

Executive Summary

Country Report Romania 2009 on measures to combat discrimination

By Romanița Iordache

1. Introduction

Recent Romanian history is marked by three 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 third period, following accession to the EU in 2007, is one of regress in the protection of human rights in general, and revival of the nationalistic and extremist discourse and conduct in relation with vulnerable groups, particularly the Roma, sexual as well as religious minorities. This last stage, of regress in relation to supporting and affirming the principles of equality and non-discrimination was more obvious in 2009.

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, as well as the recent Italian crisis which was perceived as a deterioration of the image of Romanians abroad for which the Roma minority was depicted as the scapegoat, triggered a backlash. The adoption of a new Civil Code and a new Criminal Code in the summer of 2009 was also the opportunity for conservative groups to assert their strong homophobic beliefs leading to incorporating a general prohibition of recognition of same sex marriages or same sex or heterosexual partnerships (even if entered into abroad or if contracted between foreign citizens). The revival of an extreme nationalist discourse characteristic for the pogroms of the early 90s permeated the public sphere, particularly in the context of incidents in North Western Romania in Sânicolau and Sânmartin from Mureș county, where Roma villagers were expelled from their houses and forced to agree a "protocol of cohabitation." As 2009 was an electoral year, a part of the political elite embraced a populist message which is rejecting diversity, pluralism and human rights.

Beginning with 2008, the incidents and the vilification of Romanians in Italy stirred the already racist and xenophobic media and generated an outpouring of discriminatory and offensive statements in relation with the Roma minority without any efficient reactions on behalf of the authorities.

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 Eckstein Kovacs, the head of the Department for National Minorities, who established a working group inviting experts and NGOs to contribute.

The legislative process proves the intention of a human rights-minded, minority rights-concerned minister to adopt legislation tackling highly sensitive issues for Romania of 2000: discrimination against Roma was rampant, sexual minorities were under siege with consensual homosexual activities still being criminalised, the voices of persons 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.

Ten 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 not investigated. The new Civil Code adopted in July 2009, includes a specific prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages legally registered in other countries. Transgender persons cannot invoke any legal protection as the Romanian legislation does not provide for clear and predictable procedures and standards applicable in their situation.

Specific programmes and positive actions targeting persons with disabilities or people living with HIV/AIDS are scarce and still do not cover the large array of problems these groups encounter. The national equality body (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 was under siege and beginning with the summer of 2009 the institution was effectively paralyzed due to the lack of appointments in its Steering Board by the Parliament (a majority of five out of nine is required in order to issue decisions or recommendations).

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. Art. 30 (7) of the Constitution prohibits 'any instigation ..., to national, racial, class or religious hatred, any incitement to discrimination.' Constitutional provisions are not self-enforcing.

Romania signed all major European and international human rights instruments and the Romanian Constitution asserts 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. Art. 20 of the Constitution also provides for 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, general civil law allows for torts claims for damages generated by 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. The Criminal Code sanctions incitement to discrimination, hate crimes and abuse in the exercise of an official function with a discriminatory intention. Though this provision was introduced by the 2006 amendment to the Criminal Code, the law enforcement agencies are still lagging behind with the implementation of these provisions as proved by official data provided for the OSCE ODHIR Hate Crime 2007, 2008 and 2009 Reports and by the specific statistics provided by the Prosecutor General. In 2009 a new Criminal Code was adopted by means of assuming governmental responsibility and will enter into force at a later, still unknown date. The 2009 Criminal Code maintains most of the protections available under current penal norms.

In 2008 and 2009, the Anti-discrimination Law had been reviewed by the Romanian Constitutional Court in a series of cases and its application was partially limited following these challenges as to its constitutionality. Hence, the Constitutional Court restricted the applicability of the anti-discrimination legislation in relation to legislative acts (laws and ordinances) as the relevant provision of the law was declared unconstitutional. Consequently, the NCCD and the courts are not mandated anymore to quash legal norms if they are deemed to be discriminatory. However, both in 2008 and 2009, during the constitutional review triggered by several complaints challenging the constitutionality of the mandate of the NCCD, the role of the national equality body as a quasi-judicial body was confirmed by the Constitutional Court.

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 NCCD covers all grounds of discrimination, including gender.

3. Main principles and definitions

The 2000 Anti-discrimination Law introduces a broad, comprehensive definition of direct discrimination, going beyond the substance and the coverage of the Directives 43/2000/EC and 78/2000/EC by sanctioning ‘any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, gender, 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 to other categories besides those expressly spelled out by the Law.

Beginning with 2000, when the Governmental 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 the national equality body looked at this concept in its analysis of relevant complaints and sanctioned it.

Harassment is defined and sanctioned as ‘any behaviour on grounds of race, nationality, ethnic origin, language, religion, social status, beliefs, gender, 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 Law provides for exemptions from the prohibition of direct discrimination in the areas of access to goods and services and housing, in contradiction with the provisions of the Directives.

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 material scope 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).

Following the decisions issued by the Romanian Constitutional Court in 2008 and reconfirmed in 2009, the provisions of the Anti-discrimination Law are not enforceable in the cases of discrimination triggered by discriminatory legislative norms (laws or delegated legislation) and the courts and the national equality body do not have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory.

5. Enforcing the 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 lodging 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 difficulties in practice and overstressing the already scarce resources of the NCCD which has to participate in civil proceedings as well.

As decided by the Constitutional Court the NCCD is not mandated to rule in cases of discrimination triggered by legislative provisions. In 2008, the government tried to further limit the competency of the NCCD through the Emergency Ordinance 75 from July 2008 which established that all the cases regarding potential discrimination in relation to salary-related rights of civil servants are under the exclusive jurisdiction of the courts with the courts of appeal acting as courts of first instance. The law for the ratification of the Emergency Ordinance 75/2008 however repealed this limitation, hence the NCCD and the regular courts remain responsible with potential cases of discrimination in relation to salary-related rights of civil servants.

If the venue selected for filing the complaint is the national equality body, the NCCD has 90 days, to investigate the case, organise 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 or 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 (EUR100-1,100), if the victims are a group or a community, the fine ranges between 600-8,000 RON (EUR 170-2,300). However, due to the expiration of the mandates of the Steering Board members beginning with May 2009 and the delays and failure in making new appointments, the NCCD was unable to issue decisions in the last part of 2009 as no simple majority could be reached (decisions can be taken with a majority of five out of nine votes and beginning with November, the Steering Board had only four members, thus being de facto impossible to issue a decision).

The victims seeking compensation claims for discrimination have to lodge complaints with the civil courts - 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 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 as provided by the procedures of the NCCD. 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 as proved by its jurisprudence. Though the NCCD and mostly Roma NGOs used situation testing in the past, this method was not used in more 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 by the civil courts. The case law of the NCCD interpreted this provision along the lines of the concept as provided in the Directives.

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 the Fall of 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 appointment of the Steering Board members by the six relevant parliamentary committees, as a guarantee of the institutional independence proved to be, in practice, a hindrance as politicization of the nomination process lead to the paralysis of the NCCD beginning with the Summer of 2009.

The mandate of the NCCD encompasses: preventing discrimination through awareness raising and education campaigns and by conducting studies and researches, compilation of relevant data, mediating between the parties, providing support for the victims of discrimination, investigating and sanctioning discrimination, including *ex officio* cases, as well as initiating preparing legislative bills to ensure harmonisation 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, gender, 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.

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 four years following a series of cases involving key politicians, the Romanian President, the Prime-Minister and the former Minister of Foreign Affairs, different politicians as well as cases which generated a lot of media attention (e.g. the decision on the presence of religious symbols in public classrooms) or public positions taken against racist and populist conduct. 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.