



## Executive Summary

### Country Report Romania 2011 on measures to combat discrimination

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#### 1. Introduction

The understanding of the principle of equality in the Romanian society is marked by three historical periods. According to the first thread, 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, aggressive assimilationist policies regarding national or ethnic minorities, criminalisation of consensual homosexual activities or denial of religious freedom for minority religious groups. 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 to vulnerable groups, particularly the Roma, LGBT 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, an electoral year, but continued in 2010 and 2011. As a result, by the end of 2011, the Senate approved and the Chamber of Deputies was still examining significant amendments to the Anti-discrimination Law calling off the shift in the burden of proof in discrimination cases before the national equality body.

The Romanian Anti-discrimination Law was adopted in 2000 as delegated legislation: Governmental Ordinance 137/2000 (hereafter referred to as Anti-discrimination Law or GO 137/2000)<sup>1</sup> and amended subsequently, the last amendment being from 2006. The 2000 adoption of the initial text was the initiative of former 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 history evidences the commitment of a human rights-minded, minority rights-concerned

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<sup>1</sup> The Ordinance 137/2000 was adopted by the Government based on a constitutional procedure which allows the Parliament to delegate limited legislative powers to the Government during the parliamentary vacation according to Art. 114 and Art. 107 (1) and (3) of the Constitution. The ordinances (statutory orders) must be submitted to the Parliament for approval, though in the interval between their adoption by the Government and the moment of their adoption (or rejection, or amendment) by the Parliament, they are binding and generate legal consequences.

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 Romanian law whose provisions, in many ways, went beyond the *acquis*.

Eleven years after adopting the 2000 Anti-discrimination Law, Romania remains tainted by discrimination. The Romanian Roma minority for which official statistics are contested but which is 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) mention infringements of the right to dignity in Roma cases. 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 of the authorities. The revival of an extreme nationalist discourse characteristic for the cases of arson and mob violence against Roma communities of the early 90s permeated the public sphere, particularly in the context of incidents in North Western Romania, where Roma villagers were expelled from their houses and forced to agree with a “protocol of cohabitation.” Since 2009, which was an electoral year, a part of the political elite embraced a populist message which is rejecting diversity, pluralism and human rights. The return of large groups of Roma from France in 2010 led to another outburst of racist statements, including statements issued by Romanian public officials. The gradual acquiescence with racism led in 2011 to presenting the erecting of a wall of almost 100 meters of 1.8-2 meters high in Baia Mare as ‘safety measure’ and not as segregation.

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 with acts of aggression every year during the diversity marches, attacks which remain not investigated or sanctioned. The new Civil Code adopted in July 2009, which entered into force in 2011, includes a specific prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages legally registered in other countries (even if contracted between foreign citizens). Transgender persons cannot invoke any legal protection as the Romanian legislation does not provide for clear and predictable procedures and standards applicable to 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 continue to encounter. In 2010, Romania ratified the UN Convention on the Rights of Persons with Disabilities but no subsequent legislation had been adopted for harmonization.



The national equality body (NCCD) contributed to the process of dialogue and consultation with the NGOs and social partners but the NCCD itself was 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. Art. 30 (7) prohibits 'any instigation ..., to national, racial, class or religious hatred, any incitement to discrimination.' Constitutional norms 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 UDHR, 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 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 Anti-discrimination Law, general civil law, the Civil Code allows for torts claims for damages (including 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 since 2006 incitement to discrimination, hate crimes and abuse in the exercise of an official function with a discriminatory intention, norms with limited applicability however as proved by the specific statistics provided by the Prosecutor General. In 2009, a new Criminal Code was adopted by means of assuming governmental responsibility and it will enter into force probably in 2013. 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 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.



The Labour Code amended in 2011 includes general prohibitions against discrimination in employment relations. 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 NCCD to apply the Law to other categories besides those expressly spelled out by the Law, an hyper-inflation of grounds with a negative impact on the credibility and enforceability of the law.

The Governmental Ordinance 137/2000 was amended several times, last time in 2006 leading to the gradual incorporation of the European definitions.

Since 2006, 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.’

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.’ Harassment is also sanctioned in the Equal Opportunities Law and in the Criminal Code but none of these definitions fully complies with the definition spelled out in the Directives.

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 though the enforcement of the provision in the jurisprudence of the NCCD is thin and suggests lack of understanding of the concept.

The Law does not provide for any general exceptions (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 access to goods and services and housing, in contradiction with the provisions of Directive 43/2000/EC according to which it is not possible to justify direct discrimination.

The notions put forward in the ECRI General Policy Recommendation no. 7 are not spelled out in the Romanian Law but some of them had been incorporated by the NCCD in its jurisprudence: segregation in education; discrimination by association; announced intention to discriminate; instructing another to discriminate; inciting to discriminate; aiding another to discriminate. A 2011 case which made the headlines of national and international media evidenced the failure to include in the law the prohibition of residential segregation, a form of discrimination which is increasingly present in relation to Roma.

#### **4. Material scope**

The material scope of the Romanian Anti-discrimination Law encompasses the areas protected by both the Directive 43/2000/EC and the Directive 78/2000/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 areas 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 legislator took a comprehensive approach and the principle of equality and of prohibition of discrimination applies in relation to all fundamental freedoms. Both public and private actors are under the duty to observe the framework established by the Anti-discrimination Law (including 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 applicable 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 alleged discrimination took place. The NCCD can also start a case ex officio. The victim can choose between filing a complaint with the NCCD or/and lodging a civil complaint for damages with the court (stamp duties are exempted). The victim can also choose to use both venues simultaneously which is creating difficulties in practice and it is overstressing the already scarce resources of the NCCD which must participate in civil proceedings as expert institution. If the venue selected for filing the complaint is the NCCD, it has 90 days to investigate the case, organise hearings and rule on whether anti-discrimination provisions were breached. When NCCD finds that discrimination took place it can issue a recommendation or an administrative sanction (administrative warning or fine). The NCCD rulings can be appealed before the administrative courts. If the victim is an individual, the amount is between 400-4,000 RON (€100-1,000), if the victims are a group or a community, the fine ranges between 600-8,000 RON (€ 150-2,000).

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 NCCD must be also present.

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 allowed 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 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 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. The case law of the NCCD interpreted this provision along the lines of the Directives in some cases but not consistently, the NCCD leaving the onus of the proof on the plaintiffs in a significant number of cases. A draft completely calling off the duty of the defendant to provide evidence and making it optional was approved by the Senate in 2010 and by

the end of 2011 was pending in the Chamber of Deputies after being endorsed by the Human Rights and National Minorities Committee and by the Equal Opportunities Committee in the Chamber.

## 6. Equality bodies

The national equality body, Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination (NCCD)] was provided for in the Anti-discrimination Law of 2000 but it 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 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 between the Summer of 2009 and April 2010. The April 2010 appointments had been criticized by the NGOs and by independent candidates for failing to observe the legal requirements and for politicization of the processes seriously hampering the need to professionalize.

The mandate of the NCCD encompasses: preventing discrimination through awareness raising 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, as well as initiating legislative bills to ensure harmonisation of legal provisions with the equality principle. In practice, the NCCD main function is of a quasi-judicial body which can find that a certain deed amounted to discrimination and subsequently issue an administrative sanction (warning or fine).

The visibility of the NCCD increased exponentially in the last four years following a series of cases involving key politicians, the President, the Prime-Minister, the former and current Minister of Foreign Affairs, a Member of the European Parliament, as well as cases which generated a lot of media attention ( e.g. the decision on the presence of religious symbols in public classrooms, school segregation cases) 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. The appointment of six members in 2010, out of which only two had renewed mandates, was assessed by human rights groups as a turning point towards diluting the role of the institution. In cases of discrimination, the NCCD increasingly issued recommendations instead of deciding in favour of administrative sanctions, a practice contested by human rights groups: as the recommendations are not specifically mentioned as a remedy in the Law, they do not amount to an administrative sanction as provided by the Law and are by no means compliant with the requirements of sanctions being effective, proportionate and dissuasive.