

Today, in Romania, the complex of values concerning the democratic liberties of the citizen and the protection of the human rights has become not only an element of the common perception and a fact of social conscience, but also a component of political doctrines of the parties and an important instrument for the functioning of the legal statute and of its institutions.

Romania has demonstrated that the attention granted to the minorities' rights, to the affirmation modalities and protection of the ethnic and cultural identities is a way to stability, peaceful cohabitation and social development, Romania having the institutional and legislative mechanisms by which the rights of ethnic minorities are guaranteed. However, Romania is not completely immune to the possible skidding to various intolerance forms.

I. Historical, Cultural and Social Background

(1) How historically has your national law dealt with religious discrimination?

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 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 the last years.

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 Italian or French crisis¹ 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

¹ Actually such crisis happened in more other European countries like England, Scandinavian countries, Spain, Switzerland and other.

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 90es permeated the public sphere, particularly in the context of incidents in North Western Romania in Sânicolau and Sânmartin from Mureş county, where Roma villagers were expelled from their houses and forced to agree a “protocol of cohabitation.”² 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 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-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.

² Recently on the 12th of April 2011 there was a sort of “local revolution” in the village of Racoş (Braşov County), where 4 Roma persons attacked a member of the Hungarian minority from the village. Together, Romanians and Hungarians attacked the part of the village where the Romas lived. In 2009 in the village of Tărlungeni (Braşov County), the mayor decided to build a 3 meters high wall between the part of the village where the Romas live and the other part of the village where Romanians and Hungarians live, because the first were always attacking the properties of the others for stealing different things.

Specific programs 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) What effect, if any, have UN instruments on religious discrimination and Article 14 ECHR had on your national law both before and after their ratification and/or incorporation? What if any political debate accompanied these developments? What was the contribution of religions to this debate?

In the Opinion 176 of the Parliamentary Assembly of the Council of Europe adopted before the acceptance of Romania in the Assembly existed some recommendations on the field of discrimination as well. Romania tried to fulfill these as follows.

After the adoption of the new Penal Code, in 1996, art. 200 on same-sex relations was modified. In its new form, the article no longer punishes with jail terms consensual same-sex relations between adults. Paragraph (1) introduces a condition, namely that same-sex relations should not cause public scandal, a provision easy to abuse. Moreover, the age of consent is different for heterosexual and homosexual relations. What is even more important is that the association of homosexual persons with a view to expressing their identity is forbidden. Consequently, homosexuals continue to be discriminated against. In 2000, the Chamber of Deputies adopted a draft bill that proposed the repeal of article 200. Several groups, including the Romanian Orthodox Church, have exerted pressure on the Senate, which has not yet voted on this draft law. The pressure put by such groups, who vocally advocated against homosexuality in the fall of 2000, could do even more harm: to determine the Senate to preserve the status of homosexuals as a threatened category.

The return of property to churches has been only partially observed. By means of governmental decisions, several of the old buildings that used to be owned by Hungarian and Mosaic churches were returned. The Greek-Catholic Church also got back some of its former worship places by means of court decisions. But the essential problem related to the former properties owned by churches has still not been generally solved in accordance with legal norms.

- (3) What was your government's view on the EU Directives 2000/43/EC and 2000/78/EC when they were in draft form? What national debate (including debate in your national legislature) was there prior to implementation of the Directives in your law? What role did religions play in this debate?

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.

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.

II. The Duty not to Discriminate: The Prohibition against Discrimination

- (1) **What discrimination authority (eg an Equality Commission) is charged in your state with oversight of religious discrimination? How is it appointed? What is its membership? What are its functions? What roles if any do religions have in its work?**

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 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.

As a positive development, in 2008, the Romanian Constitutional Court seized the chance to clarify the legal status of the NCCD during a case challenging the constitutionality of Articles 16-25 of the Anti-Discrimination Law establishing the mandate of the NCCD. The Court affirmed that “the NCCD is an administrative agency with jurisdictional mandate, which enjoys the required independence in order to carry out administrative-jurisdictional activities and complies with the constitutional provisions from Art. 124 on administration of justice and Art. 126 (5) prohibiting the establishment of extraordinary courts of law.”³

(2) What are the key instruments or sources of law on religious discrimination in your country? What are the key elements of this law? Are the prohibitions civil or criminal? How is religion defined? Are non-religious beliefs protected?

The Romanian Constitution provides for equality and non-discrimination in broad terms. These provisions are implemented in practice by the specific anti-discrimination legislation mentioned above.⁴ The Governmental Ordinance 137/2000 was amended

³ Romania/ Curtea Constituțională/Decision 1096 (15.10.2008). The Court maintained the constitutionality of Articles 16-25 of the Anti-discrimination Law regarding the quasi-judicial nature of the national equality body. Available at <http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true>.

⁴ 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

subsequently in 2002, 2003, 2004 and 2006 to enhance transposition of the Directive 2000/43/EC and the Directive 2000/78/EC.⁵

The scope of the Anti-discrimination Law was substantially diminished in 2008, following a series of decisions of the Romanian Constitutional Court (CCR) which limited both the mandate of the NCCD and of the civil courts in relation to cases of discrimination generated by legislative provisions.⁶

(3) What are the fields in which the prohibition is operative?

There are in the Romanian law clear specifications on the fields of discrimination as follows:

- Equality in the economic activity, in employment and profession;
- Non discriminatory access to the administrative and juridical public services, to health public services, to other services, goods and facilities;
- Access to education;
- The right to the free choice of residence and to free access to public places
- The right to personal dignity.

(4) What does the prohibition cover (eg direct or indirect discrimination, incitement to discriminate, victimisation, harassment)? What defences or other justifications are available? What remedies are available and how have these been used in practice?

The law covers 15 discrimination criteria, which transforms it in one of the most complete law on this field in Europe.⁷

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.

⁵ Romania/ Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, was published in Monitorul Oficial al României No. 431 of September 2000. See also: Romania/ Law 48/2002 concerning the adoption of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (31.01.2002); see also Romania/ Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (30.08.2003); see also Romania/ Law 27/2004 concerning the adoption of the Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (11.04.2004). See also Romania/ Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination

⁶ Romania/Curtea Constituțională/Decisions 818, 819 and 820 from 3.07. 2008. In these three decisions, the Constitutional Court has concluded that the dispositions of Art. 1(2) letter e) and of Art. 27 of the Governmental Ordinance 137/2000 are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory. Based on the constitutional principle of separation of powers, the Constitutional Court emphasised the constitutionality of the Anti-discrimination Law but asserted that the enforcement of the Law by some courts is unconstitutional due to the fact that during its application, some courts decided to quash particular legal provisions deemed as discriminatory and replaced them with other norms, thus 'creating legal norms or substituting them with other norms of their choice.' Available at <http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true>.

⁷ Article 2 of the Anti-discrimination Law defines discrimination as: "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

The criteria are:

- Race
- Nationality
- Ethnic origin
- Language
- Religion
- Social status
- Beliefs
- Gender
- Disabilities
- Sexual orientation
- Age
- HIV positive status
- Chronic non-infectious disease
- Refugees
- Assailants

(5) **What case-law has developed on these matters?**

According with a public survey realized recently, the population consider that the religious minorities are the less discriminated entities or categories from those mentioned in the law.⁸

The most well known case on religious discrimination happened in Romania in 2006. On the 12th of August 2006 the philosophy teacher Emil Moise, whose daughter attended the Fine Arts High School in the city of Buzău requested the NCCD to stop the act of discrimination allegedly constituted by the display of religious symbols in the aforementioned public school. Moise claimed the displays in question discriminated against atheists, agnostics and persons belonging to minority faiths. He also referred to the symbols' negative effect on the development of children's personal and creative autonomy, particularly since Romanian Orthodox symbols also transmit "values of subservience".

In decision 323/21.11.2006 the College of Directors of the NCCD found with the plaintiff in his central claim that the display of religious symbols in public schools constituted a form of discrimination against agnostics and minority faiths, and ordered that such displays be present only during classes of religious education.⁹ The Council recommended that the Ministry of Education and Research adopt, within a reasonable time frame, regulations designed to safeguard the proper exercise of children's right to learn under fair conditions, as well as the right of parents to educate their children in conformity with their religious and philosophical worldviews and, further, to ensure the principle of state secularism and the autonomy of religious *cults* (acknowledged religious denominations) and of children's religious freedom.

exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life."

⁸ <http://www.cncd.org.ro/files/file/Fenomenu%20discriminari%202009.pdf>

⁹ Gabriel Andreescu, Liviu Andreescu, *The European Court of Human Rights' Lautsi Decision: Cotext, Contents, Consequences*, in *Journal for the Study of Religions and Ideologies*, 9,26 (Summer 2010), p. 47-74, here p. 56

While the College of Directors avoided some of the more sensitive issues raised by Moise – such as the question of the “values of subservience” allegedly promoted in schools by some Orthodox practices –, its decision was thoughtful, carefully crafted, and of remarkable significance. The decision was greeted with a fiery debate involving parliamentarians, two ministries (the Ministry of Education and Research and the Ministry of Culture and Religious Affairs), religious groups, secularist NGO’s, public intellectuals and militant journalists.

The Orthodox Patriarchate’s press office released a communiqué in which it called any decision to remove religious symbols a “brutal, unjustified measure restricting religious freedom.”

Alone among the *cults*, the Seventh Day Adventist Church saluted the NCCD decision, noting that the state and its institutions, public schools among them, should not be “involved in promoting and supporting the teachings and values of a particular religion or religious faith.” The Ministry of Education and Research and, respectively, two Romanian Orthodox Church-friendly non-governmental associations appealed the NCCD’s decision in two separate cases. After the lower-court decisions, on 11th June 2008 the High Court of Cassation and Justice declared the appeals admissible and overturned point 2 of the NCCD decision recommending that the Ministry of Education elaborate and enforce regulations concerning the display of religious symbols in public institutions. After the decision of the Romanian Court, Moise complained to the European Court of Human Rights and in 2011 there was the final decision in the Lautsi case which applied to Romania too.

Another case on the field happened in 2010 when the Romanian Humanist Association whose members asked the NCCD to decide if the presence on the national promoting internet page of the Romanian Ministry for Communications www.e-romania.ro only of the Romanian Orthodox Church, with its dogmatic teaching and history could be an act of discrimination against the other 17 cults recognized by the law in Romania. Moreover the internet page was realized from sustained from the public money of the Ministry. Through its decision 340/23.11.2010 the NCCD decided that the page content is discriminating against the other cults and against the neutrality of the public institutions towards religion in Romania through mentioning in the section e-biserica.ro (e-church.ro) only of the Romanian Orthodox Church. As a consequence of the NCCD decision the page was changed with e-cults.ro and contains now information about the all 18 cults recognized in Romania.

III. The Right to Distinguish or Differentiate: Exceptions to the General Prohibition

The Anti-discrimination Law uses the exemption of occupational requirements in the context of access to labour though the wording of Art. 9 of the Anti-discrimination Law is not identical with the language of Art. 4 of Directive 2000/43/EC leaving the future jurisprudence of the NCCD and of the courts to ascertain whether the two concepts are fully compatible:

the provisions of Articles 5-8 (prohibition of discrimination in employment relations), cannot be interpreted as restricting the right of the employer to refuse hiring a person who does not correspond to determining occupational requirements in that particular

field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.

As the grounds covered by the Romanian Anti-discrimination Law are broader than the protected grounds of the two Directives, the differences of treatment in case of determining occupational requirements apply not only for the five grounds mentioned in the Directives, but on all protected grounds.

The Anti-discrimination Law does not include specific provisions on an exemption for employers with an ethos based on religion or belief to comply with Art. 4(2) of Directive 2000/78, but the provisions of Art. 9 on determining occupational requirements which are recognised as exemptions under a clear legitimacy and adequacy test can be interpreted as allowing for ethos or religion based exceptions:

Art. 9 - None of the provisions of articles 5-8 shall be interpreted as a restriction of the employer's right to refuse to hire a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.

Lacking relevant jurisprudence developed either by the courts or by the NCCD in application of such exceptions for ethos or religion based associations, it is still early to assess the tests used in analysing the conditions under which these exceptions will be accepted.

The Law on religious freedom and the general status of religious denominations includes provisions on labour relations taking place within state recognised religious denominations - Law 489/2006 established a three tier system with traditional religious denominations being granted the status of state recognised religious denominations (*culte*) under very strict conditions, religious associations (*asociații religioase*) and religious groups (*grupuri religioase*) which do not meet the strict criteria established by the law or choose not to register as legal persons.

According to Articles 23-26 of the 2006 Law on religious freedom and the general status of religious denominations, state recognised religious denominations have the right to select, appoint, hire and discipline their own employees, a practice already in force in 2000 when the Anti-discrimination Law was adopted. Issues of internal discipline are solved according to bylaws and internal provisions by the religious courts of each denomination. Theoretically, the legal regime established in this chapter only in relation to religious personnel of recognised denominations could be extended to religious personnel of other entities the ethos of which is based on religion or belief (such as registered religious associations) according to the legal principle that where the reason behind a normative provision is the same, the norm applied should be the same accordingly. There is no jurisprudence developed in this field so far.

(1) On what grounds does the law permit different treatment?

The Anti-discrimination Law does not include specific language mentioning that anti-discrimination measures should be taken without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the

maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Specific articles allow for exceptions when the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary in relation to employment, housing and access to goods and services (Articles 9, 10 and 11 of the Anti-discrimination Law).

National defence institutions and public institutions dealing with public order and national security are exempted from the obligation for all authorities and public institutions, public or private legal persons with at least 50 employees to hire persons with disabilities in a percentage of at least four per cent of the total amount of employees, according to Article 78(4) of Law 488/2006.

No other exceptions are provided in the national law.

(2) Who may discriminate?

Art. 2(9) of the Governmental Ordinance 137/2000 (the Anti-discrimination Law) defines positive action as an exemption from the prohibition against discrimination stated in Art. 2 as:

“Measures taken by public authorities or by legal entities under private law in favour of a person, a group of persons or a community, aiming to ensure their natural development and the effective achievement of their right to equal opportunities as opposed to other persons, groups of persons or communities, as well as positive measures aiming to protect disadvantaged groups, shall not be regarded as discrimination under the ordinance herein.”

The definition of positive action in the Romanian legislation is not limited to racial or ethnic origin, religion or belief, disability, age or sexual orientation and covers all protected grounds.

(3) What conditions must be satisfied?

Besides the definition of affirmative measures in the Anti-discrimination Law, specific legislation introduces affirmative measures in relation to particular groups: Roma, children and youth, particularly children and youth living with HIV/AIDS, persons with disabilities, single parents, unemployed, socially vulnerable or senior citizens. No positive actions were reported in relation to religious minorities.