5. Case Law and Legal Opinions

5.1. National Case Law

We haven't any case law at the national level that would mean progress in the practical application of the right to equal treatment. Nevertheless, we would like to make mention in this section of a **sentence from the La Coruña Regional Court, of 15 May 2009,** in which a review is made of the legal framework derived from Article 14[20] of the Spanish constitution as it is currently being applied.

This sentence makes is clear that the legal opinion of the Constitutional Court with regard to the correct interpretation of the right included in **Article 14** is a **mandate for the three powers** (legislative, executive and judicial) and, moreover, **generates a subjective right for the citizen** to obtain from these public powers that equality in the regulation and in its application.

With regard to the **legislative power,** this right means that Parliament may not passes laws that create unequal or discriminatory situations among citizens, although this constitutional mandate must be qualified: the legislator may not create regulations that gives different treatment to people who, from all lawful perspectives, are in the same situation. However, the legislator may introduce differentiating elements, although they entail a more favourable treatment, when aim of these measures is to compensate for the disadvantageous situation of certain social groups.

The mandate given to the **executive power** consists of the administration being unable to use its regulatory power to create unequal situations for people who are equal, nor may it –when resolving administrative processes– interpret the regulation in a way that is contrary to the principal of equality before the law.

As institutions charged with applying legal regulations, the **judicial power** is required to interpret the regulations in a way that does not create inequalities between equals. This implies that it must rule respecting the principle that "equal legal consequences are derived from equal situations".

Furthermore, the **subjective right** that this Article 14 generates for people consists of providing an action that allows one to file a suit aimed at re-establishing equality in those cases where this right has not been respect the law and that has been personally violated. It is important to note the **clarifications** made regarding this right:

1º- It must always begin with the comparison of factual situations or people who are equal. Discrimination is produced when, in two identical situations –or to two people in the same situation– regulations are applied (or interpreted) in a way that produces discrimination based on their gender, religion, etc. However, not all difference denies equality and is necessarily discriminatory; this must be used for situations in which the introduction of differentiating elements in equal cases is lacking a rational foundation or are obviously arbitrary. In order for it to be stated that there is a violation of the right to equality before the law, subjective situations that are homogenous and comparable must be compared. No attempt must be made to demonstrate equality between those who are unequal. From this follows that any claim of the fundamental right to equality requires a criterion, factor or characteristic so that it may be verified by comparing it to that produced by the inequality, a contrasting element that must consist of a specific legal situation in which other citizens or groups of citizens finds themselves.

2º- The "equality" referred to is the equality "in" the law, which does not necessarily entail material equality or a real and effective economic equality. The goal is not for everyone to be equal in all areas of life.

[20] Article 14 SC: "*Spaniards are equal before the law, without any discrimination based on birth, race, gender, religion, opinion or any other personal or social condition or circumstances prevailing.*"

This sentence analyses the **areas** in which this mandate would apply, establishing that –as an initial mandate to the powers of the state– the obligation is imposed on public institutions (which created the regulation and apply it), but not to private persons whose free will is limited only by the prohibition from engaging in discrimination contrary to constitutional order such as, among others, those specifically listed in Article 14. This means that the application of fundamental rights, in this case the principle of equality, to relations between individuals must be done with many clarifications and the area in which they develop these relationships must be distinguished from one another. On the one hand, in areas such a job relations, equality before the law is very important and the business owner's principle of free will is very limited by social legislation; nevertheless, the effectiveness of this right is very limited when applied to civil or business relationship between private parties. In this are, the principle of freedom to establish contracts and the free will to establish contracts is applied in all of its breadth, unless they are contrary to law, morality or public order. Despite this, the sentence adds that a discriminatory situation is valid because of the mere fact that it was established under conditions of apparent freedom or wilfulness, and so we understand that an individual's free will is not total in this area either unless a specific response is given to the situations in which it is not.

This sentence goes on to remind us that when it is alleged that there has been a violation of the fundamental right to equality, the legal regulation that has been the object of the differentiating or discriminatory application must be identified. As this is the right to equality "before the law", it must be stated what law has been applied in such a way as to generate a situation of discrimination.

5.2. The Stoica v. Rumania Case (Decision from the European Court of Human Rights)

We at the FSG feel that it is important to highlight this sentence[21] from the European Court of Human Rights (ECHR), not only because it once again makes patently clear the existence of discrimination against the Roma community throughout Europe, but rather because we believe it denotes progress on one of the most relevant issues with respect to **violence with a racist component: the obligation of the state to carry out an effective investigation of the facts** and establish a **special vigilance and highly effective mechanisms for reacting.** This sentence also recalls the Court's case law with respect to **inhumane or degrading treatment** and the **prohibition of discrimination,** for which, moreover, the **reversal of the burden of proof** towards the government against the suit has been brought has been used. The events that led to this suit occurred on 3 April 2001, when the plaintiff was 14 years old in Gulia, a city in Romania whose population is eighty percent Roma. According to the plaintiff, that day a group comprising the deputy mayor and more than ten police officers stopped in a local bar to check on the business's documentation. One of the police officers asked a man if he was a Gypsy, and the deputy mayor told the police officers that they should give him and the other Gypsies "a lesson", so the police began to beat them. The plaintiff took off running along with other children, but was reached by an officer who began to bear him and, despite the plaintiff telling him that he had recently had surgery on his head, the officer carried on beating him until the child passed out, which time the officer left him lying there on the ground. According to witnesses, while this was going on, the deputy mayor and police officers could be heard making racist comments. On the same day –3 April– the child was taken to the hospital by his parents and a medical certificate was issued that concluded that the boy had ecchymosis, a thoracic contusion and excoriation caused by a long blunt instrument, and that he needed three to five days of treatment in order to recover.

The plaintiff petitioned that the State of Romania be found guilty for violating –among others– Article 3 of the European Convention for the Protection of Human Rights and Public Freedoms (prohibition of torture and subjection to degrading or inhumane treatment) and of Article 14 (prohibition of discrimination) with respect to the same Article 3 in the Convention.

[21] Available at: http://www.gitanos.org/upload/76/34/CASE_OF_STOICA_v._ROMANIA.doc

With regard to the application of **Article 3 of the Convention,** the ECHR has established that, even under the most difficult of circumstances –such as the fight against terrorism or crime– the Convention **prohibits torture or degrading treatment or punishment in absolute terms;** Article 3 does not **make provisions for exceptions and is unrepealable,** even in the event of public emergencies[22]. Now then, for abuse to correspond with Article 3 of the Convention, there must be a minimum degree of severity and the assessment of this minimum is going to depend on all of the circumstances surrounding the case, such as the duration of the event, its physical or mental effects and, in some cases, on gender, age and the victim's state of health. Based on this, the **ECHR considers a treatment to be "inhumane" when it – among other things – was premeditated, applied over several consecutive hours, and when it caused bodily harm or intense physical or mental suffering.** These are qualified as degrading because they are able to awaken feelings of fear, anguish or inferiority in the victims capable of humiliating and devastating them[23]. In the case in question, the gravity of the blows found by the physician examining the plaintiff indicated that these injuries were serious enough to be equivalent to the abuse that corresponds with Article 3 of the Convention. Thus, it then considers if the state should be considered responsible for these injuries[24].

In this decision, the ECHR reiterates that, when an individual proposes to file an arguable complaint that he has been illegally and severely abused by the police or by other agents of the state and therefore, this violates Article 3 of the Convention, this provision –applied in conjunction with the general duty of the state included in Article 1 of the same document to *"to guarantee to all those below its jurisdiction the rights and liberties defined in* (the Convention)"– requires that an **official and effective investigation be carried out**[25]. In this particular case and in regard to the investigation of the events carried out by the authorities in Romania, the ECHR states that, despite the fact that 20 to 30 of the town's residents were present during the incidents, only three of them provided statements to the police and five to the military prosecutor; nevertheless, all of the police agents and public guards present gave statements; there is no explanation whatsoever why the other inhabitants of the town did not provide statements during the investigation so that the fact that they did not provide statements casts doubt upon the rigorousness of the police's investigation of the case[26]. By the same token, the ECHR shows its concern about the way in which the statements provided by the townsfolk were discarded by the military prosecutor; the ECHR does not cease commenting that the prosecutor did not explain why the inhabitants' statements should have been less credible than that of the police, since all of the participants could be considered equally partial in their opposite positions during the procedure[27]. The ECHR believes –just as the plaintiff– that the fact that the police made no mention of the insults alleged by the Roma in their declarations cast doubt upon their version of the events; moreover, it states that the investigation was confined to exonerating the police officers, thus failing to identify those who were possibly responsible for the plaintiff's injuries. This is particularly serious if we bear in mind that the plaintiff was a minor when these event occurred and was seriously disabled[28]. The Court insists that if it is true that the violence was carried out not by the police but by an individual, the legal accusation of the responsible party may only be done via a prior complaint filed by the injured party. However, an accusation such as that may not be filed if the police do not identify those responsible for the events. Therefore, in this case, the plaintiff could not file a criminal complaint against those who had allegedly beaten him[29]. Based on all of the above, the Court found that the government had not satisfactorily established that the plaintiff's injuries were caused by anything else other than the treatment inflicted by the police, and it concludes that these injuries were the result of inhumane or degrading treatment. Taking into account the aforementioned deficiencies **identified in the investigation,** the ECHR concludes that state authorities did not fulfil their obligation to carry out an appropriate investigation regarding the plaintiff's allegations of abuse and, thus, there is a violation of Article 3 of the Convention.

22 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 59.
23 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 60.
24 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 62.
25 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 67.
26 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 72.
27 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 73.
28 DECHR, 4 March 2008, "Stoica v. Romania", paragraphs 76 and 77.
29 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 78.

With regard to the **violence in Article 14 with respect to Article 3 of the Convention,** the ECHR's case law establishes that **discrimination means to treat in a different manner – without a reasonable and objective justification – people in similar** situations[30]. Moreover, it considers that **racial violence is a particular affront to human dignity** and, seeing its dangerous consequences, **it requires the authorities to provide a special vigilance and a vigorous reaction;** it is for this reason that the authorities must use all possible means to combat racism and racist violence. In this way, the democratic vision of a society in which diversity is not perceived as a threat but rather as source of wealth[31]. In this particular case, the Court starts by examining the allegations of racial motivation in the development of the investigations and it reiterates that when violent incidents are being investigated, **governmental authorities have the additional duty of taking all reasonable steps to unmask any type of racist motivation, and to determine whether racial hatred or prejudices may have played a role in the events.** In fact, according to the ECHR, **to treat racist violence in the same fashion as cases where there is no racial motivation** could be "turning a blind eye" to the specific nature of acts that are particularly destructive of fundamental rights. To fail to make the distinction when the situations are essentially different **could constitute a treatment that unjustifiable and irreconcilable with Article 14 of the Convention**[32].

The Court admits that **proving racial motivation is extremely difficult** in practice, and for that reason the obligation of the government to investigate possible racist overtones in an act is an obligation that requires the best efforts, although it is not absolute, i.e., for the ECHR, **the authorities must do everything reasonably possible** in the circumstances of each case in order to fulfil this mandate. In this case, the Court states that the military prosecutor concluded that there had been no racial aspect to the incidents, basing himself solely on the statement of one witness and on those of all of the police; moreover, the Court views the fact that only the inhabitants –mainly of Roma ethnicity– were considered partial in their statements, while those of the police were integrated into even the reasoning and conclusions of the prosecutor[33]. Nor does the court seem to be satisfied with the fact that the military prosecutor paid no attention to the statement by the local police officer who, in his own report, described the violence by the inhabitants as "purely Gypsy", despite this kind of description being obviously stereotypical. Due to all of the above, the ECHR found that the authorities did not do everything in their power to investigate the possible racist motivation behind the conflict; it goes even further, as it considers that the reversal of the burden of proof falls on the government, taking into account all of the evidence of discrimination ignored by the police and the military prosecutor and the subsequent conclusion of a racial slant in the investigation of the incidents[34]. In the case at hand, it is clear to the Court that racial motivation is behind the actions of the police and that neither the prosecutor responsible for the criminal investigation nor the government had a clearer way of explaining the incidents or, at the end of the day, provide some argument that could show that the incidents were neutral from a racial perspective. Based on this, the ECHR found that there had been a violation of Article 14 of the Convention (prohibition of discrimination) in conjunction with Article 3 of the same document.

30 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 117.
31 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 117.
32 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 119.
33 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 121.
34 DECHR, 4 March 2008, "Stoica v. Romania", paragraph 126-130.

5.3. The Coleman Case (Decision from the Court of Justice of the European Union)

We believe this sentence[35] to be one of the most significant advances in the interpretation of the Directives comprising the European legal framework of the fight against discrimination. . As a result of this case, the **broad scope of protection** provided by said directives is defined, as the Court finds that **people may request protection against discrimination despite they themselves do not have the discriminatory characteristic.** Although –as we will see below– the sentence always refers to the specific situation of the case in question (discrimination because of disability), there is no doubt that it represents a significant advance in the interpretation of the contents of both directives, whatever the alleged reason for discrimination may be.

The issue in the aforementioned case was a prejudicial issue raised within the framework of a suit in England concerning the concealed dismissal of which the plaintiff claimed to have been the object. Specifically, the plaintiff filed a case claiming to have been the victim of a concealed dismissal and of less favourable treatment than that received by the rest of the employees due to the fact that she was responsible for a disabled child. The plaintiff alleged that she was forced –as the result of the treatment she received– to stop working for her former boss. Among other things, some of the facts[36] presented were that: when she tried to go back to work after her maternity leave, her former boss was against her returning to the job she had done until that time, in circumstances in which the parents of non-disabled children would indeed have been allowed to return to their former positions; the business owner also was against giving her the same scheduling flexibility and the same working conditions as he did to her colleagues who were parents of non-disabled children; the plaintiff was described as "lazy" when she requested a reduction in her workday so that she could care for her son, while these opportunities were given to parents of non-disabled children; insulting or inappropriate comments were made against hers and against her son.

In order to obtain an appropriate **interpretation of Directive 2000/43/EC,** the English Court submitted four prejudicial questions to the CJEU (Court of Justice of the European Union):

1. *"Within the context of the prohibition of discrimination because of disability, does the Directive (2000/78/EC) protect solely disabled people themselves against direct discrimination and harassment?*
2. *"Should the reply to the first question be negative, does the Directive protect workers who – even though they themselves are not disabled – receive a less favourable treatment or suffer harassment as the result of their association with a disabled person?*
3. *"When a business owner treats a worker in a less favourable manner compared to how he treats or would treat other workers, and it can be shown that the motive for the treatment of said worker is the fact that he has a disabled child in his care, does this treatment constitute a direct discrimination that violates the principle of equality established by the Directive?*
4. *"When a business owner accuses a worker and it can be shown that the motive for the treatment of said worker is the fact that he has a disabled worker in his care, does this harassment violate the principle of equal treatment established by the Directive?"*

In order to respond to these questions, the Court examined the aim of the Directive, its definition of the **principle of equal treatment, the concept of direct discrimination** and the people to whom said Directive is applicable.

Taking all of this into account, the CJEU found that nothing can be gathered from the provisions in the Directive implying that the principle of equal treatment that it is attempting to ensure should be limited to people who have a disability themselves. On the contrary, the **aim of the Directive is to fight –** in terms of what concerns employment and occupation, **all kinds of disability-based discrimination.** The principle of equal treatment **would not apply to a determined category of people, but rather based on the motives addressed in Article 1 of this document.** Thus, any interpretation of Directive 2000/43/

[35] Available at: http://www.gitanos.org/upload/03/30/STJCE._17.07.08__coleman.doc 36
[36] DCJEU, of 17 July 2008, matter C-303/06, paragraph 26.

EC that limits the scope of its application exclusively to those people who are themselves disabled could deprive said Directive of a significant part of its useful effect and reduce the protection it aims to provide.

With regard to **harassment** – bearing in mind that the Directive does not consider it to be a **form of discrimination,** the Court states that, for the same reasons already stated, the aforementioned Directive must be interpreted in the sense that **it is not limited to prohibiting the harassment of people who are themselves disabled.**

In view of the Court's reasoning and of the final response to the questions, we understand that said **"extensive effect"** of the protection in the Directive against direct discrimination may be also be interpreted from **Directive 2000/43/EC** with respect to the application of the principle of equality in the treatment of people, regardless of their racial or ethnic origin. Moreover, in this case, it must be borne in mind that the protection is not reduced to only the scope of employment and occupation, but that it also applies to the social protection, social advantages, education and the access to goods and services available to the public.

In this sense, when working with **people of Roma ethnicity,** protection against direct discrimination is enormously broadened, because not only will one be able to request protection for Roma people, but also for their family members or related people who have been discriminated against as a result of said relationship with this person. Let's think, for example, about a mixed couple: in the Discrimination and the Roma Community 2008 report, several cases of discrimination were presented in which the non-Roma member of the couple would go to look at rental flats and there would be no problem to rent it; nevertheless, when they would go with their partner, the problems and excuses would begin. In these cases, we understand that both members of the couple could request protection due to direct ethnicity-based discrimination, despite the fact that one of them does not have the characteristic that gives rise to the protection, in this case, ethnicity.

5.4. The Williams Case (Legal Opinion of the Human Rights Committee. Communication No. 1493/2006)

That ethnicity-based discrimination exists in Spain is something that we know and, occasionally, it is carried out by civil servants and tolerated by governments. This reality has been shown with the legal opinion[37] of the Human Rights Committee of July 2009, in which they find that **Spain has violated Article 26 of the International Covenant on Civil and Political Rights**[38]: *"All persons are equal before the law and they are entitled without any discrimination to the equal protection of the law." In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status.* In this sense, it finds that a police officer thought that the victim was suspicious based only on his racial characteristics and that the Spanish Courts that addressed the case justified it.

In this case –a woman from the United States who had obtained Spanish citizenship– was requested by the police to show her identification in a train station, a requirement that was not made of anyone else. When the woman asked the officer for an explanation of the check, he told her that he was obligated to verify the identity of people like her, since many of them were illegal immigrants. After the victim filed several complaints in the different courts of **racial discrimination,** the Constitutional Court rejected the appeal for protection filed, as it found that the request for identification was not the result of patent or concealed discrimination[39]. Subsequent to this, the victim decided to turn to an international court and filed the pertinent complaint against Spain in the aforementioned Committee.

The Human Rights Committee has found that carrying out generic identity checks with the aim of protecting citizen safety or to control illegal immigration is lawful. However, **these checks cannot be made** by authorities with **ethnic characteristics as the only indication** of their possible irregular situation in the country. They must not be carried out in a way that only those people with determined physical or ethnic features be checked. In this case, despite the fact that it seems that was no written order from the Home Office regarding carrying out identity checks based only on people's skin colour, it seems clear that the police officer did indeed act in accordance with said criterion and that, moreover, the courts that addressed the case found it to be justified. *"The responsibility of the state is clearly compromised.* (***The committee can only conclude that the author was singled out for such identity checks solely only because of her racial characteristics and that these were the decisive factor for suspecting her conduct was unlawful.*** *(...I) [The Committee] considers that the facts before it disclose a violation of Article 26, read together with Article 2, paragraph 3 of the Covenant."* Because of this behaviour, the **Spanish State** has the **obligation** to **provide the author with an effective remedy,** including a **public apology;** it must also **take steps to prevent its employees from engaging in acts such as this case.** Within 180 days, the government shall provide information on the measures adopted to apply said opinion.

[37] Human Rights Committee. United Nations. Opinion. Communication No. 1493/2006. Available at: http://www.intermigra.info/extranjeria/archivos/jurisprudencia/CCPR.doc

[38] Available at: http://www2.ohchr.org/spanish/law/ccpr.htm

[39] Opinion 1493/2006. paragraph 2.6