

Executive Summary 2007

Romanian Country Report on measures to combat discrimination

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1. Introduction

Recent Romanian history is marked by two periods having a major impact on the absorption of European values by the Romanian society, particularly the principle of equality. On one hand, the Romanian society still has to come up to terms with the experience of being a part of the Communist block for half a century, an experience defined by an imposed rhetoric of equality which was *de facto* contradicted by the aggressive policies targeting minorities and 'otherness' in general. On the other hand, Romania still has to cope with the more recent past of a long transition, which started in 1989, and was supposed to end once Romania joined the European Union on January 1st 2007. This recent past can be defined as a period of increased awareness of the situation of minorities in general (ethnic, national, religious, sexual, vulnerable groups etc.), doubled by a gradual process of asserting the rights of these groups and the principles of equality and non-discrimination.

The increased visibility of the different minorities, the fact that diversity was brought in the public forum, the calls seeking the recognition of the needs of the different groups and the incorporation of these needs in public policies, triggered a backlash in terms of the revival of an extreme nationalist discourse which permeates the public sphere and a part of the political elite in a quest for legitimacy based on a populist message which is rejecting diversity, pluralism and human rights.

Anti-discrimination legislation was adopted in 2000 as delegated legislation and amended in 2006 (2000 Anti-discrimination Law). The 2000 adoption of the initial text was the initiative of Minister Peter Ekstein Kovacs, the head of the Department for National Minorities, who established a working group together with NGOs supported by the local Open Society Foundation. This was the very last act of that government before transferring power to the new government. In the background of the legislative process lays the intention of a human rights-minded, minority rights-concerned minister to adopt legislation tackling highly sensitive issues (discrimination against Roma was rampant, sexual minorities were under siege with consensual homosexual activities still being criminalized, the voices of people living with disabilities were practically absent from the public debates, religious minorities were unable to gain recognition under the law and had to function as non-for-profit organizations). The discussions taking place in parallel regarding the two European Directives influenced the phrasing and the spirit of the law.

Eight years of adopting the 2000 Anti-discrimination Law, Romania remains tainted by discrimination. The Romanian Roma minority for which official statistics are contested but which is considered as ranging between 500,000 and 1,500,000 (the largest in Europe) is facing discrimination in access to employment, access to health, access to services and goods, most of the cases of the National Council for Combating Discrimination (NCCD) also mentioning infringements of the right to dignity in Roma cases, though reports on cases of segregation in education are rare and a large number of initiatives had been developed to improve the



situation of Roma. Though expressly protected by the 2000 Anti-discrimination Law, sexual minorities remain the most attacked group, with legislative drafts aiming at restricting their rights and acts of aggression every year during the diversity marches which remain uninvestigated. Specific programmes and positive actions targeting disabled people or people living with HIV/AIDS are scarce and still do not cover the large array of problems these groups encounter. The NCCD and some of the ministries contribute to a genuine process of dialogue and consultation with the NGOs and social partners but the NCCD itself is under siege.

2. Main legislation

The Romanian Constitution includes direct and indirect provisions on equality and protection of minorities. The equal treatment of all citizens is guaranteed by Art.4.2 providing for citizenship without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin, and by Art. 16 providing for the equality of all citizens before the law and public authorities, without any privilege or discrimination.

Romania signed all major regional and international human rights instruments and the Romanian Constitution asserts both that constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to and the primacy of the international regulations where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, unless the Constitution or national laws comprise more favourable provisions.

Besides the specific 2000 Anti-discrimination Law, civil law allows for torts claims for damages generated by acts or facts of discrimination and the Criminal Code includes provisions on aggravating circumstances when the criminal intention is based on any of the grounds protected by anti-discrimination legislation and sanctions incitement to discrimination, hate crimes and abuse in the exercise of an official function with a discriminatory ground – though introduced by the 2006 amendment to the Criminal Code, the law enforcement agencies are still lagging behind with the implementation of these provisions.

The Labour Code includes general prohibitions against discrimination in employment relations and labour courts can decide in such cases. A special law on equal opportunities between women and men replicates some of the provisions of the 2000 Anti-discrimination Law but the law lacks effective remedies and adequate mechanisms for the implementation – de facto, the national equality body covers all grounds of discrimination, including gender.

3. Main principles and definitions

The 2000 Anti-discrimination Law introduces a broad, generous definition of direct discrimination, going beyond the substance and the coverage of the Directives 43/200/EC and 78/2000/EC by sanctioning ‘any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual



orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.’ Even though the list of protected grounds is very generous and includes grounds outside the five grounds mentioned by the directives, the catch-all phrase ‘any other criterion’ creates the possibility for the courts or for the national equality body to apply the 2000 Law in the future to other categories besides those listed by the Law.

Beginning with 2000, when the Ordinance 137/2000 was adopted, the anti-discrimination legislation was frequently amended, leading to the gradual incorporation of the European definitions, with the last amendment in 2006. Following the 2006 amendments, the Law defines indirect discrimination as ‘any provisions, criteria or practices apparently neutral which disadvantage certain persons on grounds of one of the protected groups, excepting the cases when these practices, criteria and provisions have an objective justification based on a legitimate purpose and the methods used to reach that purpose are adequate and necessary.’

Discrimination by association is not provided by the 2000 Law but reportedly, the national equality body looked at this concept in its analysis of relevant complaints.

Harassment is defined and sanctioned as ‘any behaviour on grounds of race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, belonging to a disadvantaged group, age, disability, refugee or asylum seeker status or any other criterion, which leads to establishing an intimidating, hostile, degrading or offensive environment.’

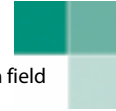
Victimisation is defined as any adverse treatment triggered by a complaint with the NCCD or by a case lodged with the courts of law regarding the infringement of the principle of equal treatment and non-discrimination. The instruction to discriminate is defined and outlawed. Multiple discrimination is defined and constitutes an aggravating circumstance in cases of discrimination.

The 2000 Law does not provide for any exceptions and exemptions (the definition of genuine and determining occupational requirements still needs further interpretation) nor for reasonable accommodation but specifically includes a definition of positive measures.

The notions put forward in the ECRI General Policy Recommendation no. 7 are not spelled out in the Romanian 2000 Law but some of them had been incorporated by the national equality body in its jurisprudence: segregation; discrimination by association; announced intention to discriminate; instructing another to discriminate; inciting another to discriminate; aiding another to discriminate.

4. Material scope

The ambit of the Romanian 2000 Anti-discrimination Law encompasses the areas protected by both the Directive 2000/43/EC and the Directive 2000/78/EC: employment and labour-related issues, including social benefits and social protection, access to goods and services, housing, education, access to health. The Law goes beyond these standards and provides also for



protection in relation to freedom of movement, as well as for the protection of the right to dignity. When defining discrimination, the Romanian legislator took a comprehensive approach and the principle of equality and of exclusion of discrimination applies in relation to all fundamental freedoms. Both the public and private actors are under the duty to observe the framework established by the 2000 Anti-discrimination Law (including in the case of private employers).

5. Enforcing the 2000 Anti-discrimination Law

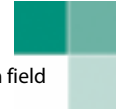
Any individual or any legal entity with an interest in the case, including human rights NGOs and minority groups can file a complaint with the NCCD within one year the deed amounting to discrimination took place. The NCCD can also start the case *ex officio*. The 2000 Romanian Law gives to the victim of discrimination the possibility of choosing between filing a complaint with the national equality body or/and filing a civil complaint for damages with the court of law (and provides for an exemption from paying judicial taxes in such cases). The victim can also choose to use both venues simultaneously which is creating problems in practice.

If the venue selected was the national equality body, the NCCD has 90 days, to investigate the case, organize hearings and rule on whether anti-discrimination provisions were breached. The NCCD will decide if the case amounted to discrimination and in the cases when it finds that discrimination took place can issue a recommendation, an administrative sanction (administrative warning or fine). The NCCD rulings and sanctions can be appealed before the administrative courts. The amount of the fines differs: if the victim is an individual, the amount varies from 400 RON to 4,000 RON (100-1,100 Euros), if the victims are a group or a community, the fine ranges between 600-8,000 RON (170-2,300 Euros).

The victims seeking compensation claims for discrimination have to file complaints with the court system - the NCCD decision is not required but it may play an important role in ascertaining whether discrimination took place and in establishing the quantum of the damages. The courts will request for the presence of the NCCD during the cases.

The visibility of the NCCD increased exponentially in the last three years following a series of cases involving key politicians, the Romanian President, the Prime-Minister and the former Minister of Foreign Affairs, as well as cases which generated a lot of media attention (e.g. the decision on the presence of religious symbols in public classrooms). The victim of discrimination can choose to contact a human rights NGO and seek representation or can start the case in *nome proprio*. The victim can choose to communicate with the NCCD confidentially in order to avoid media attention. The same request of confidentiality can be filed with the courts and it is up to the judge to decide whether the proceedings will take place in camera.

The 2006 amendment to the 2000 Anti-discrimination Law specifically allowed for any type of evidence to be used in cases of discrimination, including audio and video recordings as well as statistical data and the NCCD is using statistics. Though the NCCD and mostly Roma NGOs used situation testing in the past, this method is not used in the recent cases.



Instead of reversing the burden of proof towards the defendant, the 2006 amendment to the 2000 Anti-discrimination Law introduces the concept of ‘sharing the burden of proof’ meaning that ‘the person interested (in proving that discrimination took place) has the obligation of proving the existence of facts which allow to presume the existence of direct or indirect discrimination, and the person against whom a complaint was filed has the duty to prove that the facts do not amount to discrimination.’ It is unclear how this principle is used in practice.

6. Equality bodies

The national equality body, *Consiliul Național pentru Combaterea Discriminării* [National Council on Combating Discrimination (NCCD)] was provided for by law in August 2000 but was effectively established in 2002. Beginning with 2007 the NCCD started opening regional offices. The NCCD is an autonomous public authority under the control of the Parliament, whose independence is clearly spelled out in the Anti-discrimination Law. The mandate of the NCCD encompasses: preventing discrimination through awareness raising and education campaigns, mediating between the parties, providing support for the victims of discrimination, investigating and sanctioning discrimination, including *ex officio* cases, as well as initiating drafts to ensure harmonization of legal provisions with the equality principle. The NCCD is mandated to deal with all forms of discrimination based on race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.

The mandate of the NCCD includes: preventing discrimination (education and information campaigns, awareness raising, studies and researches, compilation of relevant data), mediating in cases of discrimination, investigating-including initiating cases *ex officio*, finding and sanctioning discrimination, monitoring, providing assistance to victims of discrimination, as well as preparing bills to ensure harmonization of legal provisions with the equality principle.

In practice, the NCCD is a quasi-judicial body which can find that a certain deed amounted to discrimination and issue an administrative sanction (warning or fine). Victims can also initiate civil claims when seeking damages. The visibility of the NCCD increased exponentially in the last three years as the institution gradually became a proactive actor, engaged in a multitude of projects and established itself as a serious voice in the realm of combating discrimination in a very sensitive environment.