speech , <http://www.cdep.ro/pls/dic/site.page?id=339&idl=1&par1=2>, Retrieved 1.03.2010.

⁵⁵ Article 2 of Ordinance 137.

⁵⁶ Koppelman, *Antidiscrimination law and social equality*, p. 238.

⁵⁷ Koppelman, *Antidiscrimination law and social equality*, p 238.

banning their expression. The only remedy would be, therefore counter speech, openly challenging the very basis of those attitudes.

Another pertinent argument opposing the censoring of sexist speech is related to the possible consequences of its implementation. The interpretation of the exception to freedom of speech would be interpreted by judges or other members of equality authorities, who may carry themselves some of the existing social prejudices. There have been documented cases when “the prohibition of ‘degrading’ material can be interpreted to serve purposes that are very far from what [the feminist drafters of the prohibition] had in mind”⁵⁸. Prohibiting speech is a “risky slope” and the destination may not always serve a feminist purpose regardless of the original objectives.

Continuing on this path, another reason for opposition to the banning of sexist, as well as racist, homophobic, or other offensive speech relates to the wide extent of prohibition. The principle of banning speech which is offensive and demeaning for individuals belonging to historically disadvantaged groups can apply to many categories which have been or continue to be ground for discrimination. Each group would therefore be entitled to its own share of prohibited speech. Moreover, since sexism, racism and other biases are pervasive in most societies, and manifested in virtually all forms of expression, the law would have to censor “movies, romance novels, billboards, televisions, newspapers, song lyrics, magazines, rock videos, clothes fashion, the art gallery wall....”⁵⁹. The outcome of this anti-discrimination project can have serious consequences for a democratic society, particular for the young democracies in Central and Eastern Europe where freedom of speech is still a relatively new concept.

⁵⁸ Koppelman, *Antidiscrimination law and social equality*, p. 260..

⁵⁹ Koppelman, *Antidiscrimination law and social equality*, p. 262.

2.5 Access to public services/benefits and to professional development

Historically, welfare systems as well as most professions have traditionally been developed in such a way as to fit the gendered social patterns: ascribing men to the professional/public sphere and women the child-rearing responsibility in the private sphere. Accordingly, employment and work patterns have been conceived with the male standard in mind, while childcare-related state services and benefits, when being provided, have been envisioned as being primarily linked to the (“nonworking”) mother’s. Consequently, with the renegotiation of these gender roles, women’s inclusion into formal employment and subsequently their interest in life-long employment, after becoming mothers, posed certain dilemmas to the established system. The same applies to men’s deeper involvement in child care and in directly receiving child-related public benefits, as well as their desire to enter non-traditional male occupations.

The traditional discussion on gender equality in regard to access to public services and professional opportunities, connects to the classical feminist debate mentioned before, related to equality as sameness vs. equality as difference. Providing for equality has been discussed either as treating men and women in the same exact manner when it comes to offering state benefits and professional opportunities, or in a complementary way: providing certain benefits and opportunities for women and the opposite ones for men. The first approach would ignore the objective realities in which women are still the primary care takers and on average continue to be paid less than men⁶⁰, and occupy fewer positions of authority. The second approach often

⁶⁰ Koppelman, *Antidiscrimination law and social equality*, Pp.137-138.

perpetuates the status quo characterized by women's unequal status both in the home and at the workplace and the corresponding group stigma.⁶¹

As Bock and James explain reflecting upon the case of the United States, employing the concept of gender equality either as sameness or as difference, in conceiving welfare benefits for pregnancy and parental leave can have cause a disproportional harm to female employees. Applying the sameness standard, which existed in the US prior to the adoption of the Pregnancy Discrimination Act, childbearing was treated by the law as an “‘unique’ and ‘additional’ disability for women” which, unlike other disabilities, was not covered by insurance.⁶² According to this view on gender equality, women were equal to men in as much as they were similar to them. But since men, who were the standard, did not get pregnant, pregnancy was not subject to regulation or welfare benefits.

In response, a number of feminists, who can be seen as approaching the concept of gender equality more through difference than through sameness, demanded the acknowledgement of women's special role in reproduction and caretaking. Therefore, they asked for the inclusion of pregnancy in the package of welfare benefits, even when such benefits are not granted for disabilities in general. They claimed that failing to do so would negatively impact a much higher number of women than men.⁶³ However, the counterargument to their claim was provided by other feminists who consider that due to this maternity leave which was targeting women, men would be preferred by employers, therefore gaining a competitive advantage. As they simply put it, this “difference-oriented approach” placed women who applied for maternity

⁶¹ Koppelman, *Antidiscrimination law and social equality*, pp.138-139.

⁶² Karen Offen “Body Politics: Women and the Politics of Motherhood in France, 1920-1950” in .” in *Gisela Bock, Susan James (eds.) Beyond Citizenship, Equality & Difference*, London: Routledge, 1992, p. 152.

⁶³ Offen “Body Politics” p. 153.

leave in “special ‘mummy tracks’ that often turned into mummy traps.”⁶⁴ That is to say it “protected” women in such a way that it either excluded them from certain jobs limited or slowed down their career.

Men can also find themselves discriminated against when seeking to be directly involved and receiving child-related public benefits, or when aiming to enter a profession which is not traditionally seen as a male-activity. The second situation can be exemplified by the case of *Diaz v. Pan American World Airways Inc.*⁶⁵, when a man has been denied equal access to a certain profession because of the market or otherwise said, due to customer’s preferences for female flight attendants. Celio Diaz, the man in cause, challenged Pan American Airlines’ refusal to offer him and other men the position of flight attendant, because of their gender. He claimed that his right to equal access to employment guaranteed by § 703(a) (1) of Title VII of the 1964 Civil Rights Act had been violated and that being a woman is not a “bona fide occupational qualification” for that job.⁶⁶ After, initially, his claim had been rejected, the plaintiff appealed the lower court’s decision which had found Pam American’s preference for female stewardesses legitimate. The first court grounded its decision in the following argument: “(1) its view of Pan American’s history of the use of flight attendants; (2) passenger preference; (3) basic psychological reasons for the preference; and (4) the actualities of the hiring process”⁶⁷. However the higher court rejected these arguments, using a “business necessity test, [and] not a business convenience test”⁶⁸ for the interpretation of the “bona fide occupational qualification”. Therefore it was decided that restricting the access of male candidates to this position was in fact

⁶⁴ Offen “Body Politics” p 153.

⁶⁵ *Diaz v. Pan American World Airways Inc.*, <http://openjurist.org/442/f2d/385/diaz-v-pan-american-world-airways-inc>, Retrieved 02.03.2010

⁶⁶ *Diaz v. Pan American World Airways Inc.*

⁶⁷ *Diaz v. Pan American World Airways Inc.*

⁶⁸ *Diaz v. Pan American World Airways Inc.*

gender discrimination on the basis of Title VII. Koppelman takes this reasoning further arguing that respecting customer's preferences, aside from discriminating male candidates, also constitutes gender discrimination against women. He claims that such preferences "are likely to reflect assumptions of male superiority and female inferiority", uphold the idea of separate spheres for the two sexes and this is "closely associated with the devaluation of women".⁶⁹

The Romanian law guarantees the equal treatment of citizens at all stages of employment. Article 3 of Ordinance 137 emphasizes the applicability of the anti-discrimination principle to the right to labor (understood as recruitment, hiring, labor conditions, promotion and access to professional development schemes), social protection, education, public services, freedom of movement, and in other fields.⁷⁰ Therefore, the act of denying a person the right to enter a certain profession on the basis of his/her gender constitutes a felony. The cases analyzed by this research which relate to unequal access to public services/ benefits or to professional development have been filed on the basis of this law. Nevertheless, equal access to public services/ benefits is also protected by article 247 of the Criminal Code regarding abuse while on duty through the denial of certain rights states. These articles states: "The denial of denial of a right or exercise of a right, to a citizen, by a public servant, as well as the fostering of fear or inferiority for the former, on the basis of nationality, race, sex or religion is punishable with detention from 6 months to 5 years"⁷¹

⁶⁹ Koppelman, *Antidiscrimination law and social equality*, p. 140.

⁷⁰ Article 3 of Ordinance 137

⁷¹ Article 247 of the Romanian Penal Code

Chapter 3. Data Analysis: Part 1: Presentation and Discussion of the Cases

3.1. General Remarks on the Interpretation of the Council

This chapter relies on the decisions of the National Council for Combating Discrimination (CNCD) - the Council - in Romania. The Council's decisions refer to gender discrimination and have been filed before CNCD from 2006 to 2009. Only eleven cases could be found and the reasons for this state of affairs are discussed in the next chapter. While these cases differ in the field of discrimination, they can roughly be grouped into cases of: (1) sexual harassment at the workplace; (2) sexist speech against women; and (3) (un)equal access to public services/benefits and to professional development. This latter category is further divided into two subsections: (a) (un)equal access to public services/benefits and (b) (un)equal access to professional development.

In all the cases, the name of the parties involved is not known, except for the cases in which one or both of the parties are legal entities, such as non-governmental organizations and state authorities. However, in some of the cases, the alleged discrimination involved a public act, therefore the name of the person accused is often available in the media. Thus, those names have been included in this research for more clarity.

The overall aim of this chapter is to evaluate the interpretation of gender discrimination provided by the Council. In statistical terms, the Council decided that discrimination has occurred in the overwhelming majority of the cases, namely 9 out of 11. Yet, 9 of these cases were fairly uncontroversial cases of direct discrimination and only one case involved a claim of indirect discrimination. This final case also happens to be one of two instances when the Council sided with the defendant's justification and declared that no discrimination has occurred.

In terms of the reasoning and justifications offered by the Council in support for its judgments, these often rely on well established precedents, typically of the European Court or Human Rights and on international and national legislation. In addressing cases from the category of sexual harassment, the Council invoked the “unjust and degrading treatment” of the victim and relied on the right to personal dignity. In the cases of sexist speech, the right to be free from discrimination was discussed by the Council in relation to the right to freedom of speech and it has been decided that the latter has its limitations. Yet, these are valid only when there is a specific legal basis as in the case of the anti-discrimination legislation. Finally in the cases of (un)equal access to public services or to professional development, the Council used the principle that “the differential treatment of similar or comparable situations is discrimination unless such “treatment has an objective justification and a legitimate goal, and the action is proportional with the goal to the achieved”. Neither the principles themselves nor their interpretation have been developed by this Council, but have been adopted from international precedents, which also rely on the existing national and international legislation in the field.

3.2. Sexual harassment

This category of the cases is least represented in the CNCD decisions. Only two complaints such complains were found. One of these two cases can be classified was a hostile environment type of harassment while the second, can be best understood as a case of quid-pro-quo harassment.

The first case, filed before CNCD in December 2006 is a rather standard case of sexual harassment at the work place. According to the facts of the case⁷², the plaintiff was a woman employed as a medical nurse and the defendant a man who served as a medical doctor in the

⁷² Decision No. 212 of 30.07.2007, National Council for Combating Discrimination.

same hospital as the plaintiff. She claimed that on the 7th of June 2006, while sanitizing the office of the defendant she has been immobilized and sexually addressed by him. He had also locked the door to the room. According to her statement, she has “categorically refused”⁷³ his provocation and told him that she would shout so that other colleagues will hear if he does not stop. However, the doctor replied that he has verified and there is nobody else around. He then released her and unlocked the door when she threatened to talk to his wife about this event.

After this date, the plaintiff has discussed this event with other colleagues and as a consequence the defendant refused to allow her to perform her tasks in his office, arguing that that “she didn’t keep her mouth shut”⁷⁴. On the 13th of October 2006, the plaintiff officially requested the management of the hospital to form a committee of mediation in order to address this matter, after she has been denied a meeting with the manager.⁷⁵ Subsequent to drafting this petition she has been accused of professional incompetence and certain doctors refused to collaborate with her ever since. On the 8th of December 2006 a mediation meeting has been held and the defendant has addressed the following question to the plaintiff: “what did I do? Did I break your panties?”⁷⁶ During the mediation the plaintiff maintained her declaration and the defendant denied all accusations.

CNCD has conducted its own investigation in the field and discussed with medical practitioners who worked with the parties at the time. The council has decided that the plaintiff has been indeed discriminated against, on the basis sex. The decision cites article 2 (1) of Ordinance 137/2000)⁷⁷ and point 4 of the same article which states that “any active or passive behavior which through the effects it generates unjustly advantages or disadvantages and is

⁷³ Decision No. 212 of 30.07.2007, National Council for Combating Discrimination, p.1

⁷⁴ Decision No. 212 of 30.07.2007, National Council for Combating Discrimination, p.2.

⁷⁵ Decision No. 212 of 30.07.2007, National Council for Combating Discrimination, p.2.

⁷⁶ Decision No. 212 of 30.07.2007, National Council for Combating Discrimination, p.2.

⁷⁷ Decision No. 212 of 30.07.2007, National Council for Combating Discrimination, p.6.

degrading to a person, group or community”⁷⁸ The council also cited article 15 of the same ordinance, in its decision which incriminates any conduct aiming at threatening the dignity of a person, or at creating an intimidating, hostile, degrading, humiliating or offensive environment” for the victim on the basis of her sex⁷⁹. Finally, the council also refers to article 2(5) regarding harassment on the basis of gender.⁸⁰

Regarding procedural aspects, CNCD notes that the claim has been legally filed within the period of one year. Moreover, the decision mentions that, while the defendant has denied the accusations and has attempted to prove his innocence his arguments are not convincing. Thus, since he bears the burden of proof, according to article 20 (1) of the same ordinance, he is found guilty. This decision has been approved unanimously by the members of the Council. However, no fine has been issued and the only sanction has been a warning for the aggressor.

The second case of sexual harassment analyzed in this research is more complex because it also includes elements of a labor conflict between the two harassed employees and their employer. In addition to harassment of a sexual nature the victim has also been subject to other types of harassment which has not targeted only female employees nor did it have a sexual motive at its core.

The plaintiff has been employed as a legal officer/ counselor at Distrigaz Sud SA which has been privatized and became part of C.E.E. Gaz de France in 2007 when this case was examined by CNCD. As a result of this change in the ownership and management of the company, according to their statement, the number of employees, including legal officers has been reduced. This has been achieved through the compensatory remuneration of employees or through other means. In these circumstances, the plaintiff affirms that in October 2003 she has

⁷⁸ Decision No. 212 of 30.07.2007, National Council for Combating Discrimination, p.6.

⁷⁹ Decision No. 212 of 30.07.2007, National Council for Combating Discrimination, p.6.

⁸⁰ Decision No. 212 of 30.07.2007, National Council for Combating Discrimination, p.6.

been transferred to a different location belonging to the same employer without her consent. Moreover in the new office her superior has received her with hostility, has been denied access to the legal department of the company, “compelled to work in an office with employees in various other types of professions, no access to a computer or to legal library resources, and no tasks”⁸¹. In 2006 she has been invited to a meeting, together with other legal officers, in which they have been asked to conclude all activity and resign their job.⁸² The plaintiff did not resign and soon filed a petition to the higher echelons of the company to be given work tasks. She was told that her situation will be investigated and that she will be given work tasks in accordance with her position. Yet, she has been moved by her immediate superior to a different office together with employees in different types of professions who were not being given any work tasks, with no access to a computer, no telephone, no legal library resources, and with restrictions to electricity and heating”⁸³ They have been told that “since you have nothing to do, you don’t need anything”⁸⁴.

In this context the plaintiff has also been harassed on the basis of her gender in one instance, according to the facts of the cases available in the file, by being asked the following question: “why should you worry about your job, you are young and good looking?”⁸⁵. She reports that another female colleague who was older, and who was in a similar situation at the workplace as her, has been told that she can become a [female] pimp (in Romanian “matroana”, equivalent of female pimp).⁸⁶

⁸¹ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.1.

⁸² Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.2.

⁸³ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.2.

⁸⁴ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.2.

⁸⁵ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.2.

⁸⁶ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.2.

CNCD has asked the employer to investigate the situation and to respond to the accusations. Following an internal investigation, S.C. Distrigaz S.A. has responded that, according to the declarations of employees, “there are no more activities requiring the labor of legal officers”.⁸⁷ In response to the accusations of sexual harassment, the employer denied all accusations and stated that no employee has witnessed any offensive statement or allusion”.⁸⁸ Nevertheless, CNCD concluded that this response does not prove that there has been no discrimination or harassment on the basis of gender.⁸⁹

Therefore, the Council decided that discrimination has occurred. The decision cites article 2 (1) of Ordinance 137/2000) regarding discrimination, restriction or exclusion on the basis of sex;⁹⁰ and point 4 of the same article which states that “any active or passive behavior which through the effects it generates unjustly advantages or disadvantages and is degrading to a person, group or community”⁹¹; paragraph 4 of the same article, regarding “any active or passive conduct which advantages or disadvantages a person, group of community, or subjects her/him or them to an unjust and degrading treatment”⁹²; article 15 of the same ordinance, which targets any conduct aiming at threatening the dignity of a person, or at creating an intimidating, hostile, degrading, humiliating or offensive environment” for the victim on the basis of her sex⁹³. Finally, the council also refers to article 19⁵(2) of the same ordinance regarding personal dignity and the misdemeanor character of “any public act with the characteristics of nationalist-chauvinistic propaganda, of incitement to racial or national hatred, or act which has the purpose

⁸⁷ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.2.

⁸⁸ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.2.

⁸⁹ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.5.

⁹⁰ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.5.

⁹¹ Decision No. 212 of 30.07.2007, National Council for Combating Discrimination, p.6.

⁹² Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.5.

⁹³ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.6.

of affecting the dignity of, and creating a hostile, offensive, degrading and intimidating environment, for a person, group or community on the basis of their...sex”⁹⁴

3.3. Sexist speech

This section discusses four cases in which sexist speech against women in the public sphere, either in politics or in other decision-making positions. In all cases, the offensive speech has been voiced in the media, in the first two cases being television, while in the second two in the written media. While in three of the cases, the author of sexist speech against women is a man, in the last case discussed here, the offensive ideas are voiced by a woman. In all four cases CNCD found in favor of the plaintiff. The reasoning and legal resources invoked by CNCD are common for all cases discussed in this section and will be analyzed subsequent to the presentation of the cases.

The first case has been filed before CNCD in September 2007. The plaintiffs, who may or may not have had a direct interest in this cause condemned the expressions used by a candidate for the election to the European Parliament. These were made during the “Euroscepticii” talk show on Realitatea TV on the 8th of September 2007. The name of this politician is not mentioned in the file, but his name, George Becali, is available in the media. The defendant has used the following expressions in addressing a female participant to the discussion: “girl”, “go and be a prostitute” implying that women’s place is not in the public sphere or in politics, and claimed that “she withered” (meaning that she is old and unattractive) after giving birth to a child.⁹⁵ When being asked to reply to the charges brought against him, the defendant refused to provide a written position or to present himself before the Council.

⁹⁴ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.6.

⁹⁵ Decision No. 397 of 04.10.2007, , National Council for Combating Discrimination, p 2.

In the second case the alleged author of sexist speech is also a male politician, running, this time for the Senate, in the 2008 parliamentary elections. In an interview for Agerpres, the candidate on behalf of the political alliance PSD-PC has made a series of remarks regarding women in politics, especially referring to young female candidates for the Parliament. The name of the defendant is not mentioned in the file, but his name, Segiu Nicolaescu, and his declarations are widely available in the media. In the interview he stated the following ideas: “these young women, who wish to become a Senator or member of the Chamber of Deputies...as if there’s nothing else in this world they could do, can’t they have children...they have to think of becoming MPs and such”⁹⁶. Yet, he nuanced his position by saying: “there is no doubt that there should be a few women in politics” but that those should be “older, and not pursue a political career”⁹⁷. He also commented on Ms. Clinton’s political activity, stating “I looked at Ms. Clinton and I was shocked! Clinton during his time was not a [true] president, his wife even less so!”⁹⁸

The plaintiff, The Center for Curricular Development and Gender Studies, FILIA which is an NGO advocating women’s rights challenged the views of the defendant on women’s role in society. FILIA claimed that his views confine women to the private sphere (“having children”) and supposes that biology should continue to have a decisive role in one’s destiny. Moreover, the plaintiff argued that such statements have a very serious negative effect upon the underrepresentation and under-participation of women in politics in Romania by maintaining and reinforcing the status quo.⁹⁹

⁹⁶ Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p. 1-2

⁹⁷ Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p. 2.

⁹⁸ Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p. 2-3.

⁹⁹ Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p. 3.

It could be added here that such speech reinforces the masculine character of politics as well as other gender stereotypes. It does so by perceiving male political candidates as being the norm (“Clinton”) while female candidates are describes as the special category (“Ms. Clinton”). Moreover, the very underlining assumption of this statement is that women marry men who are in one way or another – typically intellectually, professionally and financially - superior to them. Therefore, if a man, in a given couple was not good enough as a president (in the opinion of the author of the statement) the woman stands even fewer chances of success. Or perhaps, in his opinion, it is improper and unacceptable for a woman to aim at something that her husband could not accomplish. While Nicolaescu does not explain his statement, such interpretations are certainly likely and logical.

The following two cases discussed are related to women in decision-making positions, more precisely to their ability to take important decisions during their menstrual cycle. The first case has been filed by two plaintiffs, a female judge and a female prosecutor, against the author of two articles published in May and June 2006 in the Journal “Vocea”.¹⁰⁰ The incriminated passages refer to the professional activity of the plaintiffs and are:

Incredible! After serving 3 years in prison because of a judge who was probably during her [menstrual] cycle, five [deleted from file] have been condemned to another 16 years for the same act!”¹⁰¹ / “(...)When you get to see with our own eyes, the outrageous decisions taken by a few women (muieri=traditional derogatory term for women) who have become judges and prosecutors and who don’t give a menopause about the dramas they generate by their lack of brain ...please take my word for it that it is pure suicide to abstain yourself from cursing like a gypsy”¹⁰² / “Wouldn’t they have been better off next to the pots, since there they would have only determined indigestions and this only to their families? Is there no conscience left in the brain of these women (....) How could such stupid and reckless women exist?” / “And you madam, important judge at the Court of Appeals and that fig who enters menopause every time she loses a case (...)”¹⁰³

¹⁰⁰ Vocea translates as “Voice” in Romanian; Long title of the journal: “Vocea – Saptamanal Independent Ardelenesc...si nu prea”.

¹⁰¹ Decision No. 204 of 2.04.2007, National Council for Combating Discrimination, p. 1-2.

¹⁰² Decision No. 204 of 2.04.2007, National Council for Combating Discrimination, p. 2.

¹⁰³ Decision No. 204 of 2.04.2007, National Council for Combating Discrimination, p. 2.

Therefore, the plaintiffs have claimed that the two articles undermine their professional competence and ability to serve as a judge and respectively a prosecutor at the Court of Appeals. At the plaintiffs' request the Supreme Council of Magistrates also adopted two decisions upholding their professional competence.¹⁰⁴ Nevertheless, the author of the two articles believed that he has not discriminated against anybody and replied that "the articles were strictly concerned with the professional activity of the two magistrates who, in his opinion, are guilty of major mistakes."¹⁰⁵ Moreover he added that the claims are the result of a journalistic investigation and the language used is "dear to the readers of the journal" [which aims at the preservation of the linguistic heritage from a certain part of the country].

It is also important to note here that such traditional words and expressions describing women often carry connotations of inferiority. Moreover, they send a conservative message regarding women's place in society (ex: "near the pots"). Additionally, the ideas highlight and hyperbolize gendered experiences such as menstruation and menopause, thus having the role of mystifying and overemphasizing the importance of these aspects of womanhood. There is an exaggeration of the biological processes of menstruation and menopause beyond normal parameters ("ex. enters menopause each time she loses a case") and a repetition of such terms aimed at conveying the idea that "women are trapped in nature". A similar trend of thought is also encountered in the next case.

In the last case discussed under this section, the plaintiff was again, FILIA who denounced the sexist aspects of the article: "[name of author, which has been erased], former feminist: too much sex and vulgarity have become harmful role models" written by a female

¹⁰⁴ Decision No. 204 of 2.04.2007, National Council for Combating Discrimination, p. 2.

¹⁰⁵ Decision No. 204 of 2.04.2007, National Council for Combating Discrimination, p. 2-3.

author.¹⁰⁶ The name of the defendant is not mentioned in the file, but her name, Monica Tatoiu, and the incriminated article are available in the media. The article contains the following statements: "...three days a month are terrible, because in these days you cannot think rationally. If you have to take a decision during the time you have your period it's horrible."¹⁰⁷ "I only collaborate with female directors, but during these periods, in which hormones boom, I don't allow them to sign contracts involving money."¹⁰⁸ The author also referred to the Roman period when "women could not become judges or lawyers, precisely because in those three days, they can take decisions which are destructive for the future"¹⁰⁹.

FILIA claimed that the conduct of the author of the article has a discriminating effect inside the company led by the defendant. It breaches the rights to intimacy and personal dignity of the female employees, is overall discriminatory and has an effect upon the legitimacy of the work performed by any woman, especially work which involves decision-making.¹¹⁰ The plaintiff also mentions the existing statistics on women's under-representation in business decision-making.¹¹¹ In this case, the defendant responded to CNCD's request to reply to the accusations and motivated her actions and statements by arguing that the reference to Roman times is a historical fact which cannot be denied. With regard to her testimonial about her own actions, she submitted written declarations of three of the female directors under her authority, stating that "they have not been discriminated against and their right to intimacy has not been violated"¹¹²

¹⁰⁶ Decision No. 204 of 2.04.2007, National Council for Combating Discrimination, p. 1-2.

¹⁰⁷ Decision No. 277 of 28.04.2009, National Council for Combating Discrimination, p.1

¹⁰⁸ Decision No. 277 of 28.04.2009, National Council for Combating Discrimination, p.1-2.

¹⁰⁹ Decision No. 277 of 28.04.2009, National Council for Combating Discrimination, p.2.

¹¹⁰ Decision No. 277 of 28.04.2009, National Council for Combating Discrimination, p.2.

¹¹¹ Decision No. 277 of 28.04.2009, National Council for Combating Discrimination, p.2.

¹¹² Decision No. 277 of 28.04.2009, National Council for Combating Discrimination, p.2.

The interpretation of discrimination by CNCD in all four of the cases previously presented has followed a similar pattern. The main conflict of rights is the one between the right to freedom of speech, and in the third case (“Vocea”) also the freedom of the press versus the right to dignity and of being free from discrimination. The legal resources invoked in the four cases outlawing discrimination on the basis of sex, therefore also sexist speech, were: Article 14 of the European Convention for the protection of Human Rights and Fundamental Freedoms ratified by Romania through law no. 30/1994 stating that “the exercise of the rights and liberties recognized by this convention must be guaranteed without any discrimination based on grounds such as sex, race, color, etc..”¹¹³ article 2 (1) of Ordinance 137/2000) regarding discrimination, restriction or exclusion on the basis of sex which does not have an objective justification¹¹⁴; Article 2 and 3 of the Convention for the Elimination of All form of Discrimination Against Women (CEDAW), ratified by Decree no. 342/ 1981, in which signatory stated condemn all forms of discrimination against women and agree to adopt the appropriate laws and administrative measures aimed at combating discrimination against women in all fields of life, social, political, economic and cultural.¹¹⁵; Article 15 of ordinance 137/2000, which targets any conduct aiming at threatening the dignity of a person, or at creating an intimidating, hostile, degrading, humiliating or offensive environment” for the victim on the basis of her sex (or other characteristics)¹¹⁶

Also common in all four cases were the legal resources and precedents for establishing the boundaries between the right to freedom of expression/ speech and the rights to personal dignity and non-discrimination. These were: Article 30 (1) and (2) of the Romanian Constitution

¹¹³ Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p. 4.

¹¹⁴ Decision No. 127 of 24.05.2007, National Council for Combating Discrimination, p.5.

¹¹⁵ Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p. 4.

¹¹⁶ Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p 3

on the right to freedom of speech previously presented, together with points 6 and 7 of the same article which limit the exercise of this right stating “The freedom of expression cannot cause any damage to the dignity, honor, personal life, or the right to self image of a person...”. Article 15 of OG 137/2000 which is also mentioned in this context, as describing the limits of the right to freedom of speech; and the jurisprudence of the European Council of Human Rights in cases such as *Lingers vs. Austria*, *Sunday Times vs. UK*, and *Castells vs. Spain*.¹¹⁷ Therefore, while admitting that the right to freedom of speech is essential in a democratic society, CNCD supports the interpretation that its exercise implies a positive obligation to not discriminate, or violate the dignity or the rights of others.¹¹⁸ Therefore the Council decides that the limitation of the right to freedom of expression is possible but only when there is a specific legal basis.¹¹⁹

While the previously presented argument has been characteristic for the decision in all four of the cases, the decision 59 of 2009 on the cases involving the declarations of Mr. Nicolaescu, has certain particularities worth noting. One of these is the citation of Decision no. 62 of 2007 of the constitutional Court which holds that “the right to dignity is one of the supreme values, the violation of this right can even bring criminal sanctions” on the basis of Articles 205-206 of the criminal code¹²⁰ This strengthens the case for limiting freedom of speech in order to protect the right to non-discrimination. On the other hand, the second particularity of this file is the existence of a separate opinion, in favor of a looser interpretation of discrimination upholding the right to freedom of speech. The second opinion signed by three of the members of the Council: Truinea Paula Roxana, Nita Dragos Tiberiu and Dezideriu Gergely states that “both requirements have not been met at the same time”, those of article 2 of and of article 15 of OG

¹¹⁷ Decision No. 397 of 04.10.2007, National Council for Combating Discrimination, p. 4.

¹¹⁸ Decision No. 212 of 30.07.2007, National Council for Combating Discrimination, p.4.

¹¹⁹ Decision No. 212 of 30.07.2007, National Council for Combating Discrimination, p.4.

¹²⁰ Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p.5.

137/2000 because “the declarations of the defendant were not as severe as to create an intimidating, hostile, degrading or offensive environment [for women]”¹²¹. Additionally it is “extremely difficult to establish” if the declarations were intended to “lower the social status or reputation of the persons involved causing them feelings of inferiority and humiliation”¹²². Conversely, the majority opinion argued that the existence of the intention to discriminate is not relevant in establishing whether or not discrimination has occurred. One of the arguments is that “the law does not make a distinction between intentional and non-intentional discrimination”¹²³. The second argument is that, according to article 2 and 3 of OG 137/2000, indirect (and unintended) discrimination is also illegal.¹²⁴

The sanctions applied by CNCD in the four cases range from a simple recommendation, to a warning and in one case to issuing an administrative fine. The author of the two articles in the “Vocea Journal” (Decision no. 2.04.2007) has been issued a recommendation to respect the equality of chances and the principle of equal treatment between women and men, and to use a non-discriminatory language. Mr. Nicolaescu (Decision 59 of 2009) and Ms. Monica Tatoiu (Decision 277 of 2009) each received a warning. The most severe sanction, an administrative fine of 500 lei (aprox. 150E) has been applied in the case of Mr. Becali (Decision 397 of 2007). While the verdict in these four decisions is promising for the non-discrimination project in Romania, the sanctions applied and the lack of publicity of these four decisions (except by written request to CNCD) are not.

¹²¹ Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p.14

¹²² Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p.14

¹²³ Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p.8.

¹²⁴ Decision No. 59 of 03.02.2009, National Council for Combating Discrimination, p.8.

3.4. Unequal accesses to public services/ benefits and to professional development

a. Unequal access to public services/ benefits

This subsection is based on two cases in which one gender received unequal access to various public facilities, as compared to the other. In one of the cases, women had access to public a bath in fewer days than men, while in the other, men had no access to children's hospitals, as opposed to women. While in the second case the Council decided that there was discrimination and its decision subsequently led to the reversal of the situation, in the first case, CNCD rejected the claim of discrimination. In both cases, it was a legal entity, an NGO respectively a state agency which filed the case, not an actual victim of discrimination. Nevertheless, both of the cases are based on the discrimination reported by victims.

In the first case¹²⁵, an NGO advocating father's rights, the Alliance for the Antidiscrimination of All Fathers (TATA) reported the discrimination of fathers in two children's hospitals. In the plaintiff's opinion, the discriminatory treatment lays in most hospitals' prohibition of fathers to accompany their infant children during the latter's stay in the hospital. "TATA" has submitted evidence of this internal rule, such as an picture with the announcement posted on the door of a children's hospital in Bucharest stating "*children under the age of three will be received only accompanied by their mother – Their mother, not relatives*"¹²⁶ In response, the hospital accused of discrimination replied that: (1) hospitals cannot accommodate men and women in different sections due to logistic reasons; (2) some of the women who accompany their children in the hospital are breastfeeding and they would feel uncomfortable to do so in the presence of men; (3) mothers are sometimes actively involved in the medical process of treating their children and children are more likely to accept the medical

¹²⁵ Decision No. 649 of 04.12.2008, National Council for Combating Discrimination.

¹²⁶ Decision No. 649 of 04.12.2008, National Council for Combating Discrimination, p. 1.

procedures if their mother is present; (4) the majority of nurses are also women; and (5) many other children's hospitals in the country have the same rule.¹²⁷

In discussing this case, the members of the Council made reference to art. 16(1) of the Constitution stating that "citizens are equal before the law and public authorities, without privileges and without discrimination"¹²⁸; Protocol 12 of the European Convention for Human Rights which is a general provision against discrimination; art. 2(1) of Government Ordinance (G.O.) 137/2000 which defines discrimination in the Romanian law, and art. 10 of the same ordinance which specifies the infringement character of discrimination. CNCD subscribes to the established rationale that "the differential treatment of persons found in similar situations"¹²⁹ is discrimination unless "the treatment has an objective justification and a legitimate goal, and the action is propositional with the goal to the achieved"¹³⁰

In its decision, the Council refuted argument (3) by responding that "fathers are also entitled to take days off in order to spend time with their sick child" and that children sometimes do not have a mother. Moreover they cite to article 97 of the Family Code which entitles both parents to the same duties and rights over their children and Government Decision no.1942¹³¹ which regulates the medical and insurance system and uses the gender neutral term "chaperone" to describe the person who is entitled to receive accommodation and meals when accompanying a sick children in the hospital¹³². CNCD also refuted argument (5) disagreeing with the judgment of the hospital. Finally, the Council does not reject arguments (1) and (2) which are interlinked and it states that, while acknowledging the hospital's concern for the privacy of the persons

¹²⁷ Decision No. 649 of 04.12.2008, National Council for Combating Discrimination, p. 2.

¹²⁸ Decision No. 649 of 04.12.2008, National Council for Combating Discrimination, p. 2.

¹²⁹ Decision No. 649 of 04.12.2008, National Council for Combating Discrimination, p.4.

¹³⁰ Decision No. 649 of 04.12.2008, National Council for Combating Discrimination, p.5.

¹³¹ Decision No. 649 of 04.12.2008, National Council for Combating Discrimination, p. 4

¹³² Decision No. 649 of 04.12.2008, National Council for Combating Discrimination, p. 4

accompanying sick children, “this solution is not adequate”¹³³. Therefore the Council finds this practice discriminatory on the basis of art. 2(1) and art. 4 of G.O. 137/2000 and recommends that the hospital creates separate facilities for accommodating men and women who accompany their children.¹³⁴ An administrative fee of 600 Ron (approx. 150 Euro) has been issued to the hospital.¹³⁵

In the second case¹³⁶ discussed in this subsection, the National Agency for Equality of Opportunity for Women and Men (ANES) filed a petition directing the Council’s attention to the schedule of a public bath in Bucharest which provided access in five days for men and in only one day for women. The defendant, in this case a department of the Municipal Council, has justified this situation by stating that, because of the specific arrangements of this facility, women and men cannot be admitted at the same time. Redesigning the particular building would lead to an increase of the admission price, which would make it inaccessible for many of its current client, as the service is especially targeting persons with low incomes.¹³⁷ The Municipal Council has also added that, while earning a profit is certainly not the aim, the cost of providing this service must be covered. Moreover, the administration of the building argued that dividing the daily schedule of the bath in such a way that both men and women would be able to use it everyday but in different time slots was not a possible solution. This would require cleaning the facility two times a day which would also increase the cost of admission. Finally, they found one day per week to be sufficient for the relatively low number of female clients, about 20-30.¹³⁸ Nevertheless, the defendant was receptive to discrimination accusations and modified the

¹³³ Decision No. 649 of 04.12.2008, National Council for Combating Discrimination, p. 6.

¹³⁴ Decision No. 649 of 04.12.2008, National Council for Combating Discrimination, p. 6.

¹³⁵ Decision No. 649 of 04.12.2008, National Council for Combating Discrimination, p. 6.

¹³⁶ Decision No. 69 of 27.03.2007, National Council for Combating Discrimination.

¹³⁷ Decision No. 69 of 27.03.2007, National Council for Combating Discrimination., p. 3

¹³⁸ Decision No. 69 of 27.03.2007, National Council for Combating Discrimination., p.3

schedule of the public bath, designating 2 days for women, prior to any decision of the Council on this matter.¹³⁹ In their discussion of the case, the members of the Council referred to art. 7 of the Universal Declaration of Human Rights providing for equal protection against discrimination; art. 14 of the European Convention for Human Rights also protecting against discrimination on various grounds including sex; art. 1 of Protocol no. 12 to the Convention for Human Rights and Fundamental Freedoms; art. 20 of the Constitution, which nominates the Universal Declaration of Human Rights and other treaties as guides for the interpretation of Romanian human rights laws; art. 16(1) of the Constitution on the equality of citizens; art. 2(1) of G.O. 137/2000.

The Council decided that there is no discrimination between women and men. They have applied the interpretation used by the European Court of Human Rights of art. 14 of the Convention that discrimination occurs when “in situations which are analogues or comparable... distinctions which are not based on a reasonable and objective justification, are introduced.”¹⁴⁰ CNCD found the arguments presented by the Council of the Municipality as convincing and as fitting the requirement of “reasonable and objective justification”¹⁴¹. The council also found the modified schedule (allowing women access for tow days/week and men 4 days/ week) to be reasonable given that, according to the statistics provided by the defendant, the number of women using the facility is much smaller as compared to men.¹⁴²

In comparing the two decisions of CNCD presented in this subsection it can be observed that in situations which are comparable in kind but not in degrees, the Council used the same rationale in order to arrive to opposite conclusions. In both cases, the standard of “reasonable and

¹³⁹ Decision No. 69 of 27.03.2007, National Council for Combating Discrimination., p.3

¹⁴⁰ Decision No. 69 of 27.03.2007, National Council for Combating Discrimination., p.5.

¹⁴¹ Decision No. 69 of 27.03.2007, National Council for Combating Discrimination., p.6.

¹⁴² Decision No. 69 of 27.03.2007, National Council for Combating Discrimination., p.6.

objective justification” has been employed. The justifications of the defendants are similar: both revolve around the argument of insufficient funds and lack of adequate facilities for providing equality of services for men and women. In both cases, statistics show that the use of the given public service by men and women is different (fewer men spend time in the hospital with their children and fewer women use the public bath). In both cases the income generated by the use of the given service by each client is relevant to the budget of the facility, whether directly by charging access in the case of the public bath or indirectly through health insurance in the case of the hospital. Yet, the decision of CNCD differs from one case to another.

The noticeable distinction between the facts of the two cases, which is likely to have weighted on the Council’s verdict, is the degree of inequality in access to the given public service. While in the second case discussed women had access to the facility in one (later two) days, in the first case men could not have accompany their children in hospital at all. There is also the issue of the different implications of the two situations, the first case having the potential of having severe consequences upon the heath of children. It may be harder to assess similar consequences in the second case. Therefore, it is likely that these considerations were responsible for the difference in interpreting discrimination.

b. Unequal access to professional development

This subsection discusses two cases of unequal access to professional development. One is related to a job advertisement and the second pertains to discrimination in professional promotion and access to the decision-making process. This subsection includes the only case started by an *ex-officio* action of the Council and the only case of indirect discrimination found

by this research. In one of the cases CNCD decided that there was discrimination while in the other it decided that no discrimination has occurred.

In 2008 the Council started an *ex officio* action to investigate whether an employment advertisement published by “Edu” printing house, was discriminatory on the basis of gender¹⁴³. The position advertised was that of “sales manager” and the 5 positions available were open only to male applicants.¹⁴⁴ The tasks of the job were “promoting sales...developing partnerships with educational institutions and upholding the interests of the printing house and promoting its image in ... cities and schools”.¹⁴⁵ The defendant justified the exclusion of female candidates by claiming that (1) the position required a great physical effort, and (2) there would be significant financial implications for the printing house if it was to employ both men and women because [the position implies traveling] and “the employer would have to cover the price of two hotel rooms for its employees, instead of a double one.”¹⁴⁶

In this case, the Council made reference to art. 16 of the Constitution; Protocol no. of the European Convention on Human Rights; art. 2(1) and art. 2(4) of G.O. 137/2000 as well as art. 5 6 and 7 of the same ordinance. Article 5 states “The action of conditioning a person’s participation in the economic life ...on the basis of ...gender...is an infringement”¹⁴⁷ while art. 6 incriminates discrimination in all aspects of employment, including but not limited to: hiring, promotion, dismissal.¹⁴⁸ The argumentation used by CNCD in this case is the same as in the previous two cases related to unequal access to public services: in analogous or comparable situations, persons should be treated equally unless there is a “reasonable and objective

¹⁴³ Decision No. 622 of 13.11.2008, National Council for Combating Discrimination.

¹⁴⁴ Decision No. 622 of 13.11.2008, National Council for Combating Discrimination., p. 1-2.

¹⁴⁵ Decision No. 622 of 13.11.2008, National Council for Combating Discrimination.. p. 2.

¹⁴⁶ Decision No. 622 of 13.11.2008, National Council for Combating Discrimination.. p. 2.

¹⁴⁷ Decision No. 622 of 13.11.2008, National Council for Combating Discrimination.. p. 3

¹⁴⁸ Decision No. 622 of 13.11.2008, National Council for Combating Discrimination.. p. 3

justification” following a legitimate goal, for doing otherwise.¹⁴⁹ The Council takes note of the justification provided by the defendant but decides, citing the European Court of Justice, that it is not “reasonable and objective”.¹⁵⁰ A number of cases including “Tanja Kreil vs. Bundesrepublik Deutschland, Case C285/98” are cited to support the judgment that “the exclusion of women from certain positions, motivated by the difficultness of the tasks to be accomplished is not an objective justification”.¹⁵¹ Therefore the Council decides that the advertisement is discriminatory to women and sends a warning to the printing house.

The second instance of reported discrimination discussed in this section occurred in 2007. A female judge, who was also the president of the Association of Romanian Judges at the time, accused the Supreme Council of the Magistrates (C.S.M) of discriminating against female members who run for the position of president of this institution.¹⁵² She motivated her claim by stating that “The 9 members of the C.S.M., in the department of the judges, are found in a position of equality....all of them can apply for the position of president”...however, “within the activity of the C.S.M, there is an apparent neutrality in the process of choosing the president of this institution.....since the moment of the establishment of C.S.M., the institution has only been led by men”.¹⁵³ Moreover, statistics show that in the 6 years of mandate, out of the 9 [eligible] members, there were 5 women and 4 men” yet the president has always been a man.¹⁵⁴ In response the defendant (C.S.M.) replied that “all 14 members of CSM have the vocation of becoming the president...but up to date, none of the female members has run for this position

¹⁴⁹ Decision No. 622 of 13.11.2008, National Council for Combating Discrimination.. p. 4.

¹⁵⁰ Decision No. 622 of 13.11.2008, National Council for Combating Discrimination.. p. 4.-5.

¹⁵¹ Decision No. 622 of 13.11.2008, National Council for Combating Discrimination.. p. 5.

¹⁵² Decision No. 44 of 09.01.2008, National Council for Combating Discrimination.

¹⁵³ Decision No. 44 of 09.01.2008, National Council for Combating Discrimination., p. 1.

¹⁵⁴ Decision No. 44 of 09.01.2008, National Council for Combating Discrimination., p. 2.

[except for the year] 2005, when there have been two candidates for the position”¹⁵⁵ coming from a male and a female member.¹⁵⁶

In discussing this case CNCD has used the same principle as in the previous cases included in this section, namely that the difference in treatment in access to professional development is considered discrimination “when in analogues and comparable situations”, unless there is a “reasonable and objective justification” which follows a legitimate goal.¹⁵⁷ A number of decisions of the ECHR establishing this principle are cited, as well as decisions of the Romanian Constitutional Court upholding the interpretation that “equality is not synonymous with uniformity”¹⁵⁸ The definition of discrimination contained by art. 2(1) of G. O. 137/2000 is also listed in the decision of this case. Nevertheless, the Council decides that the criteria mentioned above for the treatment to be considered discrimination are not met. The unequal treatment of female candidates during the process of electing the president of CSM cannot be assessed. This is firstly because “there has been a female candidate in 2005 and she simply has not gained enough votes” and secondly because “there are no hints that female members of CSM wish to run for this position”¹⁵⁹. CNCD also dismissed the importance of the statistical evidence – which this institution is legally bound to accept as proof - provided by the plaintiff in this case, stating that those are also irrelevant for the same reason: “the absence of interest in female to become candidates for the position of president.”¹⁶⁰ Consequently the Council rejected the accusation of discrimination.

¹⁵⁵ Decision No. 44 of 09.01.2008, National Council for Combating Discrimination., p. 2.

¹⁵⁶ Decision No. 44 of 09.01.2008, National Council for Combating Discrimination., p. 2.

¹⁵⁷ Decision No. 44 of 09.01.2008, National Council for Combating Discrimination., p. 2.

¹⁵⁸ Decision No. 44 of 09.01.2008, National Council for Combating Discrimination., p. 3.

¹⁵⁹ Decision No. 44 of 09.01.2008, National Council for Combating Discrimination., p. 4.

¹⁶⁰ Decision No. 44 of 09.01.2008, National Council for Combating Discrimination., p. 4.

Therefore it can be assessed that the Council's interpretation of gender discrimination regarding access to professional development is, to a certain extent, conservative. In the first case mentioned in this subsection, a printing house displayed direct gender discrimination in its job advertisement. But, in the in second case, it has been claimed that the process of electing the president of CSM indirectly discriminates against eligible female members. Statistical evidence supports such claim. In a broad interpretation, the election process can be seen to also extend to the mechanism which determines one to become a candidate. In the absence of a precedent of a female president and given the unsuccessful record of the only existing female candidate so far, it might be assumed that there exist serious disincentives for female members to run. This, in itself can be considered, in a very inclusive interpretation, to be indirect discrimination. However, the Council adopts a moderate stance: it classifies as discrimination the direct differential treatment of the first case and would accept as indirect discrimination the situation of CSM only if the female members had run for the position of president more often.

Finally, the eleventh case included in the statistics of CNCD as gender based discrimination does not in fact belong to this category. In 2008, a female prosecutor who has received a lower maternity benefit than her colleagues who had children a year before, filed a petition to CNCD claiming that she has been discriminated against.¹⁶¹ Two grounds of discrimination were invoked by her: first, the year in which she gave birth and secondly the lack of proportionality of the state maternity benefit with regard to her contribution.¹⁶² Therefore she considered herself discriminated against, as compared to other pregnant women not as compared to men. Thus, this case cannot be counted as a claim of gender-based discrimination, despite the fact that pregnancy particularly relevant to women.

¹⁶¹ Decision No. 298 of 27.05.2008, National Council for Combating Discrimination.

¹⁶² Decision No. 298 of 27.05.2008, National Council for Combating Discrimination., pp. 1-3

Chapter 4. Data analysis II – Analysis of the interviews

4.1. Reasons for the low number of cases

This chapter analyzes the key reasons for the low number of cases involving gender discrimination decided by CNCD. Subsequently, the chapter proceeds beyond the empirical realities of this study and analyzes the overall cause for the reasons determining the low number of gender discrimination cases discussed by CNCD. It concludes that, despite the relative successes of this authority in achieving its mission up to now, its constraints result from the very circumstances which led to its foundation.

First of all, the study finds that there are in fact more potential gender discrimination cases decided by CNCD, but, due to the sorting mechanism employed by this institution, those decisions have not been officially labeled as “gender discrimination”. Secondly, it finds that there are in fact more cases of gender discrimination, but they are not necessarily discussed by the CNCD, but by other institutions. As there is not a high degree of inter-institutional communication and transparency, and there is no comprehensive account of all these cases, identifying them would require a research in itself. Yet, despite the existence of other cases, both examined by other institutions or by CNCD and appearing as discrimination on other grounds, the reporting of gender discrimination cases is not a common occurrence in Romania. Therefore, this study finally identifies some of the most common causes for which acts of discrimination are often not reported.

As the discussions with experts in the field have revealed, the reasons leading to this situation can be grouped into three stages: (1) *pre-complaint barriers*, typically prevent or discourage victims of gender discrimination from filing a case; (2) *alternative and sometimes*

overlapping procedural tracks to be followed by the plaintiff which can lead the case to a different state authority than CNCD and therefore would not enter the scope of this research; and (3) *post-decision classification*: the labeling and grouping of CNCD decisions according to various criteria by the Council itself.

4.2. Pre-complaint barriers

One of the first obstacles in reporting discrimination on the basis of gender was the *collective mentality* which either does not perceive certain types of conduct as discrimination or does not find the matter severe enough to file a complaint. Mr. Haller, the legal representative of CNCD believes that “women in Romania are so used to being discriminated against that they don’t feel repulsed by this experience and they see it as something normal.”¹⁶³

This situation particularly applies to cases of unequal pay, or differential access to professional development. According to Ms. Sorescu (president of the Center Partnership for Equality) victims are only likely to report a situation which they perceive as very dangerous and critical for them¹⁶⁴. The interviewee explained that a difference in salary [as compared to a male colleague] is either: “very rarely perceived as discrimination” at the societal level¹⁶⁵, or, if it is identified as discrimination it is often

*...not seen as being so problematic by the victim, as to seek the support of an organization such as ours, or to go forward with the complaint. In general, we are dealing with persons who have faced sexual harassment and persons dismissed on the basis of pregnancy*¹⁶⁶

This situation is based on a general lack of knowledge about one’s rights at the level of the population, not only characteristic for women. Mr. Haller considers that “the vast majority of

¹⁶³ Interview with Istvan Haller (CNCD), p. 1

¹⁶⁴ Interview with Irina Sorescu (CPE), p. 5.

¹⁶⁵ Interview with Irina Sorescu (CPE), p. 3.

¹⁶⁶ Interview with Irina Sorescu (CPE), p. 5.

people, when being discriminated against, are not aware that such conduct is prohibited in Romania”¹⁶⁷ He adds that “the educational system in Romania does not encourage the understanding of the existing legislation”¹⁶⁸. Thus, within the general population in which there is a limited awareness of the human rights guaranteed by the legislation, certain groups are even less likely to be aware of their rights. Yet, such groups, including certain segments of the female population, are likely to experience an increased risk to direct or indirect gender discrimination. Laura Grunberg considers that there is a significant amount of discrimination on the basis of gender and ethnicity or on the basis of gender and age.¹⁶⁹ This discrimination, she believes, is often “manifested in many implicit forms, invisible and subtle”¹⁷⁰ The examples provided by Grunberg are: Roma women who are in a disadvantaged position on the labor market and elderly women who face the general obstacles of senior citizens in Romania but their situation is particularly “relevant for the gender dimension because the elderly population is feminized”¹⁷¹

Another widely mentioned obstacle is the *lack of visibility* of CNCD in the media and at the societal level. While CNCD has been involved in a number of awareness raising campaigns, many of the interviewees believe that there is not an adequate level of publicity. Sorescu states that “one of the main causes [for the low number of complaints] is that CNCD is not unknown as an institution, on a broad scale”¹⁷² Grunberg also mentions that she – despite her experience in the field of gender equality – is not currently aware of CNCD’s public relations strategy¹⁷³. “I did not see much media promotion... for people to find out about this CNCD...since it has been

¹⁶⁷ Interview with Istvan Haller (CNCD), p. 3.

¹⁶⁸ Interview with Istvan Haller (CNCD), p. 2.

¹⁶⁹ Interview with Laura Grunberg (ANA/ SNSPA), p.2

¹⁷⁰ Interview with Laura Grunberg (ANA/ SNSPA), p. 2

¹⁷¹ Interview with Laura Grunberg (ANA/ SNSPA), p. 2.

¹⁷² Interview with Irina Sorescu (CPE), p. 1-2.

¹⁷³ Interview with Laura Grunberg (ANA/ SNSPA), p. 7.

established”¹⁷⁴ she stated. Haller also admitted that he does not recall any campaign held by CNCD since 2007, particularly aiming at bringing attention to gender discrimination. There have been campaigns, but they often focused on discrimination on other grounds, such as race, disability or ethnicity.¹⁷⁵ “We did not pay particular attention to gender based discrimination. The reason for this was that particularly on this ground we had received very few complaints”¹⁷⁶ Nevertheless, there is a certain degree of awareness about CNCD at the societal level. Haller mentions that according to a survey conducted by the Council, “70% of Romanians know about the existence of CNCD.”¹⁷⁷ However he believes that the number of people who also know about the mission of this institution and would be able to file a complaint to CNCD is much lower.¹⁷⁸

An important step towards increasing public awareness about the activity of CNCD and assuring victims that cases similar to their have been successfully addressed by CNCD, could be achieved by the Council posting all its decisions on the website. However, only two of the eleven decisions discussed in this research can be currently found on the website of the Council. Haller responded to this situation firstly by stating that he has struggled to determine the publishing of all decisions.¹⁷⁹ Secondly, he offered three hypotheses for his colleagues’ reticence to publish: (1) “some of [their] decisions are poorly written” both in form and in content¹⁸⁰; (2) there is fear of political divergence with the Council due to the progressiveness of some decisions¹⁸¹; and (3) there is fear that the wide availability of these decisions could determine their use for a different aim than initially envisioned by the Council¹⁸². As far as the last assumption is concerned, Haller

¹⁷⁴ Interview with Laura Grunberg (ANA/ SNSPA), p. 7.

¹⁷⁵ Interview with Istvan Haller (CNCD), p. 3.

¹⁷⁶ Interview with Istvan Haller (CNCD), p. 3.

¹⁷⁷ Interview with Istvan Haller (CNCD), p. 2.

¹⁷⁸ Interview with Istvan Haller (CNCD), p. 2.

¹⁷⁹ Interview with Istvan Haller (CNCD), p. 11.

¹⁸⁰ Interview with Istvan Haller (CNCD), p. 11.

¹⁸¹ Interview with Istvan Haller (CNCD), p. 11.

¹⁸² Interview with Istvan Haller (CNCD), p. 11.

explained that out of the 800 yearly petitions, about 500 are filed by magistrates.¹⁸³ Moreover, not only that this group is very active in litigation, its members are also known for using any means or argumentation for obtaining professional or financial benefits for themselves.¹⁸⁴ The example provided by Haller is the use, by magistrates, of the EU Directive prohibiting racial discrimination in formulating claims for a higher salary.¹⁸⁵

Another cause identified by this research is the *general distrust in the justice system* and in the state institutions. This tendency is mentioned by three of the interviewees. Sorescu considers that “there is a reluctance when it comes to resorting to law and institutions in Romania, regardless of the motive [that is, of the right to be defended]”¹⁸⁶ Grunberg also points out that she believes that “generally, there is a great disbelief in such a procedure. Not only when it comes to CNCD but in the very idea that you can count on the law...that the authorities can do something ...could support you, help you or resolve your problem....We distrust the law, we distrust the institutions, we distrust the politicians....we generally distrust such things”¹⁸⁷ With particular emphasis on people’s trust on CNCD, Bogdan Draghici considers that CNCD has not proved its efficiency at the societal level to a sufficient extent.¹⁸⁸ In his view, the Council could do so by increasing the number of ex officio actions and even more so by publicly condemning cases of discrimination which they have decided upon.¹⁸⁹ Such measures, he adds, would “increase citizens trust in this institution and would convince them to petition CNCD more often, not only when they are victims themselves, but also when those around them have such

¹⁸³ Interview with Istvan Haller (CNCD), p. 1.

¹⁸⁴ Interview with Istvan Haller (CNCD), p. 11

¹⁸⁵ Interview with Istvan Haller (CNCD), p. 11

¹⁸⁶ Interview with Irina Sorescu (CPE), p. 3.

¹⁸⁷ Interview with Laura Grunberg (ANA/ SNSPA), p. 7.

¹⁸⁸ Interview with Bogdan Draghici (TATA) p. 6.

¹⁸⁹ Interview with Bogdan Draghici (TATA) p. 6.

problems”¹⁹⁰. Draghici does mention that the Council did come out publicly in some cases, but “it does it insufficiently”¹⁹¹. As a conclusion, he states: “CNCD has not yet convinced [the public] that it can react promptly”.¹⁹²

This distrust in the justice system is also combined with the *victim’s fear of exposing oneself*. In gender discrimination cases, women are the majority of victims. Ms. Sorescu explained that they have been contacted by a number of women who complained of sexual harassment at the workplace or of being dismissed because of pregnancy. However, when being informed of the existing legal remedies and of the procedure they would have to follow in order to report the case, the majority of victims dropped the matter¹⁹³. She explains that women are often uncomfortable about revealing their identity:: “The moment in which they hear that they have to file a complaint before CNCD, in which they must include their name and personal information, and to explain exactly what happened, most of the times they refuse to go forward”¹⁹⁴. Despite the fact that the name of the victim does not appear in the official decisions of CNCD, Sorescu explains that women are still reluctant to file the petition because they fear that their case will be known in their community. “Many times, victims were not from Bucharest, but from smaller cities and worked in areas in which people tend to know each other...people from a certain profession, and such a conflict with the employer” [determined by filing a complaint] might lead to barriers in future employment for the victim.¹⁹⁵ Haller also mentions this shame of publicly appearing as victims “They feel so humiliated that they are ashamed to say that they were harassed...in our society...if a woman is raped, many times the woman is considered

¹⁹⁰ Interview with Bogdan Draghici (TATA) p. 6.

¹⁹¹ Interview with Bogdan Draghici (TATA) p. 6.

¹⁹² Interview with Bogdan Draghici (TATA) p. 6.

¹⁹³ Interview with Irina Sorescu (CPE), p. 4.

¹⁹⁴ Interview with Irina Sorescu (CPE), p. 4.

¹⁹⁵ Interview with Irina Sorescu (CPE), p. 5.

guilty: why did she go out at night?”¹⁹⁶. “Therefore women who are harassed feel demeaned but at the same time believe that if they came out publicly they would be looked down upon by colleagues...and then they rather take it than fight the phenomenon.”¹⁹⁷ Women’s anxiousness about allowing themselves to be identified as victims and potentially risking a conflict with their employer was also mentioned by Mota. She explains that most of the complaints that she receives are sent anonymously via email and then, gradually, as victims gain trust in the institution they reveal their identity and go forward with the petition.¹⁹⁸

As men are also victims of gender discrimination in some cases, the shame of being publicly identified as a victim can also discourage them from filing a petition. As most cases of gender discrimination against men occur in the medical, educational or legal system in relation to their children, a significant number of men feel ashamed to admit their vulnerability in these areas. Draghici explains “To admit, as a father during a divorce trial that you are a second class parent...” and, to the extent that your child is not an infant,... “he/she will realize that the father is not of the same importance as the mother, they are not equal in rights....and he must allow himself to be humiliated in order to receive what he deserves...this is not an easy task.”¹⁹⁹. However, this fear is slightly different from women’s fear, because it is connected fathers having to admit, suddenly, that in fact, they are vulnerable because they are *de facto* not equal to women in one area of life: parenting rights.

Finally, yet another obstacle is the weak the feminist movement and particularly weak women’s activism when it comes to awareness rising campaigns about discrimination. In the process of reporting cases of discrimination to CNCD, feminist NGOs could act as a liaison

¹⁹⁶ Interview with Istvan Haller (CNCD), p. 5.

¹⁹⁷ Interview with Istvan Haller (CNCD), p. 6.

¹⁹⁸ Interview with Maria Mota (ANES), p. 2.

¹⁹⁹ Interview with Bogdan Draghici (TATA) p. 2-3.

between victims and the state authorities sanctioning discrimination. While there are some NGOs specialized in promoting gender equality in Romania they are either underfunded in general or are constrained in their use of funds in a way which prevents them from raising awareness. One of them reported severe financial difficulties which have determined them to suspend the activity. Its representative, Ms. Grunberg, who has been active in the field of gender discrimination since 1994, characterized today's feminist movement in Romania as "invisible". She added that "I see nothing being done [by women activists] and I don't think this is because all problems have been solved but because it is a moment of general impasse"²⁰⁰. The representative of civil society which did not mention financial problems did specify that funds are available only certain types of projects and such types do not include activism. Sorescu states "in this moment there is not much available funding [in general]. This [awareness raising campaigns] is a special category of activities which belong to advocacy. And there are absolutely no funds for advocacy now"²⁰¹ Yet, it is precisely activism which is needed in Romania in order to promote CNCD and its current decisions as well as the existing legal remedies for gender discrimination. "This is related to Romania's accession to the European Union which determined the type of funds NGOs can access"²⁰² Mota also shares this conclusion stating that "While in the beginning [of the establishment of ANES] the NGOs were very vocal, now they have stagnated...maybe it is related to the existence of the EU structural funds and maybe they have moved their expertise to well channeled areas, [which are likely to be funded]"²⁰³

²⁰⁰ Interview with Laura Grunberg (ANA/ SNSPA), p. 7.

²⁰¹ Interview with Irina Sorescu (CPE), p. 8.

²⁰² Interview with Irina Sorescu (CPE), p. 8.

²⁰³ Interview with Maria Mota (ANES), p. 12.

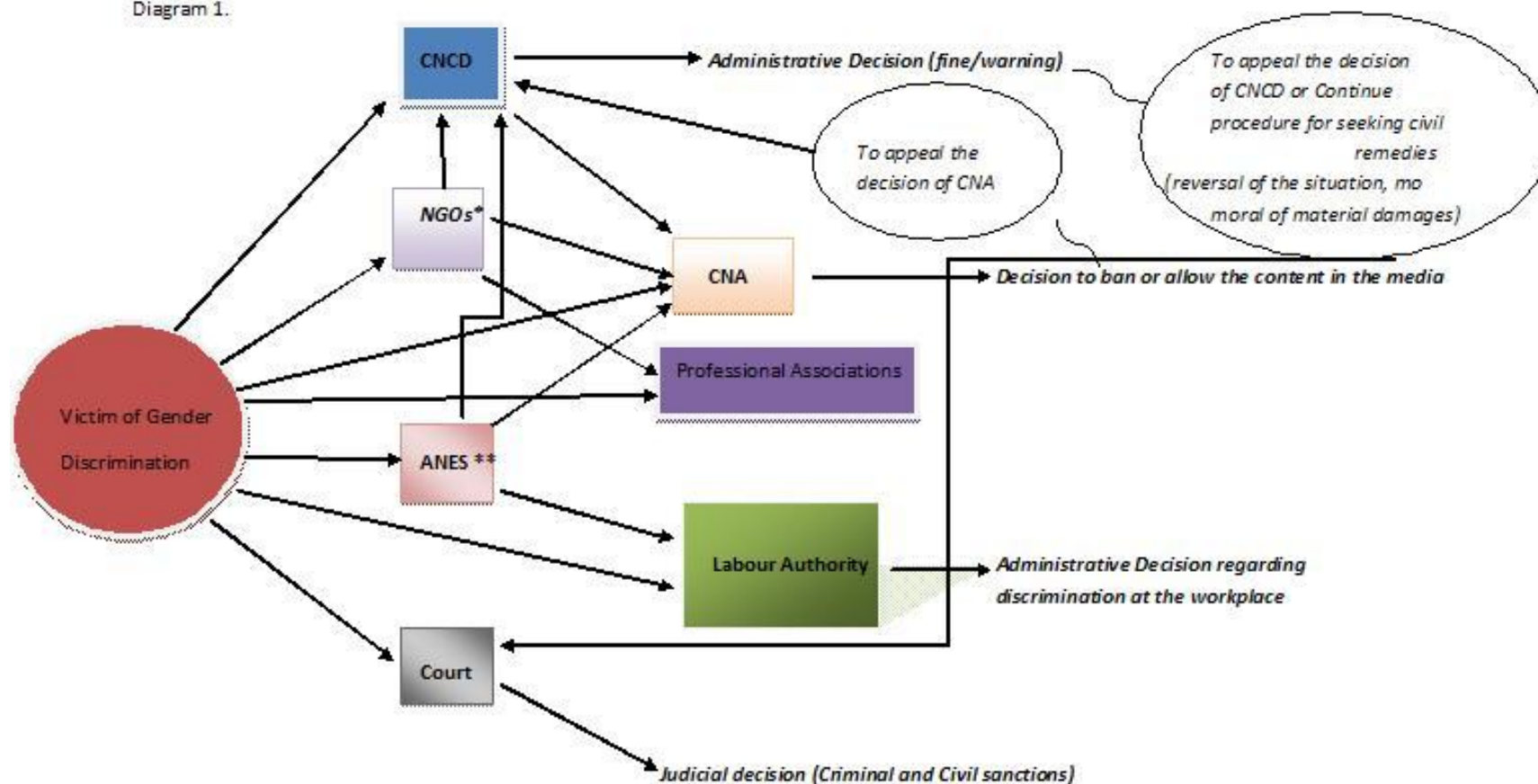
4.3. Alternative and sometimes overlapping procedural tracks

The possible alternative institutional tracks for reporting a case of gender discrimination are illustrated in diagram 1. The main alternative track to petitioning CNCD is filing a case in the court. This option can be used for any type of gender discrimination. This can completely replace the action before CNCD or can be simultaneous and parallel or complementary after the decision of the CNCD. If the victim is to make any claims based on civil (or criminal) law s/he must continue her action in court.

The other alternative tracks to the CNCD petition are particular to the area in which discrimination occurs. The professional associations of various professions, especially the association of medical doctors and the association of psychologists, are the avenues sometimes followed when filing a petition of discrimination manifested in unequal access to public services. The labor authority, especially its territorial units, is the institution where petitions related to alleged discrimination at the workplace can be addressed. Finally, cases of discrimination based on sexist or degrading speech in the media can be addressed to the National Council for Audio-visual Media (CNA). This council is also involved in the pre-petition procedure, before addressing the CNCD, because the former has the capacity of immediately censoring the discriminatory program/speech.

Figure 1. Alternative Institutional Tracks for Reporting Gender-based Discrimination

Diagram 1.



*NGOs have a counseling role in this process.

**ANES has a counseling role in the process. It also forwards cases to other institutions.

Legend:

CNCD (Consiliul National pentru Combaterea Discriminarii) – The National Council for Combating Discrimination

ANES (Agentia Nationala pentru Egalitate de Sanse intre Femei si Barbati) – The National Agency for Equality of Opportunity b/w Women and Men

CNA (Consiliul National al Audiovizualului) – The National Council for Visual & Audio Media

This diagram, describing the alternative tracks of reporting discrimination is not aimed at providing an exhaustive list of avenues and especially of outcomes of the process. It solely aims at illustrating the alternative ways in which institutions and victims of gender discrimination have taken action so far. This diagram was elaborated based on the data provided by the five experts in the field. The diagram is extremely relevant because it shows the fragmentation of the process of addressing cases of gender discrimination in Romania.

Draghici explains that in cases of unequal access to public services, especially in hospitals and schools, his NGO also used alternative mechanisms to the CNCD. “So far we have filed complaints to the professional associations of medical doctors and of the psychologists.”²⁰⁴ Draghici also points out to the existence of other cases of gender discrimination filed by judges directly in court: “Female judges go directly to court. [Those who go to CNCD] are the exceptions. There were a very high number of cases which went directly to courts”²⁰⁵

Haller notes that it is possible to file a complaint of discrimination directly to court. Moreover, this is actually necessary if one is to make claims based on civil law, whether or not the plaintiff has filed a petition to CNCD: “First of all, [the petition to CNCD] is not mandatory, is optional...the plaintiff can go directly to court without petitioning us.”²⁰⁶

*If victims wish to ask for moral or financial damages they must file a complaint before the court. Our decisions state whether or not discrimination occurred. If we decide that the victim has been discriminated against, it is an asset for her. She can then go to court, which takes into account the amount of damage produced by the act of discrimination and decides and grants financial compensation*²⁰⁷

²⁰⁴ Interview with Bogdan Draghici, p. 3.

²⁰⁵ Interview with Bogdan Draghici, p. 7.

²⁰⁶ Interview with Istvan Haller (CNCD), p. 17.

²⁰⁷ Interview with Istvan Haller (CNCD), p. 13.

*CNCD has the authority to interpret and enforce the administrative law and decides upon a infringement. The court cannot decide upon infringements, the court can only decide in the civil aspects of the case.*²⁰⁸

In cases of discrimination at the workplace, the Labor authority is sometimes involved in sanctioning the discriminatory act. Mota states:

*When there is a case of discrimination at the workplace, law 202/2002 stipulates that the investigation and decision in such cases pertains to the labor authority, because within each territorial unit of the labor authority there is an inspector specialized in the field of gender equality*²⁰⁹

Therefore, she explains, the avenue pursued by her institution when dealing with a case of discrimination at the workplace is the following: “we send the petition...we forward a request towards the territorial unit of the labor authority [where the alleged discrimination occurred] so that they investigate the case”²¹⁰ Mota added that in many cases, she also calls the person responsible for investigating and solving the petition, in order to make sure the legal procedures are followed.²¹¹

Finally, Mota discusses the procedure followed by ANES in cases of discrimination in the media, which is that of reporting the case to CNA and asking them to censor the discriminatory content. If the content is being eliminated from the media, ANES’ course of action stops here. If CNA fails to address the case or to censor the alleged discriminatory content, ANES continues the procedure by reporting the case to CNCD. “The complaint before the CNA is in fact a preliminary procedure [to the CNCD petition]”.²¹² She explains that this avenue is followed in cases when discrimination in the mass media is continuous and notifying

²⁰⁸ Interview with Istvan Haller (CNCD), p. 14.

²⁰⁹ Interview with Maria Mota (ANES), p. 2.

²¹⁰ Interview with Maria Mota (ANES), p. 2.

²¹¹ Interview with Maria Mota (ANES), p. 2.

²¹² Interview with Maria Mota (ANES), p. 8.

the CNA can lead to an immediate censorship of the program.²¹³ Conversely, going to the CNCD directly would entail a more complicated and longer procedure and the discriminatory content would appear in the media for a much longer time, until the Council reaches a decision.²¹⁴ Mota provides the example of three discriminatory commercials which never reached the CNCD. In two of the cases, the commercials were shortened in such a way to eliminate the discriminatory message, after ANES had notified CNA.²¹⁵ The other offensive commercial has been completely withdrawn by mutual agreement between ANES and the non-governmental organization which had issued it. Therefore, in this last case, neither CNCD nor CNA have been involved.

As the previous quotes indicate, there are alternative ways to report discrimination. This situation has a series of consequences upon the process of sanctioning gender discrimination. A first effect of this institutional arrangement is that the areas of competence of the different state authorities involved in the process often overlap or leave certain gaps in attributions. The situation of “institutional” gap in investigating certain types of gender discrimination is mentioned by both Sorescu and Mota: “For CNCD it can be quite difficult to assume institutional responsibility [in case of gender discrimination] because the Council functions on the basis of law no. 137/2000 but also has competence in the area of gender equality according to law 202/2002.”²¹⁶ She further concludes that “Many times, institutions decline their competence in favor of another entity”²¹⁷ This institutional gap is most often manifested in cases of gender discrimination in the media where the boundaries between the institutional competence of CNCD and CNA are unclear.²¹⁸ CNCD has general competence in the field of discrimination but does

²¹³ Interview with Maria Mota (ANES), p. 8.

²¹⁴ Interview with Maria Mota (ANES), p. 8.

²¹⁵ Interview with Maria Mota (ANES), p. 6.

²¹⁶ Interview with Irina Sorescu (CPE), p. 5.

²¹⁷ Interview with Irina Sorescu (CPE), p. 5.

²¹⁸ Interview with Irina Sorescu (CPE), p. 6.

not have competence in regulating the mass media. Conversely, the CNA has general competence to regulate mass media but, as Anemtoaicei explains, its competence in the field of discrimination, are unclear:

There is one article [in CNAs statute] which prohibits hate speech on various grounds. And this article is so broad and vague that it does not sanction anything...we could claim that virtually all media content includes discriminatory ideas on at least one ground but nobody is necessarily promoting hatred.²¹⁹

Grunberg also discusses this institutional overlap and considers that it is a consequence of many institutions being created in a rush. She uses the famous Romanian metaphor of “forms without substance”, which in her opinion is characteristic of the Romanian society at large.²²⁰

There are several consequences of the institutional conflict in the field of sanctioning gender discrimination. First of all, it is not an easy task for a person who is not specialized in this field to navigate the system without the help of an expert. This may be yet another reason for the small number of cases of gender discrimination reported to CNCD, or to other institutions. Secondly, it does not facilitate the collection and analysis of existing data on cases of gender discrimination. This leads to a non-transparent account of the situation of gender discrimination and its sanctioning in Romania. Thirdly, it shows that a significant number of gender discrimination cases never reach CNCD. The number or overall proportion of these cases is not quantified in this research. Therefore, at this stage, some of the cases which could have appeared in the statistics of CNCD and been analyzed in this research followed different tracks.

4.4. The classification of CNCD decisions as cases of “gender discrimination”

The inaccurate classification of CNCD decisions by its own staff is the final stage in which a number of cases which have reached the CNCD are lost from the official statistics.

²¹⁹ Interview with Maria Mota (ANES), p. 7.

²²⁰ Interview with Laura Grunberg (ANA/ SNSPA), p. 11.

These cases will also not be analyzed in this study. The sorting mechanism, which could be considered conservative and rigid, determines the classification of decisions into categories based on: a. grounds of discrimination, b. type of decision, and c. fields of discrimination. The grounds of discrimination are: language, ethnicity, age, nationality, beliefs, disability, HIV-AIDS, language, religions, gender, sexual orientation, and pregnancy²²¹.

During the interview, Mr. Haller made references to a number of cases relevant of gender discrimination but mentioned that they may be classified under other criteria, such as pregnancy. Mota also makes reference to cases which have been decided by CNCD in matters of discrimination filed by female professionals who were forcefully retired at a younger age than their male colleagues²²². These cases also do not appear as discrimination on the basis of gender according to the statistics of the CNCD. It is likely that they were grouped under the category of age-based discrimination.

According to Haller, this rigid division of cases into categories occurred due to two main reasons. The first reason, which only applies to pregnancy-based discrimination, is that Romania followed the French model which separates gender-based discrimination from discrimination on the basis of pregnancy.²²³ The second reason is the inadequate qualification of the person categorizing the cases.²²⁴ However, Haller agrees that this has had unforeseen consequences and stated that there are concrete plans to remedy both caused of this situation: “pregnancy obviously should go under gender”²²⁵ and from now on there will be a different mechanism for sorting the cases into categories.²²⁶

²²¹ Not listed on the website of the council but mentioned by Mr. Haller during the interview.

²²² Interview with Maria Mota (ANES), p. 3.

²²³ Interview with Istvan Haller (CNCD), p. 3.

²²⁴ Interview with Istvan Haller (CNCD), p. 4.

²²⁵ Interview with Istvan Haller (CNCD), p. 4.

²²⁶ Interview with Istvan Haller (CNCD), p. 4.

In addition to the cases in which gender discrimination is manifested in its direct form, it is likely that a number of cases of indirect gender discrimination could be found under other criteria such as sexual orientation, ethnicity or age. The former possibility has been mentioned by Ms. Grunberg, who commented that age discrimination is often a form of gender discrimination in Romania. The group of senior citizens is very much feminized because they are often women tend to live longer. She also noted the conservative understanding of gender in CNCDs grouping of cases.²²⁷

4.5. Further analysis of the data

The first conclusion to be drawn from the data is that the CNCD has had several accomplishments in combating gender discrimination. These accomplishments, which have been revealed by the interviews, include: 10 cases of gender-based discrimination resolved (most of them favorably for the plaintiff), at least one *ex officio* case (there are indications that there could be a few more cases); possibly more cases appearing under other categories of discrimination; the decisions in two gender based discrimination cases being posted on the website of CNCD; a reversal of a hospital regulation encountered in a series of hospitals, which was prohibiting fathers to stay with their ill children²²⁸; the amending of a law on pregnancy benefits as a result of existing CNCD case decisions on this topic²²⁹; a significantly lower number of discriminatory job advertisements than in the years prior to the establishment of CNCD²³⁰; a good record of cooperation with other state institutions and non-profit organization²³¹.

²²⁷ Interview with Laura Grunberg (ANA/ SNSPA), pp. 8-9

²²⁸ Interview with Bogdan Draghici (TATA)

²²⁹ Interview with Istvan Haller (CNCD)

²³⁰ Interview with Istvan Haller (CNCD)

²³¹ Interview with Istvan Haller (CNCD)

Yet, the data also shows that there is a low number of cases and a significant amount of obstacles encountered by the Council in accomplishing its mission, which have been discussed above. Thus, it can be argued that a considerable effort has been invested in addressing this matter, by some of the members of the Council, including the representative who participated in this research. Yet, the circumstances of the very establishment of this institution are hindering its activity. Based on the data, it can be inferred that the establishment of CNCD has been the neither result of public advocacy nor of genuine political interest in the topic of gender discrimination but the result of a political statement during Romania's accession of the EU.

One argument supporting the claim that this institution has not resulted as a consequence of a popular demand and of advocacy, especially as far as gender discrimination is concerned, is the fact that many types of gender discrimination are not perceived as discrimination at all. This is especially true for those conducts which are not seen as posing an immediate physical or material danger to the victim. Moreover, it is reasonable to expect a low rate of discrimination cases being reported, given that a significant part of the population lacks knowledge on this subject. This is especially true when discrimination is based on gender. The educational system in Romania, both at the elementary and university level does not encourage the study of human rights or of the women's movement(s). Furthermore, even if people would become aware of their rights at an early age, the general distrust in the legal system and in state institutions in Romania, is well documented. Finally, the persons who have reported cases of gender discrimination to CNCD so far are, in their vast majority legal professionals. They have also reported a high number of cases in courts, and will continue to do so, and are using the CNCD avenue just marginally. Thus, it is likely that this group has not been actively pursuing the establishment of an anti-discrimination authority such as the CNCD. This is yet another argument supporting the

hypothesis that the establishment of the CNCD has not been build on a grassroots foundation. Consequently, its creation could be the result of either: a modernizing political elite or one of the EU accession requirements. The research inclines toward the second option.

This research has not found proof of a high degree of political support for the activity of CNCD, especially in combating discrimination on the basis of gender. The most remarkable indicator of the low importance of combating discrimination, for political actors in Romania is the very self-censuring of visibility of CNCD's decisions due to fear of a negative response from the government (understood as the political class, in general). It must be kept in mind that this statement is only a hypothesis of the representative of CNCD who has participated in this statement and does not represent the official statement of the institution. Yet, one can easily conclude that, at the very least, the government does not actively encourage the sanctioning of discrimination cases and very progressive decisions. Moreover, the lack of educational programs or subjects on human rights, and the historical development of women's rights, as well as of the rights of other disadvantaged groups is another proof of the superficial political interest in the anti-discrimination project.

Finally, the overlapping institutional prerogatives, as well as institutional gaps, in the area of discrimination, especially gender discrimination are also indicative of a superficial interest in this subject and a desire to find a quick apparent solution to the problem. As far as gender discrimination is concerned, two different laws, Ordinance 137/2000 and Law 202/2002 have created the two institutions: CNCD and ANES within a brief period of time. Both of these institutions can investigate cases of gender discrimination. Yet the second, ANES refers these cases to other institutions (including to CNCD), depending on the field of discrimination: labor, media, access to public services/ benefits, etc. Despite there being two institutions, one

specialized in addressing gender discrimination, and one having a general mission to combat discrimination, a significant amount of gender discrimination cases, those occurring in the media, are not part of the competence of either of them. This is because the National Council for Audio-visual Media is the institution which has authority in evaluating the content of media programs. However, this council does not have prerogatives in the matter of discrimination, except for sanctioning “hate speech”, which is obviously not the best instrument for addressing gender discrimination. Thus, the lack of coordination between the institutions which can address discrimination as to avoid their overlapping in competences, and the absence of mainstreaming gender equality, as to avoid institutional gaps, illustrate a low degree of political interest in the matter of gender equality.

Thus, it can be argued that one of the limitations of the design of agencies specialized in enforcing antidiscrimination law mentioned by Martin MacEwen is applicable to the case of CNCD. As they point out, such agencies can be used by governments – in this case, the Romanian government – as a tool in creating the illusion that concrete steps are taken to reduce discrimination. The EU accession and newly acquired membership, have acted as an additional incentive for the government to adapt its agenda as to match that of the governments of older EU members. Yet, in the absence of a gradual increase in grassroots interest for the topic of anti-discrimination and of genuine political support, the activity of both the CNCD, and of ANES is likely to remain narrow.

Conclusion

This research explored the manner in which gender discrimination is interpreted by the CNCD in Romania and, given the relatively limited activity in this field, the reasons for the low number of gender discrimination cases. It concluded that among the main factors responsible for the hampering of the activity of CNCD are: the lack of public support for and awareness of CNCD and the absence of genuine political support for the Council. Moreover, the overlap in competence and institutional gaps has also been a consequence of this lack of support for the institution and has contributed to the blocking of the system. The two institutions founded to tackle gender discrimination: ANES and CNCD and their founding laws can be seen as complementary tools in combating gender discrimination. However, these institutions – together with other autonomous institutions, courts or professional associations – may also have negative and contradictory effects upon the process of sanctioning discrimination. Additionally, this institutional design also leads to the fragmentation of the process. Finally, other causes for the low number of gender discrimination cases from 2006-2009 found by this research are: (1) there are more cases of gender discrimination labeled as discrimination on other grounds; (2) there are a variety of reasons for which victims of gender discrimination, both men and women, may not report the case and (3) there is a considerable number of alternative institutional tracks to the followed in reporting discrimination, and thus there are many cases which are solved elsewhere, therefore not figuring in the statistics of the CNCD.

The research concludes that CNCD interprets gender discrimination exclusively through the lenses of already established legal reasoning and by using the applicable legislation. Thus, CNCD has no original interpretation of gender discrimination and the cases available for analysis

are uncomplicated from a theoretical point of view. In their interpretation of discrimination, the members of this Council use certain templates for each of the category of cases. In cases of sexual harassment, they rely on the right to personal dignity, deciding in favor of the victim as long as an “unjust and degrading treatment” against her, has been found. With regard to claims of sexist speech, the members of the Council have cited the right to be free from discrimination, which was interpreted in opposition to the right to freedom of speech. Lastly, the cases of (un)equal access to public services or to professional development have been discussed by applying a concept already established by EU directives, namely that “the differential treatment of similar or comparable situations is discrimination unless such “treatment has an objective justification and a legitimate goal, and the action is proportional with the goal to the achieved”. Consequently, the CNCD relies heavily on national and international regulations and precedents, especially those of the European Court of Human Rights, in deciding upon cases of gender discrimination.

There are three main limitations of this study which can serve as avenue for further research. The first one related to the inability of obtaining and analyzing the decisions of CNCD in all cases, on all ground of discrimination, in the period of 2006-2009. This could have had two potential benefits: (1) it might have led to a filtering of all the cases of direct or indirect gender discrimination; and (2) it might have identifies a significant number of gender discrimination cases which have been placed by the CNCD staff in other categories. In the absence of access to all case decisions of CNCD, there is little surprise that this study does not find cases of indirect discrimination, as they might have been too complex for the filtering mechanism to register them as belonging to the “gender” category. The same applies to potential cases of multiple discrimination, that is on the basis of two of more of the possible grounds of discrimination.

Another limitation of this research is the inability to access information about the gender-based discrimination cases addressed by institutions other than the CNCD, such as the council of medical doctors, the labor authority, the CNA or the courts. Including such data would have provided a broader image of the way in which gender discrimination is interpreted and sanctioned in Romania, outside of the CNCD. Finally, due to limitations in time and space, the study could only include interviews with six of the experts in the field of gender discrimination. Taking into account the experience and view of a greater number of the member of the civil society as well as of more CNCD members could provide a more comprehensive account of the current situation on this field.

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