Briefing paper: Anti-discrimination and equal treatment in Moldova

Date: October 2015

Submitted by: Legal Resources Centre from Moldova (LRCM)[1]

Executive summary:

This briefing paper refers to Moldova's engagement under EU-Moldova Association Agenda to ensure the full application and regulations against discrimination on all grounds, including the Law on Ensuring Equality, and strengthen the capacity of the Council for Preventing and Eradicating Discrimination (Equality Council).

The authors argue that Moldova has done a significant progress by adopting the Law on Ensuring Equality (Law no. 121) and by setting by the Equality Council, even if the latter was done with significant delay. The Equality Council has effectively started working only in September 2013, while the Law no. 121 entered into force in January 2013. This delay has not impeded the Equality Council to actively pursue its mandate in all three main directions: public policies and advocacy, prevention and awareness raising and examination of individual complaints.

However, in two of these main directions the Equality Council is severely impeded by the competences as provided by current legislation to effectively carry out its mandate. Firstly, the Equality Council cannot directly submit to the Constitutional Court a request for a constitutional review of legislative provisions that raise issues of discrimination. This severely impedes its ability to effectively ensure that the legal framework of Moldova is in line with equality and non-discrimination principles. Secondly, while examining individual complaints, the Equality Council cannot provide an effective and dissuasive remedy to victims of discrimination. The Equality Council can only find discrimination, provide recommendations and if the discrimination act amounts to misdemeanour, the Council can go to court to ask it to find that the perpetrator committed a misdemeanour and sanction him/her. The procedure is cumbersome and ineffective. In view of this, Moldova cannot be said that created an enforcement equality body with at minimum effective, proportionate and dissuasive sanctioning powers, as required by art. 15, 2000/43EC, art. 27 2000/78EC and the European Commission Against Racism and Intolerance (ECRI), General Policy Recommendation no. 2.

[1] The *Centrul de Resurse Juridice din Moldova (CRJM)* / Legal Resources Centre from Moldova (LRCM) is a not-for profit non-governmental organization based in Chişinău, Republic of Moldova. LRCM strives to ensure a qualitative, prompt and transparent delivery of justice and effective observance of civil and political rights in Moldova. In achieving these aims, LRCM combines policy research and advocacy in an independent and non-partisan manner. For more information please check www.crjm.org.

In addition to the Equality Council, the victims of discrimination can go directly to court to ask for a finding on discrimination, as well as damages. In this context, the judicial practice is extremely important and relevant for effectively ensuring equality and non-discrimination in Moldova. The judicial practice is not yet very large, but there are certain important decisions. A recent judgment of the Supreme Court of Justice is raising serious problems regarding the understanding by judiciary of the European standards on equality and non-discrimination. In the respective judgment, the highest court of the country ruled that a priest's declaration did not amount to hate speech and incitement to discrimination, but was an exercise of his freedom of expression. The priest, among other, stated that 92% of homosexuals are HIV infected and should not be allowed to be hired in education, public health and public food institutions. In its ruling, the highest court has made lengthy references to the role of Orthodox teachings in Moldovan society. This judgment annulled the first and appeal instances judgments, who rightly found that the priest's declarations amounted to hate speech and incitement to discrimination. In this context, the precedent set by the Supreme Court of Justice is a rather dangerous one and appropriate actions should be taken to prevent its further use.

The briefing paper provides specific recommendations for amending the legal framework, as well as actions for strengthening the Equality Council's capacity to carry out its mandate. The paper also provides recommendation for strengthening courts' capacity to properly examine cases of discrimination.

1. Introduction

One of the priorities of EU-Moldova Association Agenda includes the following:

> „ Ensure the full application of laws and regulations against discrimination on all grounds, including the Law on Ensuring Equality, and strengthen the capacity of the Council for Preventing and Eradicating Discrimination ('Equality Council')".[2]

Moldova adopted the Law on ensuring equality on 25 May 2012 (Law no. 121),[3] which is the main legal instrument on anti-discrimination in the country. The adoption of the law was one of the conditions included in the Action Plan on visa liberalisation, within EU – Moldova visa dialogue. The law was adopted with serious deficiencies, the final version including a series of serious concessions to the pressure exercised by groups that were against the law, in particular the Orthodox Church. As a result, the law no. 121 includes some exceptions that may be misinterpreted in practice and has awarded insufficient competences to the national mechanism set up by the Law – Council for

[2] See p. III of para 2.1. Political dialogue and reform.
[3] Law on Ensuring Equality no. 121 from 25 May 2012, Official Gazette from 29 May 2012. The law is in force since 1 January 2013.

preventing and combating discrimination and ensuring equality (Equality Council). The capacity of the Equality Council to effectively carry out its mandate is limited and needs strengthening.

Regarding international standards, Protocol no. 12 of the European Convention on Human Rights, European Charter for Regional or Minority Languages and the Optional Protocol for the European Revised Social Charter have not yet been ratified by the Parliament of Moldova.

Since adoption, no action was taken by public authorities to assess the effectiveness of the institutional framework. The current briefing seeks to raise attention of the relevant stakeholders regarding Moldova's failure to fully fulfil the Association Agenda priority related to full application of laws and regulations against discrimination on all grounds and strengthened capacity of the Equality Council.

2. Analysis

Set up and competences of the Equality Council

Equality Council was established in 2013, pursuant to Law no. 121. According to the law, the Equality Council is a collegial body, established with the purpose to ensure protection against discrimination and ensure equality for all victims of discrimination. The Equality Council is composed of 5 members, who should not be politically affiliated, are appointed by the Parliament for a period of 5 years. Out of 5 members, 3 should come from civil society and at least 3 should be licenced in law. Only the Chair of the Equality Council is a full time employee, having the position of a public employee of high dignity /rank. The other 4 members are not employed, they are remunerated only for the sittings of the Council and hence have their jobs somewhere else.

The members of the Equality Council were selected pursuant two public competitions, organized between 14 February and 29 May 2013 by the Special Commission for selecting the Equality Council.[4] The members were selected according to the Regulation on public competition for selecting the members of the Equality Council, adopted by the Special Commission. The respective regulation was a positive precedent for Moldova, providing reasonable requirements for the candidates, a reasonable deadline for application, publication of candidates' CVs on Parliament's website, as well as consultation of candidates with interested parties. The Special Commission respected these procedural stages of the competition. The respective Commission has also invited representatives of civil society to the interviews of the shortlisted candidates. The Commission, regretfully, did not

[4] The Special Parliamentary Commission for organizing the competition for selecting the candidates for the position of members of the Equality Council was created pursuant the Parliament's decision of 30 December 2012.

respect the request of civil society to provide reasons for each selected or rejected candidate (this was not included in the regulation either). The first competition resulted in the selection of two members only, who were then appointed by the Parliament.[5] The Special Commission organized a second competition, which resulted in the selection of the other 3 members. Although several NGOs have raised the problem that only two members of the Equality Council were licensed in law, as required by Law no. 121, the Special Commission proposed all those members to the Parliament, who appointed them on 6 June 2013.[6] Consequently, only two members of the Equality Council are currently licensed in law.

The Equality Council has started to work immediately after all its members have been appointed, although the necessary financial resources have been allocated much later.[7] The law no. 298 regarding the activity of the Equality Council provides that it should have an administrative staff of 20 position.

According to Law no. 121, the Equality Council has competencies in three main areas:

(1) **advocacy and public policies**, ensuring that equality and non-discrimination principles are entrenched in the national legislation and policy-making. In this respect, the Council can carry out analysis of compatibility of national legislation with international standards on equality and non-discrimination, can initiate proposals for amending the legislation (as provided by Law r. 121, but the Council does not have the right to legislative initiative, so any proposal should be backed up / taken up by the Government, MPs or the President), can issue consultative opinions on draft laws and monitor the implementation of the legislation regarding non-discrimination (art. 12 let. a)-d) of the Law no. 121).

These competences are sufficiently large and provide important tools to the Equality Council to contribute to a legislative framework based on equality and non-discrimination, as well as coming up with solutions to some forms of structural discrimination identified via realized analysis. The Council is making use of these competencies. For example, in 2014 the Council has examined 10 legislative and normative acts from the perspective of non-discrimination, covering the following fields: social protection, health, education, accessibility of information and services for disabled persons and has drafted 11 opinions regarding the draft laws,

[5] On 7 March 2013 the following two members were selected: Doina Ioana Străisteanu și Oxana Gumennaia.
[6] On 6 June 2013 the Parliament appointed Andre Brighidin, Ian Feldman, Lucia Gavriliță as members of the Equality Council.
[7] For example, the office space was provided only in September 2013.

formulating recommendations for bringing them in line with the principle of equality and non-discrimination.[8]

However, the Council lacks an important function to help it effecively carry aut its mandate rearding public policies, namely lack of the competence to request for a constitutional review of those normative acts that raise issues of discrimination.

(2) **Prevention of discrimination, including raising awareness of the population regarding the importance of equality and non-discrimination.** The Equality Council has important functions regarding the analysis of discrimination phenomenon in the country, drafting thematic studies and reports, providing recommendations to public authorities to take certain measures for combating discrimination, providing trening on equaity and non-discrimination and awareness-raising among the society.

In less that two years since it is operation, the Equality Council has managed to set up successful collaborations with various civil society groups and to publish reports and non-discriminaion guides for the general public. For example, in 2014 the Council organized 27 trening activities for judges, prosecutors, staff of local public administration, reprezentatives of civil asociety and the media from across the country. These activitis were carried out in collaboration with local and international organizations.

Another important function of the Council includes data collection on the magnitute, state and tendencies of discrimination at national level. In this respect, the Council has managed to carry aut, in collaboration with a local non-governmental organization, a national survey regarding the perception of discrimination in Moldova.[9]

So far the Council has been active in fulfilling its mandate regarding prevention and awareness raising about discrimination. But, it has to be emphasized that these activities were mostrly carried aut in partnership with local or international civil society groups / donors. The partnerships included both human and financial resources provided by Council's partners. It is doubtful that the Council would be able to carry these activities on its own. Thefore external support fo the next few years is crucial, both in temrs of financial and human resources.

(3) **Examining individual complaints and issuing recommendations on them (acting as a quasi-judicial body, but with significantly limited powers).**

The Equality Council can examine individual complaints submitted by the alleged victims of discrimination and can find misdemeanors according to Misdemeanors Code (art. 12 para.

[8] See for details the Equality Council's annual report for 2014, available here: http://www.egalitate.md/index.php?pag=page&id=850&l=ro.

[9] The survey is available here: http://www.egalitate.md/index.php?pag=news&id=837&l=ro.

(1) let. i și k) of the Law no. 121). Also, the Council can request initiation of disciplinary proceedings against the persons with decision-making powers (persoane cu functii de raspundere) that have committed discriminatory acts in their servic. The Council should also contribute to amiacable solution of conflicts that appeared as a result of discriminatory acts by mediating among the parties and looking for a mutually acceptable solution (art. 12 para. (1) let. j) and m) of the Law no. 121). If the discriminatory act includes the elements of a crime, the Council shall inform the criminal investigation bodies (art. 12 para. (1) let. l) of the Law no. 121).

If the Equality Council found discrimination, it can issue recommendations according to art. 15 para. (4) of the Law no. 121. According to art. 15 para. (5) of the Law no. 121, the Equality Council shall be informed within 10 days about the measures undertaken following its recommendations. According to Law no. 121 and provisions of art. 71^2 and 423^5 of the Misdemeanors Code,[10] it follows that the Equality Council's recommendations are mandatory and the persons that committed acts of discrimination shall implement them. However, the mere term of „recommendation", suggests that it has a recommendatory and not a binding force.

The fact that the Equality Council can only fin discrimination and cannot apply any sanctions limits significantly the efficiency of its work. These problems are described in more detail in the text below.

Examination of individual complaints without the power to apply sanctions

Since its establishment in 2013, the Council has delivered decisions for over 200 complaints,[11] one third of which came back with a finding of discrimination.[12]

These numbers appear to indicate that the Council offers a quick and accessible remedy for the potential victims. However, there are serious concerns as to the effectiveness of this remedy since

[10] Art. 74^2 prevede următoarele: „Împiedicarea activității Consiliului pentru prevenirea și eliminarea discriminării și asigurarea egalității cu scopul de a influența deciziile acestuia, neprezentarea în termenul prevăzut de lege a informațiilor relevante solicitate pentru examinarea plângerilor, ignorarea intenționată și neexecutarea recomandărilor date de consiliu, împiedicarea sub orice altă formă a activității acestuia, se sancționează cu amendă de la 50 la 100 de unități convenționale aplicată persoanei fizice, cu amendă de la 75 la 150 de unități convenționale aplicată persoanei cu funcție de răspundere." Art. 423^5 prevede CPPEDAE ca agent constatator în următoarele contravenții: art.542, 651, 71^1 și 71^2 ale Codului Contravențional.

[11] Council annual reports from 2013 and 2014 available here: http://www.egalitate.md/index.php?pag=page&id=850&l=ro

[12] In 2013 – 2014, Council delivered 72 decisions regarding at least 101 complaints. Some of the complaints were joined due to the similarity of complaints.

the Council cannot sanction the perpetrators. The Council is only mandated to issue recommendations and/or draw up a protocol regarding a misdemeanour, which the Council needs to bring to court in misdemeanour proceedings (*proces contraventional*), the court being the only body entitled to decide over the sanctions.[13]

As explained above, the recommendations issued by the Council are legally binding in a very strict legal interpretation of this term, given the fact that there is a provision in the Misdemeanor Code that allows courts to sanction the persons (individuals and legal entities) for not implementing the Council's decisions. However, for this to take place the Council needs first to issue recommendations, then monitor their application and if the recommendations are not implemented, the Council needs to draw up a misdemeanour protocol and bring it to court for the court to establish a sanction. This is a highly ineffective mechanism.

Besides the cases regarding the non-enforcement of the Council's recommendations, the Council can issue misdemeanour protocols when they consider that the act of discrimination constitutes a misdemeanour. Based on the Council's 2014 activity report, 8 out of 15 misdemeanour protocols (53%) prepared by the Council were annulled by courts in misdemeanour proceedings. The Council reported that the primary reason for these decisions was due to lack of mandate. However, upon closer scrutiny, the actual reason for annulling the vast majority of these decisions was the presence of procedural flaws relating to the Council's failure to respect formal requirements set by the Moldovan Misdemeanors' Code on misdemeanour protocols. For example, protocols were not signed by all of the members of the Council; did not state details regarding the respondent's home address, profession; or were not signed by the respondent/alleged perpetrator.[14] Current legislation likens the Council to agents empowered to find misdemeanours (similar to police officers). It does not establish the Council as a specialised body entitled to prevent and eliminate discrimination by actually sanctioning and providing adequate remedies.

The Council finds discrimination and issues misdemeanour protocols in a special quasi-judicial procedure, which includes a hearing of the parties. Law no. 121 establishes, rightly, an important provision that is crucial for anti-discrimination cases, namely the right of the Council to draw negative inferences from the failure of the alleged perpetrator to provide the requested information. Hence, in cases where the alleged perpetrator ignored the Council and does not provide any reasonable

[13] According to Council 2014 annual report, in 2013-2014 the Council issued 15 protocols for misdemeanours, which is 23% of the total number of decisions (65 in 2013-2014).
[14] Legal Resource Centre from Moldova/ Euroregional Centre for Public Initiatives, "Analysis of the compatibility of Moldovan legislation with the Acquis on equality and non-discrimination" 2015 p. 147 (unpublished).

justification, the Council has the right to examine the case and adopt a decision in the absence of the perpetrator. However, according to the Misdemeanors' Code, it is required that the misdemeanour protocol is drawn up in the presence of the perpetrator, which is simply impossible in anti-discrimination cases when the respondent/alleged perpetrator is not present at the hearing.

The above limitations lead to deficient practices and failure of the Council to provide an effective remedy. The acquis in the field of equality and non-discrimination requires the enforcement bodies to have at minimum effective, proportionate and dissuasive sanctioning powers.[15] The Court of Justice of the EU stated that a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of EU directives.[16] At present Moldova is in violation of these basic principles.

Multiple venues lead to arbitrary application of fundamental principles

In 2014, about 25% of the decisions issued by the Council were challenged in courts.[17] This percentage includes both decisions where the Council submitted misdemeanour protocols to the courts for sanctioning in misdemeanour proceedings and decisions in which the Council made recommendations that were challenged by the parties in administrative court proceedings. The percentage of appeals against the decisions appears to be relatively low, which could mean either that the parties trust the Council's findings or that the lack of penalties results in a disinterest on the part of the parties. Another reason for this appeal rate could be that national legislation and practice are not clear regarding the procedure for examining appeals against Council decisions.

Potential victims of discrimination can address their concerns to courts filing civil actions or through administrative procedures (*contencios administrativ*) either against discriminatory legislation or against individual acts issued by the central bodies and/or local administration that are considered discriminatory. Alternatively, cases of discrimination can be brought before the Council. Theoretically, all venues can be explored simultaneously. Furthermore, for those who opt for the Council there is a risk that the action for the proposed sanctions will result in two different venues: one action for the proposed sanctions (misdemeanours procedure) and one action against the Council recommendations (administrative procedure, which requires a preliminary complaint to the Council). This duality might lead to conflicting decisions in the same case.

[15] Art. 15, 2000/43EC; Art. 27 2000/78EC; European Commission Against Racism and Intolerance (ECRI), General Policy Recommendation no. 2; 1997

[16] European Court of Justice, Accept v. CNCD case, para. 64

[17] Legal Resource Centre from Moldova/ Euroregional Centre for Public Initiatives, "Analysis of the compatibility of Moldovan legislation with the Acquis on equality and non-discrimination" 2015 p. 132 (unpublished).

The above limitations lead to deficient practices and risks, creating a double burden for the applicants to have exhausted different venues for the same decision. Moreover, there is not yet a unified practice established for courts on verifying the legality of the Council's decision in the current legal framework through administrative procedure. Some courts have examined the merits of the case, while others only examined legal compliance based on the preliminary complaint and if there was not violated any right of the applicant to the Council.[18]

Limitations of the Council's capacities

Through individual complaints, the Council is in the position to discover not only individual cases of discrimination, but also potentially discriminatory legislation. In a significant number of cases, however, in individual cases filed by petitioners or initiated *ex officio*, the Council solves the case without providing a remedy for the person concerned, and instead they are only making general recommendations for authorities to amend legislation.[19]

The recommendations formulated by the Council in cases that raise legislative issues are, in fact, legislative proposals. Moreover, such cases unnecessarily put the Council in a confrontational situation with other public authorities, calling them for explaining the legislation from the position of defendants, rather than for the purpose of providing expert guidance and working with them on finding the right solution for amending the legislation. Such cases are additionally problematic when initiated *ex officio* by the Council, who calls the authorities for providing explanations on the current laws instead of analysing the legislation from the perspective of equality and putting forward proposals for amendments in a collegial, institutional manner.

[18] Legal Resource Centre from Moldova/ Euroregional Centre for Public Initiatives, "Analysis of the compatibility of Moldovan legislation with the Acquis on equality and non-discrimination" 2015 p. 132 (unpublished).

[19] For example, in decision no. 008/13 of 17 February 2014, initiated ex-officio, the Council analysed the legislation that regulates work-related conflicts of employees in law enforcements authorities. The Council found that lack of the State Labour Inspectorate competences over these institutions or lack of access of these employees to an independent and specialised mechanism for labour protection puts them in a disadvantaged position compared to other state employees. Similarly, in case no. 060/14 of 17 April 2014, initiated on a complaint submitted by a group of lawyers and ex-officio by a member of the Council, the Council, among others, found that women lawyers are discriminated against because they do not have equal access to medical insurance services during the leave period for taking care of their child(ren). In another case, case no. 110/14 of 9 September 2014, initiated at the complaint of an individual against the National Agency for Employment, Ministry for Labour, Social Protection and Family and the National Council Determining Disability and Work capacity, the complaint concerned alleged discrimination for access to continuous professional development. The applicant did not have a new type of certificate needed for enrolling in such courses. To obtain such a certificate, she needed to undergo a repeated control at the National Council for determining Disability and Work Capacity. This, in fact, would have meant that all disabled persons in the country would need to undergo a repeated control, which would affect them disproportionately and could have blocked the activity of the respective institution. Hence, as the Council rightly noted, special legal provisions should have been adopted for transitioning from old to new certificates in order to avoid this situation. Lack of such provisions have disproportionately affected only the persons with disabilities that did not have the new type of certificate and who wanted to enter the labour force through professional development courses. The Council found discrimination in the respective case, but did not offer any individual remedy to the applicant.

The emphasis of the Council on general recommendations and legislative amendments raises the question as to whether the provided remedy is effective, proportionate and dissuasive in relation to victims of discrimination. Identifying discriminatory legislation and providing expert advice to the authorities is crucial for the Council's activity. A pro-active approach is in this way commendable. As mentioned above, a solution would be for the Council to be able to seize the Constitutional Court in cases of discriminatory legislation. At the moment, the Equality Council can resort to the Constitutional Court review via the Ombudsman Office. In addition, as mentioned above, the Council has the competences to examine the compatibility of legislation, make proposals for amending legislation and monitor the implementation of legislation. Hence, the Council should make more use of these competences instead of focusing on its competencies of examining individual complaints.

Another important aspect of the Council's activity is the quality of the legal reasoning in its decisions. The Council is generally trying to reason well in its decisions. However, there is room for improvement. In particular, the way in which the Council interprets and applies the protected ground of "opinion" in some cases is problematic, as it does not limit the protection to some core values of the alleged victims, a part of the identity of the plaintiff, but extends it to practically any opinion, including a disagreement with a superior. Such broad interpretation increases the likelihood of qualifying any labour conflict as discrimination and wrongfully applying the discrimination form of harassment.[20]

Another challenge is that in some cases, especially those with multiple alleged perpetrators, the Council is not specific enough in its decisions regarding the level of responsibility of each party.[21] General findings and recommendations fail to have any impact if they lack comprehensive reasoning and are not specific enough.

Procedurally, the Council is trying to organize fair hearings of the parties, even if the current legislation does not provide sufficient details regarding hearings in individual cases. Still, in cases

[20] For example, in case no. 001/13, the Council found that a policeman was harassed by its superiors, but used as protected ground the disagreement of the respective policeman with the decision of his superiors to conduct searches and seizures in the police commissariat where he was working.

[21] For example, case no. 052/14 from 29 April 2014: alleged negligence in providing legal services to people with mental disabilities, initiated *ex-officio* by the Council. Explanations were presented by the 22 lawyers. Unfortunately, the Council did not take the opportunity of explaining what exact actions/inactions raised questions about possible acts of discrimination and if the actions / inactions were justified. The reasoning part of the decision suggested that all the lawyers were responsible for restricting the rights of people with disabilities even if some responsibilities were under other authorities' competence (e.g., bringing the beneficiary to the courtroom). Also, the responses of some lawyers showed evident prejudice and inaction regarding persons with mental disabilities, while others seem to have taken some appropriate measures of defence. The Council did not differentiate in its conclusions and noted simply that "the facts of the complaint amount to discrimination."

initiated *ex officio*[22] by a Council member, concerns regarding impartiality arise given that currently the member who filed the complaint does not abstain from voting and the principle of sharing the burden of proof is not fully observed. The law does not provide for the respective member's obligation to abstain, nor do members who initiate cases *ex officio* abstain from participating in the decision on the case.

The Council is also facing issues of inadequate office facilities and infrastructure. In this regard, the state authorities should be encouraged to provide the Council with an appropriate office, accessible and adequate for carrying out its mandate, as well as an adequate budget to allow effective implementation of its mandate. The Council has done a particularly good job in ensuring its transparency by posting its decisions, newsletters and activity reports on its website. After the initial period of work and with a growing volume of cases, the Council will need to improve its website and to establish an accessible and coherent database for its decisions.

The text of the law – limitations as a result of the concessions to the Orthodox Church

The Law no. 121 provides specific exceptions to discrimination, exceptions that are not grounded on international standards. Namely, art. 1 para (2) of the Law nr, 121 provides the following:

> *"(2) The provisions of this law does not apply and cannot be interpreted as infringing upon:*
>
> *a) family that is based on a free marriage between a man and a woman;*
>
> *b) relations of adoption;*
>
> *3) religious denominations and their constituting parts regarding religious beliefs."*

The exceptions regarding the religious denominations and their constituting parts are detailed in art. 7 and 9 of the Law no. 121, which are essential and determinant requirements provided for religious groups under EU Directives as well. These should be interpreted in a strict sense. As to the exceptions regarding adoption and family, these exceptions do not have any basis in international law and should be abolished.

To date there is no case examined by the Equality Council or the courts that analysed or took into account the exceptions provided by art. (1) para (2) of the Law no. 121. However, for the sake of clarity and previsibility, these provisions should be abolished, either at the initiative of the Parliament or as a result of their constitutionality review.

[22] Examples of cases initiated *ex-officio*: case 002/13 from 30 October 13; Case 008/13 from 17 February 2014; Case 048/14, 041/13 from 24 February 2014; Case 052/14 29 April 14; Case 108/14 from 28 July 2014; Case 159/14 from 13 October 14; Case 118/14 from 16 October 2014; Case 160/14 from 11 December 2014; Case 180/14 from 16 December 2014; Case 182/14 from 18 December 2014.

Dangerous precedent set by the Supreme Court of Justice (SCJ) on limits between hate speech and freedom of expression involving a priest and his remarks regarding LGBT community

The Supreme Court of Justice (SCJ) is the highest court in the country. On 16 September 2015 it has ruled on a case that was initiated by an NGO that works on LGBT rights, GENDERDOC-M.

On 19 December 2012 GENDERDOC-M submitted a complaint to a first instance court against Marchel, the Bishop (Episcop) of Balti and Falesti of the Orthodox Church. The NGO requested the court to rule that Marche's declaration was hate speech and incitement to discrimination of homosexual persons, requesting the court to oblige him to bring public apologies and to refute the spread information as untrue, to repare the moral damages caused by the offence brought by hate speech and incitement to discrimination and to compensate court fees supported by the applicant. The applicant NGO based their complaint on the following statements made by Marchel on a TV post on 30 September 2012:

> "The Law on equality has opened the door for, I would say, creating in this sense conditions for an Edem, a paradise for homosexuals, to stop them a bit, not to allow them to be hired in educational institutions, in health and public food institutions, imagine that a homosexual, 92% of which are HIV carriers are infected with HIV positive are employed at a station for blood transfusion, this would be a catasprophe".

Although the first and the appeal instances have satisfied the applicant's requests, the SCJ annulled the first and appeal judgments and pronounced a new judgment. In their judgment, the SCJ has ruled that Marchel did not infringe any rights, as he exercised his freedom of expression when making the contested declaration. The SCJ relied on several arguments in their decision, in particular the following. Firstly, Marchel had a special status of a religious figure that in his speech promoted the Orthodox teachings that he shares. In this sense, he has emphasized that according to the Bible "homosexuality is a sin" and the church does not condemn the sinner but the sinning way of living of the person. Hence the SCJ concluded that Marchel's declarations did not contain an incitement to discriminate, but an encouragement not to lead a sinning way of living. SCJ stated that these declarations are perfectly within the limits of the Law on freedom of expression Marchel was entitled to make this declaration based on the role he has in a society "based in an absolute majority on Christian-Orthodox teachings".

Secondly, the SCJ dismissed the first and appeal instances' conclusions that Marchel's statements were false. The SCJ concluded Marchel did not spread the information about HIV status of

homosexual persons, but relied on the information published in mass-media (here the SCJ included a link of a Russian outdated website that makes reference to some irrelevant research of 1981 carried out in the US). Making reference to *Handyside v. UK*, the SCJ mentioned that freedom of expression includes expressions that offend, shock and disturb the State or any part of the community. Hence, the SCJ concluded that the judgments of the first and appeal courts that obliged Marchel to bring public apologies were in fact an attempt to limit and discourage anyone that, either because of religious or civic attitude reasons, disagree with the policies promoted by GENDERDOC-M and to set up a judicial precedent.

The SCJ went on and used some procedural reasons, which are less relevant for this brief.

To conclude, the SCJ has set up a very dangerous precedent for the Moldovan judiciary, overruling the very well reasoned judgments of the first and appeal instance. In such a context, professional critiques of the respective judgments are very important for preventing that this decision becomes a precedent in the country.

3. Conclusions and recommendations

Moldovan Government has undertaken several important steps for creating a national legal instrument to protect against discrimination on all grounds – the Law on ensuring equality - and created a national anti-discrimination mechanism – the Equality Council. However, there are important limitations in the Law on equality and regarding the competences of the Equality Council. Judiciary on the other hand also seems to lay behind the standards on equality and non-discrimination. If the lower courts seem to have understood the general norms, the Supreme Court of Justice set a dangerous precedent in a case involving a representative of the Orthodox church that has made discriminatory statements regarding homosexuals.

In this context, the following recommendations are provided to Moldovan Government and Judiciary:

- Prioritise capacity building of the Council as well as of the judiciary by ensuring adequate resources and continued professional development in the areas of equality and non-discrimination;
- Amend the Moldovan legal framework by introducing the possibility of the Council to apply sanctions and by establishing that decisions of the Council are binding, as well as by establishing a single venue for challenging the Council's decisions (administrative procedures, with no requirement to use the preliminary complaint stage, similar to the regulations regarding the Audio-Visual Council).

- Further amend the law by adding provisions to Law no. 121 regarding procedural aspects that are currently missing (application of Civil Procedure Code provisions, abstention of members in cases initiated at their request);
- Amend the Law no. 121 by excluding the exceptions included in art. 1 para (2);
- Amend the Law no. 121 and Law no. 317 on the Constitutional Court and the Constitutional Jurisdiction Code to provide legal standing for the Council so that it can bring cases before the Constitutional Court;
- Provide specific training to Supreme Court of Justice on limits between freedom of expression and hate speech, involving experts from EU countries that would also be able to provide professional critique over the SCJ judgment of 16 September 2015. Conduct similar trainings for lower court judges;
- Recommend that the Supreme Court of Justice develops guidelines for the courts, prescribing single procedural standard and special procedural guarantees in cases of discrimination. This will simplify the appeal procedure against Council decisions and prevent the use of multiple venues;
- Provide the Council with adequate office facilities and sufficient funds for an adequate database of decisions and an improved website.