

Briefing for the EU – Moldova Human Rights Dialogue

24-th of March 2011

MOLDOVA: Discriminatory attitudes, impact on society and negative consequences from the Human Rights Perspective

This briefing is submitted by the Non-discrimination Coalition,¹ the Human Rights Resource Group supported by Soros Foundation - Moldova² and the Legal Resources Centre, Moldova.³

Background:

Despite the legal and political commitments of Moldova to align national legislation with international human rights norms and standards, in particular, the ICCPR, ICESCR, CEDAW, CERD, CRPD, ECHR and other international instruments affirming the human rights standards for women, children, refugees, and national minorities, Moldova still faces major problems such as unemployment, poverty, mass out migration of citizens, corruption, limited freedom of association, discrimination, non-tolerance and exclusion, etc.

Many people in Moldova are consciously prejudiced against certain groups and knowingly discriminate against them; many more members of Moldovan society are unaware that their conduct, behaviour and attitudes are discriminatory. This lack of awareness is sometimes one of the first hurdles to be overcome in the efforts towards tolerance, equality, and anti-discrimination. To take effective measures to prevent intolerance, combat discrimination and promote diversity it is important to have solid knowledge on the phenomenon, its causes and extent and have strong actors with capacities to work in promoting the human rights values and principles.

Discrimination is a general problem caused by the absence of quality information on diversity and tolerance. Prejudice and stereotypes are still strongly rooted in the mentality of the Moldovan society. According to a recent sociological study,⁴ every third respondent considers that, in the recent five years, the discrimination has increased in Moldova. On perception level, the respondents considered that most frequently discriminated people in the Republic of Moldova are persons with mental and physical disabilities (68% and 66%), followed by poor people (59%), HIV positive persons (56%), elderly (50%), representatives of gay and lesbian community (49%), Roma (48%) and women (32%).

The experience of the Anti-discrimination coalition and the reports show there is still insufficient knowledge and understanding of the anti-discrimination principles among the general public, as well as inside the target groups (lack of information related to other grounds of discrimination but theirs). The campaigns on human rights are conducted by profile NGOs, yet their visibility and impact are limited to events which they relate to.

¹ Non-discrimination Coalition is a voluntary union of several civic associations (11 at the moment) whose major aim is the protection and promotion of human rights and freedoms. The coalition was formed in 2007 because of acute problems in terms of human rights in the Moldovan society, and thus aims to contribute to the development and consistent application of a non-discriminatory legal framework in Moldova, and to promote international good practices in compliance with relevant international standards.

² The Human Rights Resource Group supported by Soros Foundation - Moldova is a group of key human rights activists who are striving to constantly monitor, document and report on human rights violations and undertake advocacy efforts for change. The Group was established in 2010 and it comprises of 13 activists who act both in their individual capacity and/or represent important human rights NGOs.

³ The Legal Resources Centre is a registered public association that seeks to contribute to raising the awareness of the authorities about and to the eradication of human rights problems; strengthening an efficient, transparent, fair and credible judiciary; creating a culture of respect for human rights; developing public policies on observance of human rights. The LRC current main activities are focused on the implementation of human rights treaties and reforms in the justice sector.

⁴ Sociological Study: Perceptions of the Population from the Republic of Moldova on Discrimination, performed by Soros Foundation - Moldova, in 2010.

Human rights education in schools and university, including law faculties, is very limited and of a poor quality. The media reports unprofessionally on human rights. Even the social advertising does not enjoy the foreseen facilitations in the Law on publicity Nr.1227-XIII from 27.06.97 (art. 21, p.2), de facto while negotiating the broadcast of social advertising free of charge, the beneficiaries would get very limited time, during late hours, or could be refused at all.

Anti-discrimination legislation:

Moldovan legislation includes few provisions, prohibiting discrimination in an explicit manner; however, most of them have severe deficiencies in terms of effectively enjoyment of the rights. The civil society, along with OSCE experts have provided to the Ministry of Justice (MoJ) a first draft of the anti-discrimination law in 2008. The Government had elaborated a first project of anti-discrimination law (ADL) and approved it in autumn 2009. The draft did not include the comments made by the coalition of NGOs. The draft was problematic and insufficient in terms of providing real remedies to discrimination. The MoJ initiated a new round of public consultations with the civil society in August 2010 and has amended the draft law taking into account some of the civil society recommendations. On the 17-th of February 2011, the Government approved a new draft law and passed it for examination to the Parliament.

The civil society welcomes the new draft of the anti-discrimination law and calls for its adoption as soon as possible by the Parliament. However, the civil society highlights the need for several amendments that are crucial for creating an effective mechanism of protection at national level and provide effective remedies to the victims of discrimination, as well as bring the draft law in full compliance with European standards on non-discrimination.

In particular, the 2011 draft law requires the following amendments:

1. Definitions and types of discrimination:

The draft provides for “direct and indirect discrimination”, “victimization and harassment”, “instigation to discrimination”. However, the definition of instigation to discrimination is limited only to actions of a person abusing of the relation of subordination of another person, which is far too limited. We suggest removing the wording “abusing of the subordination relation of another person” from the draft law.

Also, the draft law contains no definition of “multiple discrimination”, “discrimination by association”, “reasonable accommodation”, “genuine and determining occupational requirements” and “racial segregation”. For this reason we recommend that Article 2 of the draft law be completed with these definitions.⁵

Regarding the reasonable accommodation for persons with disabilities, the draft law needs several amendments in order to ensure its compliance with international⁶ and European standards⁷ in this regard. Hence, besides including a definition of “reasonable accommodation” in Article 2 of the draft Law, Article 6 should cover unjustified refusal of reasonable accommodation as a form of discrimination. In addition, specific relevant provisions on employers and education institutions should be set out in Article 8 (employment) and Article 11 (education).

2. Situations Which Do Not Constitute Discrimination:

Article 7(3) of the draft law states that “an objective justification of a legitimate scope, but the methods and scope of the measure are proportionate, adequate and necessary in a democratic society” does not amount

⁵ We provided detailed recommendations on the text of the draft law in Romanian, which include these amendments in an appeal addressed to the Parliament Commissions by 74 NGOs submitted on 18 March 2011

⁶ UN Convention on the Rights with Persons with Disabilities (CRPD) ratified by the Republic of Moldova in 2010.

⁷ In this context, it should be noted that EU launched a European Disabilities Strategy 2010-2020, which includes provisions for Eastern Partnership countries.

to discrimination. However, under EU law such exceptions could be only allowed in cases of indirect discrimination. The definition of indirect discrimination included in the draft law already includes the relevant EU standard in this area. The current wording of Article 7(3) does not comply with the EU law and risks rendering the law as a whole ineffective. Therefore, we would suggest that the Article 7(3) be deleted in its entirety.

3. Effective Remedy:

In order for any anti-discrimination legislation to work effectively, victims of discrimination and their representatives should have the opportunity to genuinely access remedies through judicial procedures that are both easily accessible and effective. In addition to the range of traditional protections and powers afforded any court in overseeing litigation, anti-discrimination legislation should also specifically provide for the "judicial and/or administrative procedures" for the enforcement of anti-discrimination obligations "available to all".⁸ Moreover, domestic law must impose effective, proportionate and dissuasive sanctions for violation of anti-discrimination norms which should include "the payment of compensation to the victim."⁹ The Council Directive 2000/43/EC additionally mandates States to "take all measures necessary to ensure that they are applied."

For this reason, it is recommended to review the relevant provisions of the draft Law (especially Art. 5(c)) to enumerate the specific types of responsibility for discriminatory actions. Further, an article is recommended to be added to the draft Law, enumerating the specific sanctions to be applied in case of discrimination, as suggested: public apologies, measures for redressing the previous situation or annulling the situation created after the discriminatory act took place, fines, moral and pecuniary damages, disciplinary sanctions, withdrawal of the authorization in case of legal entities and criminal sanctions.

Article 12 shall be also amended to include courts among the subjects entrusted with responsibilities in the field of prevention and combating discrimination. Also the non-governmental associations must be deleted from the list of mandated entities as they are carrying out their work on voluntary basis.

4. Enforcement Body - Institutional Framework for Preventing and Combating Discrimination:

A vigorous and effective enforcement body is one of the key elements of a comprehensive law on anti-discrimination. The standards and guidance for an effective body are stated *inter alia* in Article 13 of the Council Directive 2000/43/EC, in General Policy Recommendation No. 2 on Specialized Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at National Level of the Council of Europe's European Commission Against Racism and Intolerance (ECRI), and the UN "Paris Principles" relating to the Status of National Human Rights Institutions. Therefore, it would be helpful if the draft Law (especially Chapter III) were reviewed carefully to ensure that the core necessary elements for effective enforcement bodies are covered by the anti-discrimination law.

In light of international standards, an effective enforcement body should act independent from public authorities. Its independence should be guaranteed in the anti-discrimination law by the appropriate definition and clarification of the key elements relating to the body, i.e. independence from the financial control of any other public authority or institution, ring-fenced resources in terms of both budget and human resources, fair and transparent selection process for members, defined reasons for which its members may be recalled. International and European standards also set out the duties of such a body.

To strengthen the effectiveness of the body to be created in Moldova, the anti-discrimination draft law (Article 17 in particular) should include appropriate provisions on decision making process, including a guarantee that the body will act based on the principle of the shift of the burden of proof in a *prima facie* case of discrimination (see below), acceptance for complaints and interventions provided by third party (civil

⁸ Council Directive 2000/43/EC Art. 7(1) and Article 9 of the Council Directive 2000/78/EC.

⁹ Council Directive 2000/43/EC Art.15 and Article 17 of the Council Directive 2000/78/EC.

rights groups or representatives of individuals),¹⁰ the obligation to provide written and reasoned decision on the dismissal of a complaint. In addition, the scope of Article 14 of the draft Law should be expanded by adding the following competences: initiates ex-officio investigations,¹¹ provides specialized assistance to victims of discrimination; conducts independent studies, analysis and reports concerning discrimination; publishes the decisions adopted, retaining confidential data, in compilations of decisions and the official website of the institution.¹²

5. Burden of Proof:

Due to the specificity of discrimination, in line with international and European standards¹³, anti-discrimination legislation should ensure that it is practically feasible for victims to prove the discrimination they have suffered by shifting the burden of proof in cases in which plaintiffs "establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination." In such cases, as the Council Directive 2000/43/EC specifies, "it shall be for the respondent to prove that there has been no breach of the principle of equal treatment". This principle of shifting the burden of proof in *prima facie* cases of discrimination is all the more important in view of the fact that evidence of discrimination is generally in the hands of the discriminator.

The current wording of the draft Law on anti-discrimination does not appear to comply with international and European requirements in this area. In order to ensure a real shift of the burden of proof, we would suggest that the draft Law be reviewed, in particular Article 24 in conjunction with Articles 15(2) and 16(b), namely:

- Art. 16(b) be amended to the following text: "does not contain the information indicated in Art. 15 (2)";
- Art. 24 (b) the word "contraventional" be excluded and the final text remaining "the burden of proof that the acts do not amount to discrimination belongs to the defendant, except for acts that entail criminal responsibility".

In addition to the necessary amendments highlighted above, we would like to draw the European Union attention to the danger of the Moldovan Parliament to adopt the Law, but excluding the **sexual orientation** as a protected criteria. This is due particularly to the pressure of some religious and "family protection" groups and the fear of the MPs to adopt the Law before the upcoming local elections (scheduled for June 2011), which might determine many voters to support the Communist party that is vocal against the anti-discrimination law. The main reason for the lack of progress of the draft Law during 2008-2011 was exactly the sexual orientation criteria included among the protected ones. Initially, in 2008, the representatives of the MoJ stated that there is no discrimination in Moldova (that was a Communist controlled MoJ). Later the officials repeatedly affirmed that the Republic of Moldova is not ready to adopt a law that would accept this category. Even in 2010, the representatives of the Ministry of Labour, Social Protection and Family have suggested in their comments on the draft Law on anti-discrimination to exclude sexual orientation from the law basing their request on the "Christian family values of the majority of the population" that should not be ignored while amending this law. In March 2011 several MPs,¹⁴ following aggressive lobbying of religious and

¹⁰ Council Directive 2000/43/EC Art.7 (2) and Council Directive 2000/78/EC Art. 9(2).

¹¹ Ex-officio investigation of discriminatory act is provided in article 15 but is not mentioned expressly under the competences of the Council.

¹² Council Directive 2000/43/EC Art.13 (2).

¹³ Council Directive 2000/43/EC Art.8 and Council Directive 2000/78/EC Art. 10.

¹⁴ From at least three of the political parties present in the Parliament. Quotes of the MPs (translations): Valeriu Ghiletschi, Liberal Democratic Party, MP: "I became deeply sad when I heard about the Government's decision to pass the bill regarding prevention and combating of discrimination to the Parliament... Without any doubt, this draft law presents potential danger for integrity of the family and freedom of expression for the Church in terms of moral issues... if the "sexual orientation" phrase is erased, then the law per se does not represent any danger for society... I think the best solution would be to reject the bill at all." (8-th of March 2011, <http://valeriuighiletschi.org/2011/03/proiectul-de-lege-privind-combaterea-discriminarii/>) Eduard Musuc, Communist Party, MP: "These issues are not even a subject of discussion. We are being at the time of the Great Fast. Behaviour of these individuals, who frantically try to promote such kind of things, should be somehow tempered. If they keep being so impudent insisting on those things,

“family protection” groups and perhaps in view of the upcoming local elections, declared to the press that they will not vote for the law or the homosexuals, or the law with the “sexual orientation” as a protected criteria, hence completely ignoring the trends in international law, and Article 21 of the EU Fundamental Rights Charter which is clearly banning discrimination on grounds of sexual orientation.

We consider indispensable the inclusion of “sexual orientation” among the protected groups due to high level of intolerance¹⁵ towards LGBT persons and the number of cases of discrimination and hate crimes documented by GenderDoc-M.¹⁶

Recommendations:

Based on the above, we call the EU to raise the following issues within the EU – Moldova Human Rights dialogue:

- *Encourage the Parliament to adopt the Anti-discrimination Law*, with the proposed amendments in order to make sure that the EU acquis on anti-discrimination is complied with. The legislation should state clearly the types of discrimination, the mechanisms of implementation, and remedy for the victims of discrimination. No protected ground included in the draft law should be omitted;
- *Adequately raising awareness on the phenomenon of discrimination*. The state should provide and facilitate the overall informing of the population on what is discrimination, how to prevent it and educated tolerance and respect for human rights;
- *Conduct trainings to civil servants, judges, lawyers, prosecutors and police officers on matters of non-discrimination and adequate conduct towards vulnerable groups*.

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I am afraid that the civilised part of our society, consisting of 99%, will avenge... I refuse to discuss this anti-discrimination law within the [Parliamentary] Committee because our country doesn't need an anti-discrimination law.” (<http://www.youtube.com/watch?v=IWIOzwSMz40&feature=related>).

Mihai Ghimpu, Liberal Party, MP during the protest against the anti-discrimination law on 17 March 2011: “We are liberals, but we are healthy and we want a healthy family. Homosexuality is a deviation, nature is nature, but it doesn't mean that we need to put them [homosexuals] in the forefront. We don't take patients from psychiatric institutions to bring them on our main square. With all the respect for them, I will not vote”. (<http://www.azi.md/ro/story/17174>).

One of the steps to strengthen the natality is to strengthen our healthy Moldovan traditions, especially the cult of family. The divorce rate in the Republic of Moldova is alarming. Even more worrying are all sorts of weird initiatives which aim legalize and promote sexual relations that go beyond normality and the traditional Moldovan common sense, says Igor Dodon, Communist MP. Moldova has always been shunned to accept such “habits” and I hope God protects us from them and from now on”, he stated, referring to the topic of homosexuality. (17-th of March 2011, <http://unimedia.md/?mod=news&id=31336>).

¹⁵ Only 2% of Moldovans would accept a homosexual person as a neighbour or relative, Sociological Study: Perceptions of the Population from the Republic of Moldova on Discrimination, Soros Foundation-Moldova, 2010, cited above.

¹⁶ According to the results of the questionnaire performed by GenderDoc-M in 2010 on 220 respondents from the LGBT community, 130 have been exposed to direct discrimination, insults and hate crimes; out of 90 respondents who have affirmed that they have not been discriminated 70 did not reveal their sexual orientation.