

Project APE: “Civic Monitoring on the implementation of the Visa Liberalization Action Plan with the European Union”

**Implementing the anti-discrimination law
in the context of visa liberalization dialogue with the EU: achievements and challenges**

Ion Schidu, Human Rights Expert

General context

While implementing the Action Plan on Visa Liberalization with the European Union (EU), the subject of equality and non-discrimination was consistently found under different aspects in the public attention and on the action agenda of the central authorities.

The mass media and nongovernmental organizations have systematically elucidated cases when the representatives of different groups of people were discriminated, with special reference to people with mental and physical disabilities, HIV positive persons, homosexuals, Roma and members of the minority religious groups¹.

Also, there were instances when homophobic language, expressing negative and aggressive stereotypes against persons belonging to ethnic and sexual minority groups was used in public statements by senior officials², leaders of religious cults³ and other public persons⁴.

The deficient actions of the public authorities in ensuring the realization of the human rights and fundamental freedoms for all persons, under equal conditions⁵, were the subject of annual reports made by the Centre of Human Rights in Moldova and the international bodies monitoring the compliance with the commitments undertaken by the Republic of Moldova after signing the treaties prohibiting discrimination and, most recently, the conviction of the Republic of Moldova at the European Court of Human Rights⁶.

¹ The FPA Study "Preventing and combating discrimination in the Republic of Moldova: the legal framework and social perception"

² AIM Report "Towards Equality. Discrimination in the Republic of Moldova"

³ <http://discriminare.md/tag/ps-marchel/>

⁴ Report of the Centre for Human Rights for 2011, <http://ombudsman.md/file/Rapoarte/RAPORT%20CpDOM%20%202011.pdf>

⁵ In March 2012, Balti City Council and 3 other localities have passed decisions that attack directly the sexual and religious minority groups, a fact that was disapproved by local human rights NGOs and representatives of the Parliamentary Assembly of the Council of Europe.

⁶ Genderdoc Decision - M vs Moldova <http://www.lhr.md/news/328.html>

The process of developing and passing the anti-discrimination Law under the Action Plan for Visa Liberalization with the EU had a great public resonance. That Law has caused dissatisfaction for the representatives of the Moldovan Orthodox Church and its supporters have organized a series of protests against the adoption of the draft law. However, due to the efforts of the nongovernmental organization and international organizations working in the field of human rights⁷, supported by the EU officials, the Parliament of Moldova passed Law no. 121/2012 on Ensuring Equality⁸ (hereinafter - Law No. 121/2012).

However, it should be mentioned that despite systematic approach to the issues of discrimination in the Republic of Moldova by the authorities, nongovernmental organizations, specialized international bodies, senior European officials, representatives of the civil society, including the Orthodox Church in Moldova, there is no clarity in the Moldovan society regarding the necessity and benefits of creating a national mechanism to ensure equality among citizens and protection against discrimination. This fact may create additional obstacles for the coherent implementation of Law No. 121/2012.

What are the new elements brought to the Law on Ensuring Equality?

Following the principle of equal treatment among persons⁹, Law No. 121/2012 defined the concept of discrimination and its prohibited forms, listed the protected criteria based on which different treatment of a person or a group of persons is prohibited, specifying, as well, the areas in which the discrimination is prohibited.

Chapter three of the Law regulates the creation and functioning of the *Council to Prevent, Eliminate Discrimination and Ensure Equality* (hereinafter - *the Council*) as a body with legal personality under public legislation designed to ensure protection against discrimination and ensuring equal opportunities and treatment to all persons who consider themselves to be victims of discrimination.

The main tasks of the Council are: review of individual complaints brought forward by persons who think of themselves as victims of discrimination and, possibly, find offenses with discriminatory elements under the Code of Administrative Offences, develop and promote policies to protect against discrimination, initiate proposals to amend the legislation to implement and improve the protection against discrimination etc.

Based on Article 19 of Law No. 121/2012, another essential element was introduced to review complaints concerning discrimination related to the process of evidence submission to the Council and the court (*inversion/division of the burden of proof*). The essence of this mechanism lies in the derogation from the classic principle that each party must prove the circumstances invoked as the basis for their claims and objections¹⁰. The individuals who think

⁷ The National Youth Council of Moldova, "Gender Doc-M" Information Centre, National Centre for Roma People, Human Rights Resource Center, the League of Human Rights of Moldova, Association for the Promotion of Clinics, which formed the Non-Discrimination Coalition

⁸ Published on 29.05.2012 in the Official Journal No. 103, <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=343361&lang=1>

⁹ According to which all human beings are entitled to be equal in dignity, to be treated with respect and consideration and have the right to participate on an equal basis with others in every aspect of economic, social, political, cultural, or civil life without any distinction of race, nationality, ethnic origin, language, religion, sex, political affiliation, wealth, social origin or other criteria underlying the notion of human rights and which are found in virtually all international treaties aiming the protection of human rights.

¹⁰ Provided for in paragraph (1) of Article 118 of the Code of Civil Procedure.

that the principle of equality has been violated in their case and who file complaints in this regard (alleged victims of discrimination) shall only present the circumstances that allow the presumption of the discrimination, while the defendant shall have the burden of proving the lack of discrimination.

Provisions of Law No. 121/2012 will enter into force on the 1st of January 2013¹¹. The Government, within 6 months after the Law enters into force, shall submit to the Parliament proposals on bringing the legislation in line with Law No. 121/2012 and pass the regulations necessary for their enforcement.

So far, the Government has not taken any tangible steps to enforce the provisions of Article 23 of Law No. 121/2012 on Ensuring Equality.

Effectiveness of the national mechanism to prevent and protect against discrimination

Several non-governmental organizations working in the field of human rights¹² were dissatisfied with the Parliament passing the "compromise version" of the Law on Ensuring Equality, invoking its ineffectiveness in relation to the victims of illegal discrimination based on the sexual orientation, state of health, wealth and social origin¹³. Amnesty International has also expressed its concern regarding the non-inclusion in the list of protected criteria of the sexual identity as prohibited grounds for discrimination¹⁴.

The argument of the authorities that the Law will protect the minority groups referred to above in all areas and spheres of activity, by virtue of the openness of the list of protected criteria mentioned in Article 1 Par. (1) of the Law¹⁵, was not accepted by human rights defenders, who invoked the fact of limiting the legal protection only to the employment protection of homosexuals. The word "similar" at the end of the list with the protected criteria will virtually make it impossible to enforce the Law on discrimination cases based on criteria such as pregnancy, sexual orientation and identity, due to the fact that these criteria are different from the criteria mentioned in the list.

The exclusion of the "sexual orientation" protection criteria from Article 1 of Law No. 121/2012 contravenes to the provisions of the International Covenant on the Civil and Political Rights¹⁶, the Community Acquis (*acquis communautaire*), including the European Union Charter on the Fundamental Human Rights and Freedoms and the jurisprudence of the European Court of Human Rights.

¹¹ As stipulated by Article 23 of the Law.

¹² The Non-Discrimination Coalition http://nediscriminare.md/index.php?module=news&item_id=229, Amnesty International Moldova <http://amnesty.md/press-releases/schimb%C4%83rile-de-ultima-or%C4%83-la-legea-nediscriminare-denot%C4%83-la%C5%9Fitatea-guvernului>

¹³ The draft law submitted by the Ministry of Justice on May 11 2012, passed later on by the Parliament, eliminates from Article of the Law the mentioned protection criteria.

¹⁴ AIM Report "Towards Equality. Discrimination in Moldova"

¹⁵ Includes the phrase "other similar criterion".

¹⁶ Article 2, para. (2) 2. States-Parties to this Covenant undertake to guarantee that the rights enunciated in the Covenant will be exercised without discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other circumstance.

Another feature that may represent an impediment in ensuring effective implementation of the principle of equality makes reference to Article 1 paragraph (2) of Law No. 121/2012¹⁷. Since that regulation expressly provides the fact that the Law has no effects on marriages and adoptions regime, which otherwise are determined by special laws, there is a risk of misinterpretation thereof, which may lead, for instance, to the arbitrary prohibition for a person of a certain ethnicity to adopt a child.

As for the functionality of the Council to Prevent, Eliminate Discrimination and Ensure Equality, the concerns of the human rights organizations focused around the procedure used for appointing members, ensuring the functional independence and financial autonomy of the institution. Note that the current wording of Law No. 121/2012 does not favour the involvement of the members of human rights organizations in the selection and nomination of candidates for the Council in question¹⁸, which allows us to recognize that there is a possible risk of a political influence upon the process of appointing members of the Council, which could lead therefore to a possible decrease of its efficiency.

In this context, it is of a particular importance to form an institutional memory, to carry out the process of candidate selection (especially for the current membership) as members of the Council in a transparent and participatory way, in order to establish a consistent working practice within the organization.

Another prerequisite for the Council to carry out its activities in an impartial and independent way is to ensure the financial autonomy of the institution. According to the Paris Principles¹⁹, the national institutions for the human rights protection shall have an appropriate infrastructure for the smooth conduct of its activities, in particular, adequate funding. The purpose of this funding is to enable the institution to have its own staff and office, guaranteeing its independence from the authorities.

With reference to the things mentioned above, we find that up to now the administrative structure that will assist the Council operations has been not been approved and there is no clarity on the way the institution is funded²⁰ and the possibility to determine its own independent budget, which will be included in the national public budget.

Another possible impediment in ensuring appropriate review and settlement of complaints of the alleged victims of discrimination is the deprivation of the Council to apply penalties (if it

¹⁷ (2) The provisions of this Law shall not cover and shall not be construed to affect:

- a) the family based on the freely consented marriage between a man and a woman;
- b) the adoption relationship;
- c) the religious cults and their component parts when it comes to the religious beliefs.

¹⁸ Article 11. Council to Prevent and Eliminate Discrimination and Ensure Equality.

(4) to appoint candidates for the Council, the Parliament sets up a special committee composed of members of the Committee on Human Rights and Interethnic Relations and the Committee for Legal affairs, Appointments and Immunities, which hold a public contest. The contest is held at least 30 days before the end of the mandate of the previously appointed members.

(8) the candidates are reviewed by the specifically formed commission that prepares reasoned opinions on each selected candidate, which are afterwards submitted to the Parliament. The candidates are appointed into office by the vote of the majority of the members of the Parliament.

¹⁹ Paris Principles on the status of national institutions adopted by the resolution of the UN General Assembly 48/134, 20. 12.1993

²⁰ The only provision is included in Article 22 of the Law - Funding.

(1) The public authorities charged with implementing this law are funded on the account and within limits of the financial means annually approved by the state budget and the budgets of the administrative-territorial units.

(2) Activities to prevent and combat discrimination may be funded from other sources that are not prohibited by the legislation.

finds that an offense was committed while reviewing the complaints). According to the provision of Law No. 121/2012, the Council finds violations with discriminatory elements in accordance with the Code of Administrative Offences²¹, while the penalties are to be applied by the court. Thus, some deficiencies could arise in the application of the penalties as regards the period of time to address the complaints and decisions to be ruled out by the courts. Civil society representatives have also expressed their thoughts upon the opportunity to invest the Council with the power to prevent and eliminate discrimination and ensure equality with the power of the Constitutional Court if some legal provisions are found unconstitutional²².

It should be noted that along with the development of the Regulation of the Council to Prevent, Eliminate Discrimination and Ensure Equality, which should include provisions regarding the procedure to review the complaints by the Council, including the mechanism for the members to participate in the review procedure, simplified management of the audio - video evidence²³ that make reference to the mechanisms of qualitative accountability of the Council members²⁴ etc. it is necessary to bring the legislation into conformity with the provisions of Law No. 121/2012. Thus, these changes will largely focus on the Code of Administrative Offences²⁵, Code of Civil Procedure²⁶ and the Criminal Code²⁷.

Conclusions and recommendations

The Republic of Moldova has made significant steps towards bringing the national legislation when it comes to ensure equality of people and combat discrimination in quasi-accordance with the recommendations of the international bodies and standards of the European Union, which allowed the EU to take the decision to move to the second stage of implementation of the Action Plan on Visa Liberalization with the Republic of Moldova.

However, the decisive test of the Government in terms of sustainability of the initiated reforms and the quality of their implementation shall be carried out by 2013, when, at the Eastern Partnership Summit, the European officials will dwell upon the progress registered by the Republic of Moldova in the implementation of the final phase of the Action Plan actions on Visa Liberalization and prospects for signing the Association Agreement with the Republic of Moldova.

Though we support the efforts of the authorities regarding rallying of the national legal framework to the EU standards, we consider it necessary to formulate recommendations urged to intensify the cooperation with the civil society sector as regards the development, monitoring and evaluation of the implementation of public policies and decisions. Thus, at this stage it is important to work together to:

²¹ Article 12, para. (1) let. k) and Art. 15 para. (7) of Law No. 121/2012.

²² CRJM (Legal Resources Centre from Moldova) comments on the draft law of 24.02.2012

²³ According to Art. 146 para. (2) of the Code of Civil Procedure the audio-video evidence may not be used if it is prohibited by the legislation.

²⁴ 4 of the Council members will not work on a permanent basis, thus it is necessary to monitor the way the attributions are carried out.

²⁵ Sets the penalty if the Council fails to submit the requested information, introduce the Council into the list of the ascertaining agents, widen Article 43 for including in the list of aggravating circumstances the criteria for discrimination etc.

²⁶ As regards the request for the opinion on the part of the Council in case of reviewing the discrimination cases.

²⁷ As regards the completion of aggravating circumstances specified in Article 77, with the criteria of protection against discrimination. established by Law 121/2012 and the special provisions that set penalties for offenses, the reason for which may be why discrimination grounds as Articles 145, 151, 152, 176, 197 etc.

1. Design the Regulation of the work of the Council to Prevent and Eliminate Discrimination and Ensure Equality;
2. Select the appropriate candidates for the office of Council member or appoint some professional, independent and dedicated members, with an impeccable reputation, which represents the prerequisite for the proper functioning of the institution;
3. Initiate the process of bringing the legislation in accordance with Law No. 121/2012 on Ensuring Equality;
4. Initiate the process to amend Law No. 121/2012 so that it would comply with the requirements of the European Union and recommendations of the specialized international organizations;
5. Intensify the efforts to recycle civil servants, police officers, prosecutors and, in particular, judges in the field of preventing and combating discrimination;
6. Monitor and evaluate the way Law No. 121/2012 is applied and the way Council Regulation by the Members of the body, courts and other authorities are involved, submitting afterwards the necessary conclusions.

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