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Summary of legislation implementing

***Directive 2000/78/EC establishing a general framework
for equal treatment in employment and occupation***

with respect to sexual orientation

in Romania

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Introduction

Romania has ratified several international and regional documents recognizing the principle of non-discrimination as a general principle for the protection of human rights.² Only in 1991, with the occasion of the adoption of the democratic constitution, was this principle included into the Romanian Constitution. It took nine years to develop the principle into ordinary legislation creating the framework for the prevention and combating of discrimination in Romania.

Along this time, the Lesbian, Gay, Bisexual and Transgender (LGBT) community in Romania was confronted with several infringements of their human rights and discriminations. This situation was at the same time tolerated and indirectly encouraged by the Government, which kept up the penal incrimination of homosexual consented relations – the (in)famous Article 200.³ The situation was reversed when the Government decided to adopt the Anti-discrimination Law, in August 2000, and Article 200 though still in force until June 2001, was not applied in practice.

One can see that the anti-discrimination legislation was adopted in Romania before the adoption of the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.⁴ The initiative for assuming this law was autochthonous, coming from a need of regulation in the anti-discrimination field expressed by civil society, rather than the desire to fulfil the European Union's requirements. At the same time, it is important to note that the initiative did not reflect a genuine interest of the Romanian State in fighting discrimination, but a pressure from the part of civil society which assessed the situation of discrimination in Romania. This was the reason why after the adoption of the law and the repeal of Article 200, it took two years to have a workable mechanism for investigating and sanctioning discrimination.

² International Covenant on Economic Social and Cultural Rights, International Covenant on Civil and Political Rights, Optional Protocol to the International Covenant on Civil and Political Rights, Second Optional Protocol to the International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Racial Discrimination Against Women, Optional Protocol to the Convention on the Elimination of All Forms of Racial Discrimination Against Women, Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, European Convention on Human Rights, European Social Charter.

³ "Art. 200 Sexual relations between same sex persons:

Sexual relations between same sex persons are punishable with imprisonment from 1 to 5 years.

The fact prescribed at paragraph 1 conducted upon a minor, a person in the impossibility of self-defending or in the impossibility of expressing the will, or the fact conducted throughout constraint is punishable with imprisonment from 2 to 7 years.

In case the fact prescribed in paragraph 2 has the consequence of serious injury of the bodily integrity or of the health, the punishment is prison from 3 to 10 years, and if the consequence is death or the victim's suicide, the punishment is prison from 7 to 15 years.

Urging someone on or leading someone in order to practice the fact prescribed in paragraph 1 is punishable with prison from 1 to 5 years."

⁴ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

Only since 2002, have the national equality body (National Council for Combating Discrimination – NCCD) started to work against discrimination. However, its visibility has been extremely poor on the public scene. In research done in 2003, 58% of the respondents declared that they have never even heard of the NCCD.⁵ This could be one of the reasons why the number of petitions received by this institution is small compared to the predisposition to discrimination existing in Romanian society. This is especially considerable when speaking about sexual minorities. Up until June 2005, the NCCD had received a total number of 14 petitions alleging discrimination on the ground of sexual orientation.

This reflects the lack of interest from the part of sexual minorities to come out and to fight for their rights. However, it is an understandable reaction in a society where homosexuals are the most rejected group: 40% of the persons interviewed considered that no homosexuals should live in Romania compared to 25% that thought the same for the Jehovah's Witnesses or 13% for the Roma ethnics. The visibility of sexual minorities in society is also very low, only 1% of the respondents declared that there are sexual minorities among their group of relatives, friends or neighbours, and 21% that they are aware that these persons exist in their town. An interesting point is that 65% of this last category of respondents considers that homosexuality should not be punished; this could be interpreted as demonstrating that being aware of the existence of homosexuals in society might be a start for a process of accepting them as a part of society.⁶ While the most rejected situation of interaction with a homosexual was proved to be when receiving advances/overtures from somebody, the less rejected one is being workmates, which is an aspect of particular interest for this paper.

The prohibition of discrimination

The Romanian Constitution contains two articles with reference to the topic of anti-discrimination, and the principle of equality. Article 4 states one of the main principles of the Romanian State; being people's unity and equality between citizens: *"Romania is the common, indivisible country of all its citizens, without distinction based on race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin."* Another general provision found in the section concerning the fundamental rights and obligations states that: *"All citizens are equal before the law and public authorities, without privileges or discriminations."*

Both these provisions, even though general, do not contain "sexual orientation" as a ground of discrimination. The only term that can be applied, in an extended understanding of the word, is "sex" with respect to international jurisprudence in the field.⁷ In 2003, with the occasion of the constitutional amendments, within the Constitutional Forum, the idea has been promoted of introducing the term

⁵ Intolerance, discrimination and in the public opinion, Romania, 2003, Institute for Public Policies and the Gallup Organization Romania.

⁶ Idem 4.

⁷ See UN Human Rights Committee, 31 March 1994, *Toonen v. Australia*, Communication 488/1992, [1994] *Interights International Human Rights Law* 27.

“sexual orientation” in the constitutional enumeration of the grounds of discrimination, however the proposal was not accepted.

If ever introduced in the Constitution, this amendment would have more of a symbolic meaning with regard to official recognition and acceptance of equal rights for sexual minorities rather than a legal meaning. Presently, the interpreters of the Constitution consider that the list of grounds is open-ended. The criteria existing in the Constitution are only examples of possible grounds of discrimination, consequently discrimination could be based on any other ground, according to the international conventions in the field of human rights protection, which have pre-eminence over the Romanian laws (apart from the Constitution).⁸

In August 2000, following the efforts of civil society in cooperation with the State Department for National Minorities within the Romanian Government, the first Romanian law in the field of anti-discrimination was adopted, and is in force since 2 November 2000.⁹ This is the general legal provision in the field of combating discrimination. The law contains two categories of provisions: general principles and definitions together with the mechanism for combating discrimination, and several sections of special provisions with the aim of giving examples of discrimination in various fields; for example those of economic activity, employment, career, access to public administration, legal and health services and other areas of access to goods and facilities, access to education, free movement, free choice of residence, free access to public places and personal dignity.

The statute is a general multi-ground non-discrimination law, containing a non-exhaustive list of grounds of discrimination, although in the last amended form of the law, it does not include the “other ground” specification. It refers directly to “sexual orientation” as a ground of discrimination. The general definition of discrimination covers all fields of public life, sanctioning discrimination conducted against an individual or against a group or a community. The law applies to individuals and legal persons, and both public or private persons.

The definition of discrimination is inspired by the UN system. According to the law, discrimination is *“any distinction, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, handicap, chronic illness not transmittable, HIV infection or belonging to a disadvantaged category of people, which has as its aim or effect the partial or complete restriction regarding the recognition, use or exercise of human rights and fundamental freedoms or rights recognized by*

⁸ See Art. 11 para.2 and Art. 20 of the Romanian Constitution.

⁹ *Ordinance no. 137/31.08.2000 regarding the prevention and the punishment of all forms of discrimination.* On several occasions this statute has been amended, completed and adopted throughout several laws or government ordinances having the statute of law: *Law no. 48/2002 concerning the adoption of the Government Ordinance no. 137/31.08.2000 regarding the prevention and the punishment of all forms of discrimination, Government Ordinance no. 77/28.08.2003 for the modification and adjustment of the Government Ordinance no. 137/31.08.2000 regarding the prevention and the punishment of all forms of discrimination, Law no. 27/2004 concerning the adoption of the Government Ordinance no. 77/28.08.2003 for the modification and adjustment of the Government Ordinance no. 137/31.08.2000 regarding the prevention and the punishment of all forms of discrimination.*

*laws in equal conditions, in the political, economic, social, cultural or any other field of the public life.*¹⁰

The first form of the law was far from being in harmony with the European *acquis* in the field of anti-discrimination. According to the *Priority Action Plan for EU Accession (November 2002 - December 2003)*, until 30 August 2003, Romania had the obligation to realise the perfect transposition into the national legislation of the *acquis communautaire* in the field of combating discrimination. "Modifying the law on fighting all forms of discrimination to comply with Article 13 of the EC Treaty (RCE)".¹¹ From that point, the option of implementing an effective anti-discrimination mechanism was no longer an option for the Government or a request from the human rights activists, but an obligation within the EU integration programme of Romania. After the criticism from the EU Commission and Romanian civil society, the Government became interested in amending the legislation according to the EU Directives.¹² In July 2003, they made the first proposal in this sense. It was followed by an advocacy campaign by a group of NGOs and activists,¹³ in order to ensure a good transposition of the Directives. Thus, concepts such as indirect discrimination, harassment, victimization, and the order to discriminate were introduced in an accurate manner with respect to the EU legal provisions.

Nevertheless, the Romanian anti-discrimination legislation still needs further adjustments for a complete transposition of the two Directives. One such adjustment refers to the revising of the statute of the National Council for Combating Discrimination (on issues including: legally ensuring its independence from the Government, attributions, conflict of competence with other authorities in the field, procedures before the NCCD, departmental structure in order to exercise independently and effectively the great number of attributions). Another one refers to the introduction of the concept of shifting the burden of proof, which is essential for the effectiveness of the law in respect of the victims of discrimination and the introduction of the concept of reasonable accommodation.

Presently, there is a public-private joint initiative of promoting a new law project on anti-discrimination.¹⁴ This new law will gather all the legal amendments and it will supplement the legal text with new provisions taken from both the EU Directives and from the ECRI Recommendations in the field of discrimination. The law will maintain its multi ground character and its application in all domains of the social sphere. The project has a special section of definitions containing notions like: direct discrimination, indirect discrimination, multiple discrimination, victimization, harassment, incitement to discriminate, discrimination through

¹⁰ Art.2 of the Ordinance 137/2000.

¹¹ See www.mie.ro/documente/engleza/dialog_ro_ue/priority_action_plan_for_eu_acce.htm.

¹² Namely the Employment Equality Directive and the Racial Equality Directive (Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L* 180, 19.7.2000, p. 22).

¹³ Centre for Legal Resources, Open Society Foundation, ACCEPT, APADOR – Romanian Helsinki Committee, Romani CRISS, Partnership for Equality Centre, Pro Europe League, Institute for Public Policies.

¹⁴ National Council for Combating Discrimination together with Centre for Legal Resources, ACCEPT, Romani CRISS, Pro Europe League, UNICEF representation in Romania.

association, segregation, publicly declared intention to discriminate, complicity in discrimination, association with the aim of committing discrimination, affirmative actions, shifting the burden of proof, reasonable accommodation in general, reasonable accommodation at the workplace/in employment, group and community. It also contains a section with criminal law provisions – establishing the concept of hate crime and hate speech, expanding the grounds for sanctioning two important criminal offences (abuse of the rights of a person committed by a public officer or by a person providing a public service, propaganda or incitement to hate) to other grounds of discrimination, including sexual orientation and introducing a new criminal offence which sanctions acts of deportation.

In the field of employment discrimination, the anti-discrimination provisions of the Labour Code and other employment law acts come in addition to the provisions of the special anti-discrimination statute. Since 2003, the Romanian Labour Code¹⁵ contains requirements in the field of combating discrimination, which refer directly to sexual orientation as a ground of discrimination in employment.¹⁶ This law was the first to regulate indirect discrimination, compared to the Anti-discrimination Law that introduced the definition of indirect discrimination only in August 2003.¹⁷

Law 27 from 5 March 2004, regarding the adoption of Government Ordinance 77/2003 on the modification and adjustment of Government Ordinance 137/2000 on the prevention and sanctioning of all forms of discrimination, includes the notion of harassment as a form of discrimination sanctioned by the Romanian law. Article 2 paragraph 3.1: *“Harassment, which is sanctioned by law, includes any behaviour which, on grounds of race, nationality, ethnic origin, language, religion, social category, belief, gender, sexual orientation, membership of a disadvantaged category, age, handicap, refugee status, being an asylum seeker, or on any other ground, has the effect of creating an intimidating, hostile, degrading and offensive environment.”* It also defines and sanctions the instruction to discriminate which is taken word for word from the European directives.

The Labour Code prohibits discrimination based on sexual orientation with regard to adequate working conditions, social protection, health and security in employment, the respect of human dignity and belief, dismissal, and the determination and payment of the salary. It also introduces the principle of equal pay for equal work.

The Labour Code does not mention anything about discrimination when hiring a person. The Labour Collective Agreement, a secondary law act, established at the national level every year, states that when hiring or setting up a person's individual rights, employers must ensure equal opportunities and equal treatment for all their employees without direct or indirect discrimination based on sexual orientation.¹⁸ Furthermore, according to an instruction of the National

¹⁵ Law 53/2003.

¹⁶ Art. 5 of the Law 53/2003.

¹⁷ Government Ordinance 77/2003.

¹⁸ Art. 2 para.3 Labour Collective Contract Established at the National Level 1285/2002, as well as the same contracts from years 2003 and 2005.

Council for Combating Discrimination, all employers, and all authors and creators of job announcements and their representatives must ensure the free access to all phases of the hiring process for all persons without discrimination, including the prohibition of any discriminatory job announcements.¹⁹

Recent amendments of special laws or recent statutes of several professions contain non-discrimination provisions in employment relations, but also in the fulfilment of one's activity or profession. The Public Officers' Statute prohibits any discrimination between public officers on ground of sexual orientation or any other criterion.²⁰ The Social Assistants' Statute forbids any person in the exercise of the profession of social assistant from practicing, tolerating, facilitating or collaborating in any form of discrimination based on sexual orientation.²¹ Since 2005, the law on ministerial responsibility incriminates any act of a Government member for the drafting and adopting of any norms, regulations or instructions having a discriminatory nature based on sexual orientation or violating human rights.²² Even though, at the moment, this trend of adopting anti-discrimination provisions in several professions' statutes has more a theoretical-symbolical value, in that the more these provisions are invoked in cases of discrimination as binding for all members of a certain profession, the more it will raise the awareness and the interest for adopting detailed codes of non-discriminatory conduct.

Exceptions

Article 53 of the Romanian Constitution provides for a general restriction of the exercise of rights and freedoms. The conditions of limitation are in accordance with the European Convention on Human Rights: provision of the law, with the aim of protecting: national security, national order, public health and morals, citizens' rights and freedoms, criminal investigation and/or preventing the consequences of natural or other disasters. The restriction can only be imposed when it is necessary in a democratic society. The limitative measure must be proportional to the seriousness of the situation that determined it, and it must be applied in a non-discriminatory manner without prejudice to the existence of rights or liberties.

All particular restrictions disposed by any other law must comply with the conditions imposed by the Constitution. The Anti-discrimination Law does not contain a limitation in case of direct discrimination, but only in the case of indirect discrimination. However, according to the principle previously mentioned the Constitutional and ECHR norms apply with supremacy. Article 2 paragraph 2 of the Anti-discrimination Law states that any provisions, criteria or practices apparently neutral which disadvantage certain persons compared to others are not discriminatory, when these provisions, criteria or practices are justified by a legitimate aim and the methods of fulfilling that aim are adequate

¹⁹ Instruction nr. 1/ 05.03.2003 of the NCCD.

²⁰ Art. 25 para.2 of the Law 188/1999 regarding the Public Officers' Statute as amended in 2005.

²¹ Art. 21 para.2 of the Law 466/2004 regarding the Social Assistants' Statute.

²² Art. 8 para. 2b of the Law 115/1999 regarding the ministerial responsibility as amended in 2005.

and necessary. Article 9 of the same law allows a limitation in the field of employment where the person does not satisfy the occupational requirements in that field of activity.

As one can notice, these are general provisions that can apply to all forms of discrimination, based on any ground, including sexual orientation.

The most interesting thing about the exceptions or the alleged exceptions from the non-discrimination principle is to see them working in practice. As we mentioned before, in Romania, though there is a general predisposition to discriminate on the grounds of sexual orientation, there is a limited number of cases of discrimination. In the field of employment, the number of complaints is even lower.

Two situations have been brought to the public's attention in the last two years. One refers to a common protocol signed by the Ministry of Health and the Ministry of Education regarding medical incapacities with the statute on teachers or auxiliary personnel. This secondary legislation also excluded persons with sexual preference disorders, without explaining what is to be understood as a "sexual preference disorder". Even though generally in Romania psychologists no longer consider homosexuality as a psychological disorder, the LGBT rights activists were very sensitive about having this general expression in the protocol, because it could lead to abuses from the part of labour medical doctors, so they put pressure on the Government to expressly exclude homosexuals from the provisions of the protocol.

After two years of advocacy of the LGBT NGO in Romania (ACCEPT), the two ministries were persuaded to specify in their common protocol that by "sexual preference disorders they do not understand homosexuality". Even before this express mention in the text, the Government said that they do not exclude homosexuals since they apply the WHO standards. The lack of specifying this in the text could lead to abuses especially at the local level, where people are still subjected to prejudices etc.

Secondly, it seems that the issue of homosexuals working in the Romanian Orthodox Church is major on the public scene, reflecting the conflict between the right to freedom of thought, religion and belief, the employment and occupational rights and the right not to be discriminated against on the grounds of sexual orientation. In the case of G.P. against a priest (I.S.) and the regional unit of the Romanian Orthodox Church, before the National Council for Combating Discrimination, a religious singer working as a priest's assistant in a religious ceremony was accused by the priest in front of the believers as being a homosexual. After making these accusations without giving any proof, the priest tried to convince the church council that G.P. must be dismissed and he denigrated his image in front of many others. The National Council for Combating Discrimination decided that there had been discrimination from the part of the priest I.S. against G.P.'s personal dignity: "Consequently, the acts conducted by priest I.S. had the effect of differentiating and excluding G.P. based on his alleged sexual orientation from the Christian Orthodox community in the village of V." However, the NCCD did not discuss the actions of the regional unit of the Romanian Orthodox Church that had not succeeded in

calming the conflict; in fact it had threatened G.P. with medical and legal examination in order to prove his sexual orientation.²³

Article 9 of the Anti-discrimination Law refers to occupational requirements: “[All the provisions under the section on equality in economic activities and employment] ... cannot be interpreted in the sense of restraining the right of the employer to refuse to hire a person who does not satisfy the occupational requirements in the respective field, as long as this refusal does not constitute an act of discrimination according to this ordinance, and these measures are objectively justified by a legitimate aim and the methods of fulfilling that aim are adequate and necessary.”

Positive action

Article 2 paragraph 7 of the Anti-discrimination Law prescribes that: “The measures taken by public authorities or by private legal persons in favour of a person, group of persons or a community, aiming to ensure their natural development and the effective realization of equal opportunities of the last ones compared to the other persons, groups of persons or communities, and also the positive measures that aim to protect disadvantaged groups does not represent discrimination according to the present ordinance.”

Presently, no positive action on the ground of sexual orientation has been taken by the State; in fact only some measures have been taken in respect of ethnic origin (Roma).

Enforcement

The Anti-discrimination Law establishes two alternative legal ways for sanctioning discrimination: the administrative fines mechanism – decided and applied by the National Council for Combating Discrimination, and the civil remedies general mechanism – before civil courts.

Furthermore, the Anti-discrimination Law only declares mediation as one of the attributions of the NCCD. Neither this special law, nor are any other general legal provisions regulate mediation or conciliation, and the statute and powers of bodies, which could play the role of mediator, regulated either. Recently though, the National Council for Combating Discrimination has started to have mediation activities, in the absence of a legal document about the matter. The approach is, to say the least, questionable, because mediation must always be undertaken by a totally impartial body, which would then have no other responsibilities for solving the case, a situation in which it should be impossible for the NCCD to find itself in. On the contrary, the legal obligation of the Council is to sanction, and it is impossible to be first a mediator and then a sanctioning, repressive body in the same case.²⁴

²³ The case is not available to the public yet since the National Council for Combating Discrimination does not have a system of making public its decisions. However for more details see online at <http://www.crj.ro/antidiscriminare.php> (in Romanian).

²⁴ Concept Paper to Combat Discrimination in Romania, Renate Weber, 2003.

There is no system of counting and registering all cases of discrimination brought before civil courts in Romania. Consequently one can not prove whether the judiciary enforces the law. Yet, the only powerful NGO fighting for the LGBT rights initiated no suit in civil courts based on the Anti-discrimination Law. On the other hand, they filed several administrative complaints before the National Council for Combating Discrimination.

The number is still very low: fourteen complaints in almost three years.²⁵ One reason for the lack of petitions is due to people's and the state's representatives' attitude with regard to sexual minorities. The NCCD itself has not been pro-active in sustaining sexual minorities' rights compared to other groups exposed to discrimination. But, on the occasion of the first gay march in Romania, in May 2005, the NCCD had an important role in persuading the local administration to give authorisation for the demonstration. The alleged actions of discrimination refer to police actions against sexual minorities, access to public places like clubs or bars, offensive press articles, restricted access to public services (like TAROM Airlines special Valentine's Day Offer which expressly excluded same-sex couples²⁶), and only very modestly to cases of discrimination in employment.²⁷

The Anti-discrimination Law that eases the access to justice for persons exposed to discrimination has introduced important procedural provisions like: actions for compensation due to discrimination are exempt from judicial stamp tax, the possibility is granted for non-governmental human rights organizations either to assist an individual victim or to act on behalf of a victim whenever the discrimination concerns a community or a group of persons, and also the possibility that a judge may require the withdrawal of the functioning licence of the company that acted in a discriminatory manner is provided for.²⁸

Concluding remarks

Romania is a society with a serious level of intolerance towards sexual minorities and a predisposition to discrimination. Concrete cases of discrimination have taken place in several areas of the social sphere, even though only a worryingly small number of complaints or legal actions have been initiated against discriminatory conducts.

Relatively recently, the Romanian Government considered it necessary to create a legal framework for the protection of sexual minorities and other persons exposed to discrimination and adopted a general multi-ground law against discrimination. This law and its amendments are partially in accordance with the *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*. Though essential concepts

²⁵ See annual reports of the NCCD published at www.cncd.org.ro; see also National Council for Combating Discrimination's Jurisprudence, Cristian Jura, 2003

²⁶ For further details see <http://www.365gay.com/newscon05/03/030105romania.htm>.

²⁷ See Combating Discrimination – Efficiency of governmental and non-governmental initiatives, Agency for Press Monitoring 'Cațavencu Academy', 2004.

²⁸ Equality, Diversity and Enlargement – Report on Measures to Combat Discrimination in Accessing and Candidate Countries, Employment and Social Affairs, September 2003, p.102-103.

like shifting of the burden of proof are not yet implemented in the Romanian legislation, the new project law issued in June 2005, aims to ensure the full transposition of the two directives.

A general impression is that the Anti-discrimination legislation is relatively little known by the legal practitioners and by the general population, consequently there are only a small number of complaints and actions against discrimination. In the case of sexual minorities the situation is even more difficult since the fear of coming out is increased by an intolerant society and the lack of a progressive attitude from the state authorities. This is even more obvious in the employment sector where an economic dependence exists on the employer and there are no real guarantees against victimization.

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