REPORT

OCTOBER

2020

Analysis of the Practice of Courts of Law and of the Equality Council concerning Equality and Non-discrimination in the Republic of Moldova

Romanița-Elena IORDACHE

LRCM
LEGAL RESOURCES CENTRE FROM MOLDOVA

REPORT

Analysis of the Practice of Courts of Law and of the Equality Council concerning Equality and Non-discrimination in the Republic of Moldova

Author:

Romaniţa-Elena IORDACHE

This publication was produced with the generous support offered by the American people through the United States Agency for International Development (USAID). The views expressed in it are those of the LRCM and do not necessarily reflect the position of USAID or the U.S. Government.

Chișinău, 2020

Table of contents

Executive summary

Law no. 121 on Ensuring Equality was adopted in the Republic of Moldova in a regional and national context where Europeanization was the main element that mobilized the elites to adopt antidiscrimination rules. The adoption of this law, however, was merely the first step in the process of building an efficient mechanism to fight discrimination and promote equality. To ensure that the provisions of the law can turn from theoretical provisions into daily practice, it is necessary to empower the agencies mandated to enforce the law. Eight years after the adoption of Law no. 121, this report analyzes how the Equality Council and the courts of law interpret and apply the law, the relationship between various actors, and the opportunities and risks which emerged or are foreseeable.

The Equality Council has grown impressively, and its achievements are due to a large extent to its team. Their passion helped the organization to cope with the lack of resources and to overcome challenges in a transparent and open way. The organization managed to foster dialogue with the society by issuing individual and general recommendations, developing bold case law on sensitive subjects, and taking the lead in sounding the alarm when the public discourse swerved toward hatred and assaults on dignity during election periods and in times of crisis. The Council also proved its worth by acting as a mediator, coming up with general recommendations that offered systemic solutions to some forms of structural discrimination.

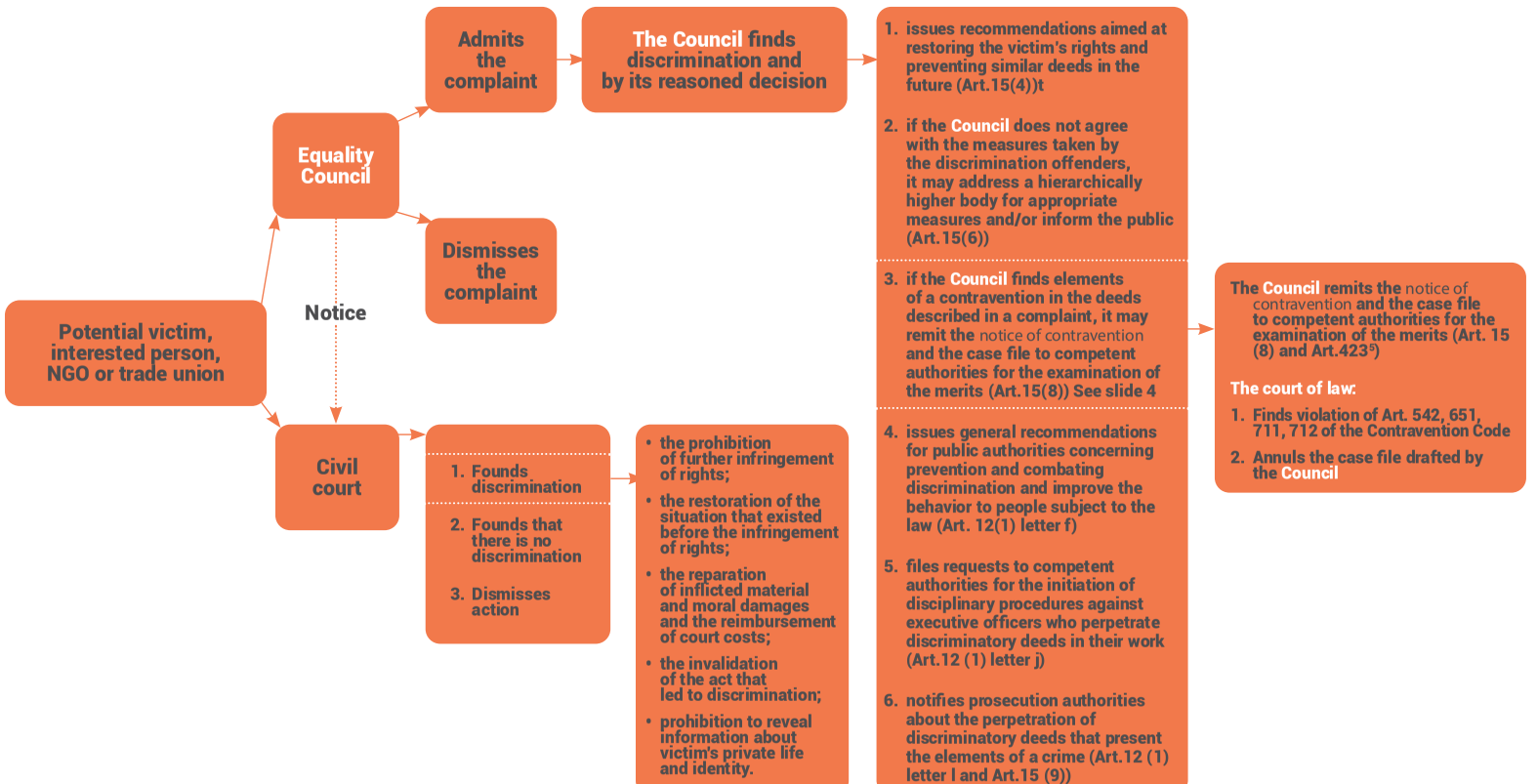
The analysis also highlights the risks—triggered by the Council's limited mandate—in granting efficient remedies as, despite the Council's power to find acts of discrimination, it cannot punish them. Instead, it has to refer notices of contravention and case files to competent courts of law, which perform a new examination and establish sanctions in light of the Contravention Code. This detour takes time and energy, and sometimes, courts have a poor understanding of the antidiscrimination law as a special law. Another identified risk was that the Council risks losing independence and efficiency because of insufficient resource allocation or the risk of politization due to attempts to make the Council a tool in political strife. Unfortunately, deficiencies in applying the procedural guarantees when issuing Council decisions have often led to the annulment of these decisions by the courts. An unexpected finding concerned the way some judges viewed the Equality Council and their ambiguity regarding its legal status as an administrative-jurisdictional authority, which lead them to take an incorrect and uncooperative stance, as they did not understand the importance of an efficient and loyal cooperation between institutions meant to protect the rule of law.

One of the key elements that can render the application of Law no. 121 meaningful consists in the mandate vested in the courts and their efficient involvement in following the spirit and the letter of the law. While being still in its early stage, the examined case law shows that courts gradually improve their ability to apply the antidiscrimination law. Still, there are some discrepancies caused by judges' poor understanding that the antidiscrimination law has the status of special law (*lex specialis*) and there are significant difficulties in aligning, or even failure to align, with international—particularly the ECtHR's—practice when courts are asked to assess the balance between freedom of expression, on the one hand, and the prohibition of discrimination and protection of equality, on the other hand. The rigid legal interpretation and lack of understanding of the special law status ensured to Law no. 121 also transpire in many instances where courts annul the Council's decisions, particularly on procedural reasons, with a superficial analysis of the merits and with no analysis of the potential impact their judgments have on victims of discrimination. Another issue concerns judges' misunderstanding of the Equality Council's role and of its relationship with courts, including the allegations that the Council interferes with justice or judicial independence by examining complaints against courts or judges, whereas in fact the Equality Council simply carries out its legal mandate. This can be explained by the failure of the National Institute of Justice to provide and regularly assess training and workshops to bring Moldovan judges up to date with the international case law on discrimination, incitement to discrimination, harassment, reasonable accommodation, and accessibility.

Latest court judgments give reasons for optimism as they show the understanding of the need to correlate remedies to the discriminatory deeds and a greater flexibility in establishing sanctions. In the long run, this approach will help to define an efficient mechanism of remedies for cases of discrimination.

In terms of the areas in which discrimination occurs, a greater part of cases brought before both the Equality Council and the courts of law concerned discrimination in the field of employment, and fewer cases are of discrimination in access to education or healthcare. Even in the absence of officially filed complaints, the Equality Council may perform the proactive role of monitoring certain fields strategically and take *ex officio* action to educate and encourage victims to initiate litigation. Unfortunately, despite its mandate under Article 13 of Law no. 121, the Council hesitates to act *ex officio*.

Possible Trajectories in Cases of Discrimination



The Equality Council or the Civil Court?

The interviewed experts' opinions about the advantages and drawbacks of filing a discrimination complaint before the Council or with a court of law

	Advantages	**Drawbacks**
Council	+ fast procedure + well-developed institutional expertise, especially for standard protected characteristics + no need for legal representation, no costs for plaintiffs + possibility of conflict mediation and friendly settlement + interagency dialogue encouraged by the Council's general recommendations	- lack of dissuasive, proportional, and effective remedies - institutional standstills in processing complaints when the nomination of Council members is delayed
Civil court	+ efficient remedies that can be customized in accordance with victims' interests + exemption from the state fee + a more nuanced application of the law, especially in sensitive cases concerning balance between the prohibition of discrimination and other rights	- long and unpredictable trial periods - need for a lawyer's representation services - the risk of having to bear court fees if the complainant loses the case - the risk that judges will not understand the law, particularly, specific procedures and, especially, the sharing of the burden of proof

Accronyms

CCRM	Constitutional Court of the Republic of Moldova
CEDAW	UN Committee on the Elimination of Discrimination Against Women
ECHR	European Convention on Human Rights
CERD	UN Committee on the Elimination of Racial Discrimination
ECRI	Comisia Europeană împotriva Rasismului şi a Intoleranţei
CJUE	Court of Justice of the European Union
Equality Council	Council for Preventing and Eliminating Discrimination and Ensuring Equality (CPPEDAE, Equality Council)
SCJ	Supreme Court of Justice
SCM	Superior Council of Magistracy
ECtHR	European Court of Human Rights
ECRI	European Commission against Racism and Intolerance
NIJ	National Institute of Justice

Recommendations

Amendments to the national legal framework

- Amend Law no. 121 and the Contravention Code to provide for sanctions against announcing the intention to discriminate, the order to discrimination given to others, assistance for others in discriminating, hate speech, and intersectional discrimination and correlate the provisions of the Contravention Code and of Law no. 121 to ensure that all forms of discrimination are punished.

- Expand the list of protected characteristics from Law no. 121 with the following criteria to reflect international standards: social origin/social status, genetic characteristics, wealth, sexual orientation, gender identity, and birth, marital status, health state, and seropositive status.

- Expressly empower the Equality Council to identify and punish hate speech in line with General Policy Recommendation no. 15 from 2015 on Combating Hate Speech of the European Commission against Racism and Intolerance (ECRI) and amend Law no. 121 and the Contravention Code to define and establish the conditions for punishing hate speech and include the institutional powers required.

- Amend Law no. 121 and the Contravention Code to provide for the obligation to ensure reasonable accommodation not only at work but also in other circumstances and define failure to ensure the accessibility of public places and services, including in Law no. 121. Expressly provide for the Equality Council's power to find and punish this type of discrimination in the Contravention Code.

- Clarify the definition of severe forms of discrimination in Article 4 of Law no. 121, correlating it with that in Article 176 of the Criminal Code and Chapter IV of Law no. 121 and specify sanctions against the severe forms of discrimination that do not - present the elements that entail criminal liability in the Contravention Code.

Complement the powers of the Equality Council with the power to find and punish all discriminatory deeds by amending Article 12 of Law no. 121, introducing a new Section VI, concerning the issuing of sanctions and the enforceability of the Council's decisions, in Chapter IV of Law no. 298, and making corresponding amendments to the Contravention Code.

- Amend the powers of the Equality Council to include the power to organize situational testing, to engage in strategic litigation on its own, and to participate as *amicus curiae* for victims of discrimination by amending Article 12 of Law no. 121 and introducing a new section in Chapter IV of Law no. 298 and include the power to refer cases to the Constitutional Court when the Council identifies instances of *de jure* discrimination.

- Amend Article 11 (4) of Law no. 121 to provide for nongovernmental organizations' involvement in the work of the special commission for appointing Equality Council members, including the possibility to participate in hearings, to address questions to candidates, and to file memos in favor or against proposed candidacies, with the requirement that the commission's opinions mention the arguments presented in the public calls and memos filed by the associations and foundations that have direct experience with victims of discrimination and of human rights monitoring and analysis.

- Amend Law no. 121, particularly Article 11 (14) and para. 7 of Law no. 298 to provide for the power of the Equality Council to adopt its internal regulations and procedures, administrative apparatus, staff number, and budget on its own, leaving only the validation and check of the mandate fulfillment and budget spending for the review by the Parliament.

- Amend Article 15 of Law no. 121 and, respectively, para. 51 of Law no. 298, keeping the legal timeframe for the examination of complaints at 30 days from the date when the complaint was filed, providing for the possibility to extend the timeframe to 90 days, specifying the exceptional circumstances when the time limit may be suspended or extended due to objective reasons, and providing for the automatic suspension of this time scale for the period when the Equality Council cannot carry out its duties because of the termination of the mandate of its members and for the duration of criminal investigation in the cases when the Equality Council refers case files to prosecution authorities under Article 15 (9) and receives them back after prosecution authorities find that the deeds did not meet the elements of a crime.

Equality Council

- Provide for the same remuneration level for permanent members of the Equality Council as for the Ombudsperson or a state secretary of the Ministry of Justice.

- Strengthen the capacity of the Equality Council's administrative apparatus by granting them the same status and remuneration level as for civil servants working at Parliament.

- Amend Law no. 121 to require the Equality Council's chairperson to inform the Parliament about the termination of the mandate of Council members six months

before the due date or to provide for the automatic extension of their mandates until newly appointed members get sworn in and take up the mandates.

- Strengthen the capacity of the Equality Council's members and apparatus by organizing experience sharing programs and workshops to ensure their professional growth.
- Adopt rules for situation testing, including the possibility that a voluntary test-taker files a complaint and requests remedies.
- Adopt an internal procedure for the application of Article 15 (8), establishing the conditions when the Council should refer case files to prosecution authorities, and sign a cooperation agreement between the Equality Council and the Prosecutor General's Office to provide for the transfer of complaints received by the Council, the possibility of advisory opinions, and the possibility to resume examination—with the restoration of the legal time scale for examination—when prosecution authorities find that the deed does not meet the elements of a crime and return the materials to the Council.
- Have the Equality Council develop a guide to approving, publishing, and punishing sexist or discriminatory advertising for competent authorities and corresponding standards to guide local public authorities and line authorities.
- Partner with the Lawyers Training Center of the Lawyers Union under a cooperation agreement to ensure mandatory in-service training for interns and voluntary in-service training for licensed lawyers.
- Establish a legal assistance department for victims of discrimination in the Office of the Ombudsperson and strengthen the capacity of its personnel to help victims of discrimination to address the Equality Council and courts of law or other authorities.

The Ministry of Justice, the SCM, the NIJ, and courts of law

- The Supreme Court of Justice (SCJ) can contribute actively to promoting an efficient antidiscrimination mechanism by developing recommendations for the courts of law about the powers of the Council and of the courts in enforcing the antidiscrimination law and its specific elements.
- Ensure continuing professional education for judges, including through direct partnerships between courts and the Equality Council for the organization of information sessions and periodic workshops in addition to the training provided by the National Institute of Justice (NIJ) or by establishing internship programs at the Council for future judges.
- The Ministry of Justice and the Superior Council of Magistracy (SCM) should set up a task force composed of Equality Council members and representatives

of the judiciary to identify concrete, appropriate solutions to implementing the international obligations of the Republic of Moldova concerning access to justice for national minorities.

- Regularly assess the NIJ's human rights training module, develop distinct curricular elements, and give priority to the topic of equality and non-discrimination, including the curricula for admissions examinations and during initial and continuing professional training programs; diversify materials about equality and non-discrimination in terms of substantive aspects as well as procedural elements and prepare distinct topics about various vulnerable groups that would be addressed at workshops conducted with the support of the Equality Council and public entities or nongovernmental organizations directly working with victims of discrimination.
- Regularly organize legal clinical workshops that could bring together judges, representatives of the Equality Council and lawyers to discuss developments in the field of equality and non-discrimination.

The adoption of regulatory acts in line with international standards

- Ratify Additional Protocol no. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- Ratify the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).
- Ratify the Additional Protocol Providing for a System of Collective Complaints to the revised European Social Charter of the Council of Europe.
- Ratify the European Charter for Regional or Minority Languages of the Council of Europe.
- Ratify the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities.
- Ratify the Optional Protocol to the UN Covenant on Economic, Social, and Cultural Rights.
- Ratify the International Labour Organization's Convention C-190 on Violence and Harassment at Work (2019).
- Clarify and correlate various tools used to establish and punish sexual harassment and harmonize the legal definition of sexual harassment to align it with the definition proposed in the Council of Europe's Istanbul Convention.

Methodology

Considering the multitude of legal analyses on antidiscrimination efforts already published by international organizations[1] and nongovernmental organizations,[2] this document was developed to provide an analysis of the evolution of the case law of the Council for Preventing and Eliminating Discrimination and Ensuring Equality (the Equality Council or CPPEDAE) and of the courts of law of the Republic of Moldova. Our intention was to establish both positive and negative aspects of the antidiscrimination case law, to identify legislative, procedural, institutional, and professional training shortcomings, and to develop recommendations that would help to overcome these shortcomings.

In examining the substantive aspects of the law, we drew on the comprehensive study *Compatibility analysis of Moldovan legislation with the European standards on equality*

---

1 ECRI, *Report on the Republic of Moldova, (fifth monitoring cycle)*, June 2018, available at https://rm.coe.int/fifth-report-on-the-republic-of-moldova/16808de7d7. Council of Europe, Olivier De Schutter, *Report on the Implementation of the European Social Charter in the Republic of Moldova: Key Challenges*, January 2018, available at https://rm.coe.int/report-the-implementation-of-the-revised-esc-in-the-republic-of-moldov/16807822f6. Council of Europe, Nadejda Hriptievschi, *Baseline study for assessing the national non-discrimination mechanisms in Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus,* October 2019, available at https://rm.coe.int/baseline-study-pgg-ii-regional-project-eng/16809e5355, Council of Europe, Constantin Cojocariu, Niall Crowley, *Opinion on Draft Amendments to: Law on Ensuring Equality (Law no. 121); and Law on Activity of the Council for Prevention and Elimination of Discrimination and Ensuring Equality (Law no. 298),* November 2019, available at https://rm.coe.int/opinion-2019-final/16809a6265. Council of Europe, Ivana Roagna, Nevena Petrusic, *Assessment of the Law on ensuring equality in the Republic of Moldova in compliance with the Council of Europe antidiscrimination standards*, February 2016, available at https://rm.coe.int/assessment-of-the-law-121-on-ensuring-equality-eng/168072f20a.

2 LRCM – ECPI, Pavel Grecu, Nadejda Hriptievschi, Romanița Iordache, Iustina Ionescu, Sorina Macrinici, *Compatibility analysis of Moldovan legislation with the European standards on equality and non-discrimination*, July 2015, available at https://crjm.org/wp-content/uploads/2015/07/CRJM-Studiu-Compat-legislatie-MD-EU-2015-07-1.pdf. Equal Rights Trust and Promo-Lex, *From Words to Deeds. Addressing Discrimination and Inequality in Moldova*, available at https://www.equalrightstrust.org/ertdocumentbank/From%20Words%20to%20Deeds%20Addressing%20Discrimination%20and%20Inequality%20in%20Moldova_0.pdf, The Equal Rights Trust Country Report Series no. 7 (June 2016). John Wadham, Dumitru Russu, *Legal analysis of the decisions of the Equality Council and the decisions of the domestic courts on discrimination cases of the Republic of Moldova*, November 2016, available at http://md.one.un.org/content/unct/moldova/ro/home/publications/joint-publications/legal-analysis-of-the-decisions-of-the-equality-council-and-the-/.

and non-discrimination[3] published by the LRCM in 2015. The analysis of the practical application of various legal institutions and legal provisions is based on the analysis of court judgments concerning civil cases filed directly in court or court judgments concerning the Equality Council's decisions challenged in court and the Council's decisions considered strategically important due to either their impact or the increased complexity of the legal aspects tackled. The analysis focused on the adequacy of procedures and the effectiveness of remedies for victims of discrimination, the impact on victims, and the wider impact of remedies on society—that is, how adopted remedies impacted communities given their educational and dissuasive nature.

The analysis of court judgments concerning discrimination covered three categories of judgments on the application of Law no. 121 and included the analysis of both the merits—the substantive interpretation of the norms—and the procedure.

-First, we analyzed judgments issued by first instance courts, appellate courts, and the Supreme Court of Justice on cases where the complaint about discrimination was filed directly in court under Article 18 of Law no. 121 on Ensuring Equality.

-The second category of court judgments included judgments concerning challenges against decisions of the Equality Council under Article 65 of Law no. 298 on the work of the Council.

-The third category of the analyzed cases included the Equality Council's decisions that were important due to their impact or the complexity of the legal aspects addressed.

The analysis of the case law was combined with interviews with representatives of the Equality Council, including persons directly involved in representing the Council in court (five persons), two judges, four lawyers who brought cases before the Council or in court, and four jurists representing nongovernmental organizations that provide assistance for victims of discrimination. Another four judges and three lawyers declined the invitation for an interview. The interviews—conducted online in March and April 2020—were semi-structured and were designed to assess the experience of interviewees as direct users of Law no. 121.

About the author:

Romanița IORDACHE is a human rights researcher specializing in equality and non-discrimination. Currently, Romanița works as an expert for Romania for the European Commission's Equality Law Network and coordinates the FRANET team of experts for Romania of the European Union Agency for Fundamental Rights.

[3] LRCM – ECPI, Pavel Grecu, Nadejda Hriptievschi, Romanița Iordache, Iustina Ionescu, Sorina Macrinici, *Compatibility analysis of Moldovan legislation with the European standards on equality and non-discrimination*, July 2015.

Over the past ten years, Romanița has been following the legal developments and the protection mechanisms in the field of non-discrimination in the Republic of Moldova, regularly conducting studies and providing training programs for lawyers, judges, human rights defenders, representatives of national institutions involved in human rights protection, teachers, and social assistants.

Her *pro bono* work includes strategic litigation to guarantee and ensure fundamental rights and freedoms. The cases developed as a team before national and European courts brought them the Financial Times' Innovative Lawyers Award for Innovation in the Rule of Law and Access to Justice in 2018. Romanița is the co-president of the association ACCEPT – Romania and the chairperson of the board of directors of the foundation Agenția de Dezvoltare Comunitară Împreună.

The author is profoundly grateful to all those who accepted to offer their time in a period of instability and concern caused by the COVID-19 pandemic and to explain the work and efforts taken to ensure equality in the Republic of Moldova. Deep gratitude also to the LRCM's Nadejda HRIPTIEVSCHI and Sorina MACRINICI, to Dumitru SLIUSARENCO, human rights lawyer, and to the representatives of the Equality Council for their availability to give feedback regarding the first draft of the report. Any errors or misinterpretation of the specifics of the Moldovan law are the responsibility of the author.

Cases examined:

1	**Equality Council**	Decision of 21 January 2020, Case no. 208/19	**2020**
2		Decision of 3 July 2020, Case no. 56/20	**2020**
3		Decision of 6 November 2019, Case no. 177/19	**2019**
4		Decision of 11 February 2019, Case no. 221/18	**2019**
5		Decision of 19 March 2019, Case no. 23/19	**2019**
6		Decision of 29 November 2019, Case no. 172/19	**2019**
7		Decision of 6 November 2019, Case no. 177/19	**2019**
8		Decision of 16 November 2019, Case no. 184/19	**2019**
9		Decision of 4 March 2019, Case no. 234/18	**2019**
10		Decision of 18 October 2019, Case no. 147/19	**2019**

11		Decision of 18 October 2019, Case no. 154/19	**2019**
12		Decision of 24 October 2018, Case no. 91/18	**2018**
13		Decision of 6 March 2018, Case no. 04/18	**2018**
14		Decision of 16 March 2018, Case no. 04/18	**2018**
15		Decision of 19 October 2018, Case no. 111/18	**2018**
16		Decision of 27 December 2018, Case no. 136/18	**2018**
17		Decision of 22 November 2018, Case no. 87/18	**2018**
18		Decision of 24 February 2017, Case no. 510/16	**2017**
19		Decision of 20 January 2017, Case no. 495/16	**2017**
20		Decision of 19 May 2014, Case no. 064/14	**2014**
21	**Supreme Court of Justice**	Order of 24 June 2020, Case no. 3ra-624/20	**2020**
22		Order of 3 July 2019, Case no. 2ra-1214/19	**2019**
23		Order of 4 of September 2019, Case no. 2ra-1509/19	**2019**
24		Order of 19 June 2019, Case no. 2ra-1073/19	**2019**
25		Decision of 7 February 2018, Case no. 2r-103/18	**2018**
26		Order of 14 November 2018, Case no. 2ra-2254/18	**2018**
27		Order of 18 March 2015, Case no. 2ra-596/15	**2015**
28	**Chișinău Court of Appeal**	Decision of 30 January 2020, Case no. 4r-3196/19	**2020**
29		Decision of 19 February 2020, Case no. 3a-1687/19	**2020**

30		Decision of 12 September 2019, Case no. 3-1003/19	**2019**
31		Decision of 7 March 2019, Case no. 2a-3142/18	**2019**
32		Decision of 3 July 2018, Case no. 2a-1073/18	**2018**
33		Decision of 6 June 2018, Case no. 2ra-2254/18	**2018**
34		Decision of 12 September 2017, Case no. 2a-1972/2017	**2017**
35	**Rîșcani Office, Chișinău Court of First Instance**	Full judgment of 3 March 2020, Case no. 3-2299/19	**2020**
36		Judgment of 11 February 2020, Case no. 3-3222/2019	**2020**
37		Judgment of 31 July 2020, Case no. 3-293/2020	**2020**
38		Judgment of 31 July 2020, Case no. 3-293/2020	**2020**
39	**Ciocana Office, Chișinău Court of First Instance**	Judgment of 20 November 2019, Case no. 4-518/19	**2019**
40	**Rîșcani Office, Chișinău Court of First Instance**	Reasoned judgment of 2 December 2019, Case no. 3-2462/2019	**2019**
41		Judgement of 17 November 2019, Case no. 3-1048/2019	**2019**
42	**Centru Office, Chișinău Court of First Instance**	Judgment of 22 March 2017, Case no. 2a-1972/2017	**2017**
43		Judgment of 15 December 2017, Case no. 2ra-2254/18	**2017**
44	**Anenii Noi Court of First Instance**	Reasoned judgment of 28 June 2018, Ghenadie Văluță	**2018**
45	**Constitutional Court of the Republic of Moldova**	Decision no. 14 of 8 October 2013 to dismiss application no. 27a/2013 for the verification of the constitutionality of some provisions of Law no. 121 of 25 May 2012 on Ensuring Equality	**2013**

46		Judgment no. 14 of 16 May 2016 on the challenge of unconstitutionality concerning Article 1 (2) (c) of Law no. 121 of 25 May 2012, on Ensuring Equality	**2016**
47		Decision no. 23 of 29 April 2016 on the inadmissibility of application no. 30g/2016 on the challenge of unconstitutionality concerning some provisions of Law no. 1593-XV of 26 December 2002 on the size, payment manner, and payment timeframes for mandatory health insurance contributions, Law no. 1585-XIII of 27 February 1998 on Mandatory Health Insurance, and the Regulations on executing, issuing, and tracking certificates of mandatory health insurance, approved by Government Decision no. 1015 of 5 September 2006	**2016**

1. Institutional antidiscrimination mechanisms

a. Equality Council

Established in 2012 under Law no. 121/2012 on Ensuring Equality and Law no. 298 on the work of the Council, the Equality Council has the mission to prevent and fight discrimination, to ensure equality, and to promote diversity. After seven years of work, during which the Council has received over 1.100 complaints, has issued 311 constative decisions, and filed with the courts 42 notices of contravention, the Council remains the main state institution with an active role in fighting discrimination. Unfortunately, this role is reduced due to the limited institutional mandate and insufficient human resources available for the Council.

The mission of the Council is clearly articulated in Law no. 121 as involving protection against discrimination and the ensuring of equality and the restoration of rights for all discriminated persons.[4] In spite of this, it is regrettable the tendency of some judges to refuse to acknowledge the legal elements of the Council's quasi-judicial mandate and to even consider its work as "interference with the administration of justice."[5] The standards provided in Article 13 of Directive 2000/43/EC, Article 13 of Directive 2000/78/EC, Article 12 of Directive 2004/113/EC, or Article 20 of Directive 2006/54/EC, the European Commission's 2018 Recommendation on standards for equality bodies,[6] ECRI's General Policy Recommendations Nos. 2 and 7, the United Nations' Paris Principles, the General Comment of the UN Committee on the Rights of the Child, the General Recommendation no. 17 of the UN Committee on the Elimination of Racial Discrimination, and Article 33 of the UN Convention on the Rights of Persons with Disabilities do not require a particular model for the mandates of national equality bodies. However, given the obligation to ensure efficient remedies in cases of discrimination and the internationally established standards of independence and efficiency of the institution, the practice of equality bodies has taken on a variety of models. Thus, besides the promotional role, another prevailing

---

[4] Law no. 298 of 21 December 2012, Rules of Procedure of the Council, Chapter I, Article 2, available at https://www.legis.md/cautare/getResults?doc_id=120696&lang=ro.

[5] SCM's plenum hearing of 1 July 2020, available at https://csm.md/ro/arhiva-sedintelor-csm.html#/?playlistId=0&videoId=0.

[6] Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies C/2018/3850, available at https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32018H0951&from=EN.

model applied by national bodies is one of administrative-jurisdictional functions, the national equality body being empowered to find and to punish discriminatory deeds.[7]

a.1. Institutional Structure

The **Council** is comprised of five apolitical members appointed by the Parliament for a five-year term. Under Law no. 121, Article 11, at least three members must be civil society representatives and at least three members must be Law graduates. Of the five members, only the chairperson has a full-time position, the others convening on the chairperson's initiative. In practice, this means that only the chairperson of the Council has a full-time job. As for the other four members they are remunerated only for meetings rather than for all their other duties—apart from examination of complaints —and receive significantly smaller pay than the payment awarded for equivalent positions, such as Ombudsperson or state secretary of the Justice Ministry. This has a negative impact on the Equality Council's ability to attract and retain experts or to carry out its mandate proactively. Another practical challenge is the members' limited availability to come to the Council and to participate in as many meetings as possible, whenever their mandate so requires. So far, the Council was comprised mostly of experts, but these people had to make personal sacrifices in order to be able to continue working.[8] The current 4 + 1 structure of the Council has proven viable so far, albeit criticized in international reports. The success can be explained in particular by the human factor. There is, however, the risk that, in the long run, the absence or non-involvement of the members would bring the institution to a standstill. A 2016 report produced for the Council of Europe warned about this risk and recommended increasing remuneration, including bringing the remuneration for the chairperson on a par with the remuneration for the Ombudsperson—the chief of the other national human rights institution.[9]

The risk of the Council loosing professional qualification or getting paralyzed is very real. All lawyers and human rights defenders who participated in the interviews

---

[7] European network of legal experts in gender equality and non-discrimination, Niall Crowley, *Equality bodies making the difference,* available at https://www.equalitylaw.eu/downloads/4763-equality-bodies-making-a-difference-pdf-707-kb (2018). LRCM – ECRI, Pavel Grecu, Nadejda Hriptievschi, Romanița Iordache, Iustina Ionescu, Sorina Macrinici, *Compatibility analysis of Moldovan legislation with the European standards on equality and nondiscrimination,* July 2015.

[8] Council members who do not work permanently are paid a benefit amounting to 10% of the national average salary for every meeting attended. Meetings are convened for examination of complaints, but not for meeting other duties of the Council described in Article 12 of Law no. 121, which include: examination of laws, preparation of legal amendments, adoption of advisory opinions, monitoring of the implementation of the law, development of general anti-discrimination proposals for authorities, and friendly settlement of conflicts.

[9] Council of Europe, Ivana Roagna, Nevena Petrusic, *Assessment of the Law on ensuring equality in the Republic of Moldova in compliance with the Council of Europe antidiscrimination standards*, February 2016. Council of Europe, Nadejda Hriptievschi, *Baseline study for assessing the national non-discrimination mechanisms in Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus,* October 2019, available at https://rm.coe.int/baseline-study-pgg-ii-regional-project-eng/16809e5355.

mentioned that the institution was late in examining some cases or preparing decisions or communicating them to offenders and complainants within the five days deadline in accordance with Article 15 of Law no. 121. The solution proposed invariably by all those who mentioned this institutional vulnerability was to strengthen the capacity of the Council by increasing the number of permanent members, increasing salaries, increasing technical personnel, and adopting personnel policies that would help to attract and retain specialists.

To nominate candidates for the Equality Council, the Parliament establishes a special committee that includes members of the Committee for Human Rights and Interethnic Relations and the Committee for Legal Matters, Appointments, and Immunities and organizes a public competition. Article 11 (4) of the law states that the competition must be organized at least 30 days before the termination of the mandates of previously appointed members. In practice, in 2018, the Parliament's delay in appointing Council members completely blocked the examination of complaints filed by presumed victims of discrimination. This led to the impossibility to observe the legal deadline for examination of complaints, which, under Article 15 of the Law, is established to 30 days, with the possibility of extension to 90 days. According to the annual activity report for 2019 of the Council, "due to the high number of cases which were not finalized in 2018, as well as due to insufficient staff, 18 percent of the files were finalized in a period of more than 90 days in 2019."[10] Amending Law no. 121 to require the chairperson of the Council to inform the Parliament about the termination of mandates and dismissals from office six months before the termination of mandates or for the automatic extension of the mandates of the members until newly appointed members are sworn in and take up the mandates could be a way forward that would help to avoid institutional standstill and would help to comply with the timeframe for the examination (which is considered as imperative by courts, meaning that decisions issued by the Council after the deadlines get cancelled). Such a solution would ensure the continuity of work and would prevent the annulment of the Council's decisions which could not be adopted within the legally prescribed timeframe due to the fault of Parliament rather than of the Council or due to extraordinary circumstances.

A special parliamentary committee conducts hearings with candidates, prepares reasoned opinions about every shortlisted candidate, and presents them in the plenum of Parliament. The direct involvement of nongovernmental organizations in the work of the special committee as members with the right to vote or as participants in hearings with the possibility to file memos in favor or against proposed candidacies, the analysis of public calls and written submissions filed by associations and foundations with a direct experience of working with victims of discrimination and of preparing analyses in this field, and the inclusion of such opinions in the questions asked during the hearings or in the final advisory opinions issued about the candidates could prevent the politization of the Council and would secure the quality and professionalism of its work.

[10] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

So far, one of the positive elements of the Equality Council was its diversity due to its gender balance and the representation of various ethnic and minority groups in its composition. Sometimes this quality—which is otherwise an element of representativity, expertise, and legitimacy that confers strength to the dialogue with various vulnerable groups and state agencies—leads to a worrying misunderstanding of the Council's role. Regardless of their background, the interviewees drew attention to the fact that certain courts or public authorities considered the decisions issued by the Council not from the perspective of their legality, procedural correctness, and merits, but rather in light of alleged personal or community interests of the members of the Council. This is regrettable, especially when such attitude comes from judges who examine challenges against the Council's decisions. As with any other agency mandated to defend human rights, the working presumption is that the Council defends public interest, and the ethnicity, religion, or gender of its members have no relevance for the fulfilment of their mandate.

A key role in the work of the Council is assigned to the **administrative apparatus**, restructured in 2019 to ensure a better efficiency. In 2019, the personnel of the Council included 13 civil servants and one high-level public official as opposed to the prescribed total staff allocation of 20 members, which means that the occupancy rate for public positions or offices was of 65%.[11] In 2018, ECRI was "particularly astonished to learn" that the total number of staff of the Council is only 20.[12] Only three out of the seven vacancies published for competition in 2019 were filled. The occupancy rate of 65% is a worrying sign because it indicates a 50% occupancy of the executive personnel and a larger workload per employee, which accounts for the huge efforts made by the personnel and the Council to carry out its institutional mandate properly. The Equality Council employees' work is similar to that of the personnel of Parliament, the Ministry of Justice, the Office of the Ombudsperson, or the National Agency for Integrity in terms of the required professional qualification, work conditions, and responsibilities. The sparseness of employees and the impossibility to attract competitive qualified personnel is therefore explained by a different valorization and a lower salary paid to the employees of the Council compared with the civil servants from similar positions at the Office of Ombudsperson or other similar agencies, such as the National Agency for Integrity or the Competition Council. The Equality Council's administrative apparatus can be strengthened only by providing its personnel the same status and remuneration level as for the civil servants working at these agencies or at Parliament.

The independence, autonomy, and efficiency of national equality bodies are the key elements described in ECRI's General Policy Recommendation no. 2, revised in 2017,[13] the Paris Principles for National Human Rights Institutions, adopted by the United

[11] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

[12] ECRI, *Report on the Republic of Moldova, (fifth monitoring cycle)*, June 2018.

[13] ECRI, General Policy Recommendation no. 2: Equality bodies to Combat Racism and Intolerance at National Level, adopted on 7 December 2017.

Nations back in 1993[14] and reiterated by the European Commission in 2018 in its Recommendation on standards for national equality bodies.[15] To ensure the independence and autonomy of the Equality Council, the power to adopt its internal regulations and procedures, administrative apparatus, staff number, and required funds for an efficient work should be vested in the Council rather than Parliament, and Parliament should retain only the budget validation and verification role. Thus, the Council should be able to propose an institutional budget depending on its needs and then follow the national budget procedure, with the possibility to defend its budget proposal directly in Parliament if it is not approved. The Republic of Moldova received the same recommendation from experts of the Council of Europe in 2016, 2018, and 2019.[16] Moreover, in its concluding observations on the third periodic report of the Republic of Moldova, the UN Committee on Economic, Social, and Cultural Rights explicitly recommended Moldova to provide the Equality Council "with sufficient financial and human resources and [to] ensure that the way these institutions are financed does not undermine their independence."[17] For that end, it is necessary to amend Article 11 (14) of Law no. 121 and para. 7 of Law no. 298 to state that the Equality Council adopts its internal regulations and procedures, decisions concerning its administrative apparatus, staff number, and budget on its own and the Parliament has the role of validating the request for the institutional budget and checking how the institution carries out its duties and spends its allocated budget.

a.2. The Powers of the Equality Council

The experts interviewed, the mass-media, and the annual activity report published by the Equality Council indicate a steady growth of the visibility of the institution and its work.[18] Out of all the duties provided for in Article 12 of Law no. 121 on Ensuring Equality and Chapter IV of Law no. 298, the ones in relation to which the Council excelled due to its proactive involvement were the **duties** with increased impact, such as the examination of the compliance of the laws in force with non-discrimination standards, the adoption of advisory opinions on the conformity of draft regulatory acts with the norms on the

[14] UN, Resolution 48/134 of 20 December 1993, Principles relating to the Status of National Institutions (Paris Principles), 1993.

[15] European Commission, Recommendation on standards for equality bodies, C(2018) 3850 final, 22 June 2018.

[16] Council of Europe, Ivana Roagna, Nevena Petrusic, *Assessment of the Law on ensuring equality in the Republic of Moldova in compliance with the Council of Europe antidiscrimination standards*, February 2016. Council of Europe, Olivier De Schutter, *Report on the Implementation of the European Social Charter in the Republic of Moldova: Key Challenges,* January 2018. Council of Europe, Constantin Cojocariu, Niall Crowley, *Opinion on Draft Amendments to: Law on Ensuring Equality (Law no. 121); and Law on Activity of the Council for Prevention and Elimination of Discrimination and Ensuring Equality (Law no. 298)*, November 2019. Council of Europe, Nadejda Hriptievschi, *Baseline study for assessing the national non-discrimination mechanisms in Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus,* October 2019.

[17] UN doc. E/C.12/MDA/CO/3, para. 9.

[18] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

prevention and combatting of discrimination, the monitoring of the implementation of relevant laws, the submission of general proposals to public authorities to prevent and fight discrimination and improve the treatment of persons to whom Law no. 121 applies, the development of information and awareness-raising campaigns aiming to end all forms of discrimination in the context of democratic values, and the organization of training activities for various public agencies.

In performing all these duties, the Council must act proactively as an expert who identifies areas of concern and standards and creates conditions for an interagency dialogue to identify inclusive solutions. In particular, considering the recent experience of the year 2019, which was an election year in the Republic of Moldova, many interviewees praised the Council for actively monitoring printed and online media for electoral discourse that incited to hatred and discrimination. The monitoring was coordinated between the Ombudsperson's Office, the Council for Preventing and Eliminating Discrimination and Ensuring Equality, and the Office for Interethnic Relations, which took on a joint stance formalized by signing a joint statement about the conduct and the coverage of the election campaign without hate speech and discrimination. The joint position was forwarded to the Audio-visual Council so that it could implement the recommendations received.[19] Unfortunately, this general statement did not lead to reactions in individual cases, other than decisions issued when specific complaints were filed.

The current powers of the Council lack several key elements, as noted in independent analyses, including in the 2018 report concerning Moldova released by the European Commission against Racism and Intolerance (ECRI).[20] Paradoxically, despite its quality of official ascertaining the contravention under Article 12 (1) (k) of Law no. 121/2012 and para. 32 (d) of Law no. 298/2012, the Equality Council cannot grant efficient remedies. Thus, although the Council has the power to find contraventions, it lacks the power to establish sanctions.

The powers of the Council should be revised to include: the punishing of discriminatory deeds, the right to request the Constitutional Court to carry out a constitutionality check when some legal rules are considered discriminatory, and the right to take legal action on its own in strategic cases, especially in cases of structural discrimination.[21] The Council's mandate should be extended to enable the institution to carry out situation testing on topics that require the understanding of the context and evolution of discrimination in order to adopt recommendations or specific rules. Another power that requires attention is the independent and efficient provision of legal assistance for victims of discrimination. In this regard, ECRI's General Policy Recommendation no. 2, revised in 2017, and relevant

---

[19] The Ombudsperson's Office, the Council for Preventing and Eliminating Discrimination and Ensuring Equality, and the Office for Interethnic Relations, Joint statement on the conduct and coverage of the election campaign without discrimination and hate speech, 20 September 2019, available at http://egalitate.md/wp-content/uploads/2019/09/declaratie-comuna.pdf.

[20] ECRI, *Report on the Republic of Moldova, (fifth monitoring cycle),* June 2018, para. 98-99.

[21] ECRI, *Report on the Republic of Moldova, (fifth monitoring cycle),* June 2018. Council of Europe, Ivana Roagna, Nevena Petrusic, *Assessment of the Law on ensuring equality in the Republic of Moldova in compliance with the Council of Europe antidiscrimination standards*, February 2016.

EU directives[22] underscore the importance of ensuring independent assistance for victims so that they could seek remedies before the Equality Council, courts of law, or other public authorities. Currently, the Ombudsperson already has established its territorial offices and has developed competencies in assisting victims of human rights violations, and therefore, further developing its capacity to provide assistance to victims of discrimination could be an efficient solution.[23]

Currently, the Equality Council does not have the express power to identify and punish hate speech in line with ECRI's General Policy Recommendation no. 15 of 2015 on Combating Hate Speech,[24] which means that Law no. 121, and the Contravention Code should be amended to provide for this power.

During the interviews, in addition to praising the Council for the way it had treated sexism in outdoor advertising, time and again, the interviewees suggested that the Council could facilitate the adoption and dissemination of shared standards on outdoor advertising in order to prevent the approval and publication of advertisements with discriminatory or degrading content and to develop a fast-track procedure for removing and sanctioning them. In this context, the Equality Council could act as a facilitator and catalyst so that public administration authorities with various responsibilities in approval and verification of outdoors publicity could apply the guidelines developed by a task force working jointly with representatives of the Equality Council.

a.3. The Procedure before the Equality Council

Of all the powers described in Article 12 of Law no. 121 on Ensuring Equality and Chapter IV of Law no. 298, the most important one is the jurisdictional mandate, and it includes **the finding and punishing of discriminatory deeds following the examination of complaints** filed by alleged victims of discrimination and following *ex officio* actions, the filing of requests to competent authorities for the initiation of disciplinary procedures against executive officers who perpetrate discriminatory deeds in their work, the finding of contraventions with discriminatory elements in line with the provisions of the Contravention Code or, if applicable, the notification of prosecution authorities about the perpetration of discriminatory deeds that present the elements of a crime.

According to the Council's activity report for 2019, 33% of the 257 complaints examined that year were finalized with decisions that found discrimination, 19%, with decisions

---

[22] Directive 2000/43/EC, Directive 2000/78/EC, Directive 2004/113/EC, Directive 2006/54/EC.

[23] Council of Europe, Nadejda Hriptievschi, *Assessment of the effectiveness of access to justice for victims of discrimination, hate crime and hate speech through non-judiciary redress mechanisms in the Republic of Moldova*. Carried out within the Project on strengthening the access to justice for victims of discrimination, hate crime and hate speech in Eastern Partnership countries, part of the Partnership for Good Governance for Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus, co-funded by the European Union and implemented by the Council of Europe. Available on request.

[24] ECRI, General Policy Recommendation no. 15: Combating Hate Speech, adopted on 8 December 2015.

that did not find any discrimination, and 48%, with decisions on inadmissibility.[25] The high percentage of inadmissible complaints or complaints where alleged discriminatory deeds had not been confirmed indicates that the Equality Council should continue its commendable effort to explain the law, procedures, and legal requirements in simple language.

The interviewed lawyers and experts stressed that, after 2018, the increase in the number of complaints has resulted in more complaints being issued with the violation of the legal timeframe for disposition and having a lower quality of reasoning in the decisions. In this context, it was noted that the Equality Council needs more human resource, its administrative personnel needs to be strengthened through experience-sharing programs and workshops aimed at ensuring professional growth, and the Council's case law needs to be unified as a matter of institutional priority.

The most worrying aspect noted by the interviewees was the decrease in the number of actions taken by the Council *ex officio* in respect of high-profile cases or strategic cases requiring urgent monitoring, analysis, examination, and punishment. Despite the express provision in Article 13 (1) of Law 121 that "the Council shall initiate the process of establishing a discriminatory deed or its absence *ex officio* or on request from interested parties, including on request from trade unions and community-based associations active in human rights promotion and protection," the Council has neither internal procedure for this suo motu procedure nor the criteria that would automatically trigger an *ex officio* action based on the media monitoring carried out by the institution.

As for the **procedures** before the Council, legal guarantees, especially those provided for in para. 53 (e) of the Council's Rules of Procedure approved by Law no. 298, establish that complaints and actions initiated *ex officio* against discriminatory deeds must be examined in line with the guarantee of the right to defense, which was confirmed by courts when these procedures were challenged.[26] Unfortunately, some of the Council's decisions whose findings concerning the merits of discrimination cases were correct were, however, annulled in court because of the failure to observe the legal requirements regarding summoning or the deadlines for the issuance of the decision as imposed by law.

An innovative and extremely useful element introduced by the Equality Council in its work is the proactive encouragement of ***amicus curiae***, or written submissions, filed by experts, nongovernmental organizations, or governmental institutions. In practice, this means that the Council opens sensitive cases to interested third parties to collect specialized data and informed opinions. The publication of case summaries along with the subjects on which the Council requests opinions before a certain deadline on its website http://egalitate.md/amicus-curiae/ is another way in which the Council performs its role of facilitating dialogue on important subjects in community.

---

[25] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

[26] Rîșcani Office, Chișinău Court of first instance, judgment of 28 November 2019, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/261999b0-cf2c-4799-9d97-30a3beb67d8e.

According to the most recent ECRI's country report, international analyses, and all the interviewed experts and practitioners, the main shortcoming of the Council is related to the efficiency of the trajectory of the complaints following a finding of discrimination by the Council. The unanimous recommendation was to augment the powers of the Council with the power to punish discriminatory deeds by amending Article 12 of Law no. 121 and introducing a new Section VI in Chapter IV of Law no. 298 and the Contravention Code, as well as to endow the Council with the status of official ascertaining the contravention and the power to impose sanctions against established discrimination, specifying the enforceability of its decisions and the possibility to challenge the sanctions imposed and the recommendations issued in administrative court.

b. Courts of Law (Procedure and Evidence)

b.1. Civil Cases

Article 18 (1) of Law no. 121 provides for the possibility of direct action in civil court, stating that those who consider themselves victims of discrimination may file their case in court. This is also available for trade unions or community-based associations specialized in human rights promotion and protection, which also are endowed with legal standing.

Unfortunately, Article 192 of the Civil Procedure Code does not include express provisions that would establish an obligation for the courts to hear and judge discrimination cases expeditiously or as a matter of priority, in order to respond to the need to ensure efficient remedies within a reasonable time, although Article 192 (3) provides for the possibility to establish shorter time-limits. The delay in the procedures and long time limits reduce victims' confidence in their rights, increase the risk of victimization, and weaken the dissuasive effect of potential sanctions as well as the educational usefulness of remedies granted through irrevocable judgments.

According to Articles 358 and 362 of the Civil Procedure Code, first instance court judgments are appealable before the courts of appeal, where the time limit for filing an appeal is 30 days from the moment when the court of first instance issued its ruling. The decisions of the courts of appeal are final and enforceable from the moment when they are issued. However, they can be challenged in cassation before the Supreme Court of Justice within 2 months of the full judgment being communicated (Article 434 of the Civil Procedure Code). Lawyers, NGO representatives, and representatives of the Equality Council, all stressed the importance of correlating the provisions of Law no. 121 and Law no. 298 with the provisions of the Civil Procedure Code in respect of evidence, time-limits, and remedies provided in cases of discrimination. This correlation and the professional training that would address the topic of non-discrimination in a practical way are essential to foster the understanding by the judges of the *lex specialis* nature of the provisions of the antidiscrimination law concerning the active procedural capacity, evidence, and available remedies.

In practice, the positive element in the regulation concerning the **active legal standing**, provided in Article 18 (2) of Law no. 121 and para. 38 of Law no. 298, which states that

complaints must be filed in one's own name, on behalf of another person only with their consent, and on behalf of a group of persons or a community, has resulted in challenges, especially in actions initiated by nongovernmental organizations when they acted in the public interest. These challenges were caused by a poor understanding of the law, and it is encouraging that courts have noted and applied this essential element specific to the antidiscrimination law, which was introduced from the European community law with the purpose of reducing the pressure on victims and of ensuring the public interest of fighting discrimination. Confronted with such challenges regarding the active legal standing of nongovernmental organizations, courts correlated them with Article 73 of the Civil Procedure Code. In fact, the Court of Justice of the European Union (CJEU) has interpreted Article 9 of Directive 2000/78/EC as allowing Member States to recognize the right of associations to initiate administrative procedures based on the antidiscrimination law, without having to act on behalf of a complainant and in absence of an identifiable victim.[27] National courts also adopted this approach in applying Article 18 (2) of Law no. 121. For example, the Chișinău Court of Appeal acknowledged the importance of recognizing the legal standing of nongovernmental organizations in a case filed by the *Center for Legal Assistance for People with Disabilities against the Weekly Făclia and Vitalie Pastuh-Cubolteanu*, in which the nongovernmental organization claimed that an article published by the magazine incited to discrimination against children with mental or motor disabilities by promoting the idea of social segregation of children with disabilities. In this context, the court considered that it was sufficient to invoke the provisions from the organization's statute to establish its active legal standing.[28]

> *"...Given that the signatories are members of a platform, a community-based organization, and taking into account their goal, the complaint in this part can be considered as being filed on behalf of a group or a community that is treated differently in light of the analyzed norm, which does not entail the consent of this community and/or group. In this situation, we admit the complaint of the organization in the interest of the group this community-based organization advocates for. Thus, the work of the signatory organization implies defending of the group or community, with the possibility to file actions in this regard, such as petitions and complaints, without the group's consent.*
>
> Rîșcani Office, Chișinău Court of first instance, decision of 28 November 2019

An apt practice developed by the courts of law in dialogue with the Equality Council is that of **advisory opinions** issued by the Equality Council and provided to courts under Article 74 of the Civil Procedure Code, which allows for the participation of competent

[27] Court of Justice of the European Union, case C507/18, *NH v. Associazione Avvocatura per i diritti LGBTI — Rete Lenford*, Grand Chamber judgment of 23 April 2020, ECLI:EU:C:2020:289.

[28] Centru Office, Chișinău Court of first instance, judgment of 22 March 2017, Case no. 2a-1972/2017, *A.O. Center for Legal Assistance for People with Disabilities v. the Weekly Făclia and Vitalie Pastuh-Cubolteanu*. Chișinău Court of Appeal, decision, Case no. 2a-1972/2017, *A.O. Center for Legal Assistance for People with Disabilities v. the Weekly Făclia and Vitalie Pastuh-Cubolteanu*.

public authorities in legal proceedings on their own initiative, based on the request of a party to the case, or *ex officio* based on a request by the courts. Remarkably, the current powers of the Council do not include **assistance for victims of discrimination**—a function that is explicitly mentioned in Article 13 of Directive 43/2000/EC as follows: *"without prejudice to the right of victims and of associations, organizations or other legal entities referred to in Article 7 (2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination."*[29]

Thus, the current practice of the courts requesting an informed opinion from the Equality Council as an expert organization is worth to be noted and commended, as it helps to establish the wider context and relevant data that courts can use to better assess discriminatory deeds. This practice was applied in several key cases[30] and it is welcomed by lawyers and representatives of nongovernmental organizations providing legal assistance to victims of discrimination.[31]

This practice of requesting an advisory opinion and maintaining a constructive dialogue between institutions, acknowledging the Equality Council's role as a specialized entity, has also been observed in the recent development of the relationship between the Constitutional Court of the Republic of Moldova (CCRM) and the Equality Council. For example, in 2019, the Constitutional Court requested the Council to provide an opinion about the review of the constitutionality of Article 27 (5) of Law 270/2018. In its opinion, the Council showed that the rule whose constitutionality had been assessed led to indirect discrimination in the field of employment for certain categories of persons and the CCRM included this opinion in its reasoning.[32]

The interviewees also mentioned another initiative of the Equality Council, which had reacted proactively to the crisis caused by the COVID-19 pandemic by issuing an advisory opinion to guide the Commission for Exceptional Situations. This intervention helped the institutions responsible with the state of emergency to adopt a decision that did not lead to discrimination.

As the number of cases—and implicitly, the number of requests for advisory opinions by the Council—will grow, it will become necessary to establish criteria to prioritize the Council's interventions depending on the strategic importance of cases, the severity of the deeds, and discrimination trends in society, and to prioritize those interventions that address the areas or help the vulnerable groups that need priority action in light of the statistical data resulting from the annual reports or in light of the -priority objectives decided in the institutional strategy.

---

[29] Council of the European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[30] Chișinău Court of Appeal, decision of 12 September 2017, *A.O. Center for Legal Assistance for People with Disabilities v. the Weekly Făclia and Vitalie Pastuh-Cubolteanu*.

[31] Chișinău Court of Appeal, decision of 12 September 2017, *A.O. Center for Legal Assistance for People with Disabilities v. the Weekly Făclia and Vitalie Pastuh-Cubolteanu*.

[32] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

The practice regarding the **procedures** before courts of law is uneven, as confirmed by the case law and the interviewees' experiences. A 2016 analysis of the Council of Europe recommended shorter time-lines for the examination of the complaints against discriminatory deeds.[33] Indeed, faster procedures in such cases are justified, considering that—as explained in specialty literature—lack of reaction or a slow reaction to discrimination leads to new trauma in victims and sends out the wrong message that discrimination is tolerated. Recommendations concerning the adoption of fast-track procedures were also emphasized by ECRI.[34]

The Civil Procedure Code and Law no. 121 regulate the **administration and evaluation of evidence** significantly differently. Given the discordance between the rules of the Civil Procedure Code as the overarching law and the special law, it is important that judges understand the special law status of Article 19 of Law no. 121. Thus, while the antidiscrimination law regulates the burden of proof in accordance with the EU Community law standards, where establishing the presumption of discrimination rests on the plaintiff and the proof that alleged actions do not constitute discrimination rests on the defendant, Article 118 of the Civil Procedure Code prescribes the classical rule that burden of proof to support allegations rests on the one who makes the allegation (plaintiff) in line with the principle *onus probandi incumbit ei qui dicit*—wording used by the courts in all examined cases. Article 118 of the Civil Procedure Code leaves however room for the special law standard, specifying that the general norm is to be applied „if the law does not provide otherwise"—wording that judges should interpret as indication to apply the principle of the shared burden of proof. Alternatively, it may be useful to expressly include the exception provided for in Law no. 121 in the Civil Procedure Code. The difference is worrying because discriminatory deeds are often difficult to document due to their specificity. It is for this reason that the burden of proof is shared, meaning that potential victims need to establish only the presumption of discrimination and the defendant must refute it. The case law analysis revealed that the practice was not even in this regard. However, it also identified cases where trial court judges had placed the burden of proof correctly on each party and had noted the defendant's failure to respond and refute the presumption raised by the plaintiff's evidence.

"There is no need to mention that both the national law (Articles 15 (1) and 19 of Law no. 121 on Ensuring Equality) and the practice of the European Court of Human Rights (see, among other cases, Dordevic v. Croatia, paras. 82 – 84, para. 177, Chassagnou and Others v. France, paras. 91 and 92, Timishev v. Russia, para. 57) set a special rule concerning the burden of proof in litigations on discrimination, namely that the burden of proof rests on the defendant when the complainant produces evidence that raises the presumption of

[33] Council of Europe, Ivana Roagna, Nevena Petrusic, *Assessment of the Law on ensuring equality in the Republic of Moldova in compliance with the Council of Europe antidiscrimination standards*, February 2016.

[34] ECRI, General Policy Recommendation no. 7: National Legislation to Combat Racism and Racial Discrimination, adopted on 13 December 2002 (amended on 7 December 2017).

*discriminatory treatment... Having analyzed the case files, the court found the presumption of harassment in the actions of the offender ****. Under Article 15 (1) of Law no. 121 of 25 May 2012 on Ensuring Equality, the burden of proving that the alleged deeds do not constitute discrimination rests on the presumed offender. Thus, the court notes that the offender failed to produce credible evidence before the court to refute the circumstances found by the official ascertaining the contravention."*[35]

Ciocana Office, Chișinău Court of first instance, judgment of 20 November 2019, Case no. 4-518/19

Another difference between the antidiscrimination law and the general civil procedure is that the rules concerning evidence in cases of discrimination should, in principle, be more favorable for victims. In practice, this led to legislative solutions that allowed the use of **statistical data or audio-video recordings as evidence**. Article 146 (2) of the Civil Procedure Code states, however, that audio-video recordings produced in secret may not serve as evidence if this is not allowed by law. This provision does not take into account the specificity of discrimination, the vulnerability of victims, and the difficulties they have in producing evidence. Amending Law no. 121 and the Civil Procedure Code to expressly provide for the special rule listing the types of evidence admitted in cases of discrimination and correlating this provision with those of the Civil Procedure Code could be a way forward consistent with the international practice.

Professional training for judges and lawyers should include workshops dedicated to discussing and analyzing the specificity of evidence in cases of discrimination. In the context of collecting and weighing evidence, situation testing should also be admitted as a way of developing the presumption of discrimination, with the explicit provision that test-takers may file complaints on their own behalf and receive remedies.

b.2. Challenging Decisions of the Equality Council in Administrative Courts

Para. 65 of Law no. 298 expressly provides for the possibility to challenge the decisions of the Equality Council in administrative court when complaints to the Equality Council are filed by an interested party, a trade union, or a nongovernmental organization. On several occasions, this provision raised questions, and therefore it is important to clarify that if a party wants to challenge a decision of the Equality Council, it need not file a preliminary complaint, as specified in para. 65 of Law no. 298.

Under Article 224 of the new Administrative Code of the Republic of Moldova, when judges examine the merits of a case in administrative court, they may: annul an individual administrative document in full or in part in actions for contestation if the administrative document is illegal and infringes the rights of the plaintiff; order the public authority to

[35] Ciocana Office, Chișinău Court of first instance, judgment of 20 November 2019, Case no. 4-518/19, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/3978c91d-81c2-4e43-92a5-749cb1d0d05b.

issue an individual administrative document if the plaintiff's claim to have such a document issued is well-founded; order action, the acceptance of action, or inaction in actions for the fulfillment of obligations if such a claim of the plaintiff is founded; or acknowledge a legal relationship or lack thereof or the nullity of an individual administrative document or an administrative contract.[36]

From 2015 to 2019, 108 decisions of the Council were challenged in court, and in 52 cases, the procedure was finalized. Of these 52 cases, the courts upheld 46 decisions of the Council and annulled 6.[37]

The courts of appeal are obliged to check the legality of decisions in full, both for compliance in form and for substance, including the infringed rights of the victim and the defendant and the public interest to fight discrimination.

Courts' control of the compliance of the Council's decisions with requirements concerning form determined a controversial practice concerning **the time limits for the examination, deliberation, and issuing of administrative documents**. Courts had to find a solution to situations when the Council could not comply with the legally prescribed imperative time limit of 30 days (with the possibility of extending it to 90 days) due to objective reasons, independent of its will and organization.

Article 15 of Law no. 121 states that complaints must be examined within 30 days of filing, with the possibility to extend this time-limit to maximum 90 days. The deliberation may take place on the same day or at a later day established by the Council, but not later than five days after the hearing. In its turn, para. 51 of Law no. 298 states that the time limit within which the reporting member must decide on a complaint is of 15 days and can be extended to 45 days, with a written notice to the chairperson about the circumstances that require such an extension. The courts interpreted these time limits as imperative rather than recommended, missing the underlying need at the basis of this legal requirement. Short deadlines and their imperative nature cater for the public interest to have discrimination complaints solved expeditiously and serve as protection guarantees for

[36] Article 224 of the Administrative Code: Court Judgments. (1) When examining the merits of a case, the administrative court shall issue one of the following judgments: a) in actions for contestation – to annul, in full or in part, the individual administrative document and the potential decision solving the preliminary statement if these are illegal and infringe the rights of the plaintiff; b) in actions for compelling – to annul, in full or in part, the individual administrative document dismissing the request or the potential decision adopted in preliminary proceedings and to order the public authority to issue an individual administrative act if the plaintiff's claim to have this document issued is well-founded; c) in actions for the fulfillment of obligations – to order action, the acceptance of action, or inaction if such a claim of the plaintiff is well-founded; d) in actions for the declaration of a right – to acknowledge a legal relationship or lack thereof or the nullity of an individual administrative document or administrative contract if the legal relationship exists or, respectively, does not exist or the individual administrative document or administrative contract is null; e) in actions for regulatory review – to annul, in full or in part, the regulatory administrative document if it is illegal or to declare it null if it is null; f) to dismiss the action as unfounded if the conditions for issuing a judgment described in para. a) through e) above do not apply.

(2) If the individual administrative document has already been enforced on its annulment in court, the court shall order, on request, the reversal of the enforcement to the extent possible.

[37] Equality Council, answer to a request for public information no. 03/211 of 10 February 2020.

potential victims of discrimination. Unfortunately, courts' recent practice of interpreting these time limits as imperative resulted in the forfeiture of the right of the victims to defend themselves, thus perverting the short timeframes prescribed by law as protection guarantees for victims and transforming them into a pretext to cancel the liability of the offenders.

A case that received a wide media coverage due to its political coloration highlights the challenges generated by the Equality Council's (non)compliance with this time limits, the courts' poor understanding of the time limits, and the institutional limitations that may arise from the failure of the Parliament to appoint Council members in time. On 13 June 2018, the Gender Equality Platform filed a complaint regarding the incitement to discrimination against women in politics following Ilan ȘOR's derogatory remarks about the politician Maia SANDU. On 19 October 2018, the Equality Council issued a decision establishing the fact of discrimination and recommending the defendant to issue a public apology for his sexist remarks and incitement to discrimination, as well as to refrain from sexist and discriminatory remarks going forward.[38] Since the legal 90-day time limitation for the examination of the complaint expired on 11 September 2018 and the time for hearing and issuing a decision exceeded this deadline, Ilan ȘOR sued the Council in court. On 28 November 2019, the Rîșcani Office of the Chișinău Court of first instance admitted Ilan ȘOR's claim and annulled the Council's decision as illegal.[39] In its defense, the Council invoked objective reasons that had led to going beyond the legal examination time limits, explaining that the mandates of its members had expired three months earlier and, after the Parliament had appointed new members, the large backlog caused delays in all cases. The trial court justly noted that the law did not provide for an exception from the time limit for examination and deliberation for situations in which the Council could not discharge its duties because of the termination of mandates or the Parliament's failure to appoint new members in reasonable time. The court, however, did not take into consideration whether the late issuance of the decision had infringed any of Ilan ȘOR's rights or whether the failure to comply with the legal time limits or the annulment of the Council's decision would have any impact on the victim. The court's judgment was also problematic because of its discordance with Articles 17 and 20 of the Administrative Code, as the court failed to consider whether the delay in the Equality Council's administrative work resulted in the infringement of any right.

> *"...citizens should benefit from the work of state entities in various fields in full, and the lack of members of an entity should not affect individuals' right to have the time limits prescribed by the law regulating the entity's work observed."*
>
> Rîșcani Office, Chișinău Court of first instance, decision of 28 November 2019

[38] Equality Council, decision of 19 October 2018, Case no. 111/18, available at http://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_111_2018.pdf.

[39] Rîșcani Office, Chișinău Court of first instance, judgment of 28 November 2019, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/261999b0-cf2c-4799-9d97-30a3beb67d8e.

On 19 February 2020, the Chișinău Court of Appeal **dismissed the appeal** filed by the Equality Council, noting among others, the exceedance of the maximal 90-day time limit prescribed by law for examination of the complaint.[40] On 24 June, the judicial panel for administrative cases of the Department for Civil, Commercial and Administrative Cases of the SCJ declared the action in cassation filed by the Council for Preventing and Eliminating Discrimination and Ensuring Equality inadmissible.[41] SCJ judges did not provide a thorough reasoning for their decision, and the mere citing of principles applicable to the cassation as per the ECtHR's jurisprudence cannot replace the required analysis of the specific elements of the case. SCJ judges did not take into consideration the rationale behind the legal time limits, whether going beyond the legal time limit had had any impact on Ilan ȘOR's rights, and what impact would be triggered by the annulment of the Council's decision that could not have been issued within the legal time limit for reasons beyond the Council's control, including the impact on the victim of discrimination and on society overall. Apparently, the message of the SCJ judges was that, as long as lower courts had already issued a judgment in this case, it was useless to assess the procedural aspects related to the noncompliance with the time limitations prescribed by law for examination and deliberation and to the substantive aspects related to the meaning of incitement to discrimination, sexist language, and limits of freedom of expression.[42] According to Article 442 of the Civil Procedure Code, in examining the action in cassation, the court should have addressed all arguments invoked by the Council.

This was not an isolated case. The Rîșcani Office of the Chișinău Court of first instance had already examined a case that took 174 days from the moment when the complaint was filed until issuing the decision because the Council had been unable to examine it as the mandates of two of its members had expired and new members had not been appointed in time. The Parliament's failure to appoint members had precluded having a quorum of four members as required for deliberative meetings.[43] Likewise, with regard to a decision of the Equality Council against *Ziarul de Gardă*, judges insisted on the imperative character of the time limits, overlooking the factual circumstances that had led to its violation and failing to apply Articles 17 and 20 of the Administrative Code to consider what right had been infringed by the Equality Council's administrative work.[44]

---

[40] Chișinău Court of Appeal, decision of 12 February 2019, Case no. 3a-1687/19, available at https://cac.instante.justice.md/ro/pigd_integration/pdf/49619f8d-d976-4a97-aa59-a03413d316ac.

[41] Supreme Court of Justice, order of 24 June 2020, Case no. 3ra-624/20, available at http://jurisprudenta.csj.md/search_col_civil.php?id=56868.

[42] Department for Civil, Commercial, and Administrative Cases, Supreme Court of Justice, order of 24 June 2020, Case no. 3ra-624/20, available at http://jurisprudenta.csj.md/search_col_civil.php?id=56868.

[43] Rîșcani Office, Chișinău Court of first instance, full judgment of 3 March 2020, Case no. 3-2299/19.

[44] Rîșcani Office, Chișinău Court of first instance, judgment of 11 February 2020, Case no. 3-3222/2019.

The establishment of a fixed time limits for the issuing of a decision by the Council on complaints filed by interested parties is in harmony with the principle of legality, security of legal relations, and legal certainty. In fact, this time limit is intended to discipline the behavior of the beneficiaries of the law and to ensure a coherent and predictable climate for the examination of complaints filed under the law governing the work of the Council for Preventing and Eliminating Discrimination and Ensuring Equality.

Rîșcani Office, Chișinău Court of first instance, judgment of 11 February 2020, Case no. 3-3222/2019.

The observance of legal time limits—albeit a requirement concerning form—is part of the elements of legality. A way forward could be either to have the SCJ prepare a recommendation for courts and explain the nature of the time limits and its interpretation as intended to defend rights and to guarantee the public interest of fighting discrimination or to establish by law that the time limits prescribed in Article 15 of Law no. 121 are just a recommendation and that the Equality Council must provide a justification when exceeding the 30-day period or to establish conditions justifying delays in exceptional circumstances, such as the impossibility to convene members or a period of crisis.

When it comes to **evidence** in cases of challenging the Council's decisions, it is possible to understand the special law status of Article 15 of Law no. 121 in relation to Article 93 of the Administrative Code. Thus, the general rule that every party must produce evidence to support their claim is complemented with the provision that "every participant shall produce evidence to support the circumstances concerning exclusively their own field" and the specific reference to the special rule: "Additional regulations or waivers shall be admitted only in accordance with the law."

Another worrying issue is how state institutions, including some judges, position themselves in relation to the Equality Council when, in exercising its mandate, the Council invites them to hearings, requests their opinions or finds acts of discrimination perpetrated by them. Thus, an action that is part of the institutional mandate, which entails observing the principle of equality before law, has been interpreted as "the Council's interference with the work of courts or prosecution authorities" or as "an assault against the independence of justice." A recent incident discussed in the press and at the SCM may serve as an example. A judge from the Rîșcani Office of the Chișinău Court of first instance filed a complaint with the Superior Council of Magistracy against the Equality Council, criticizing "the apex of abuse and insolence reeking of humiliation for the entire judiciary."[45] Judge Paniș protested against the Council's request to participate in hearings and to answer the allegations of harassment brought against him in a complaint filed by a lawyer with the Council. Even though the complaint was filed after the issue of a judgment that had occasioned it, and not while the trial was still in progress, the judge—who acted as defendant in the complaints procedure before the Council—considered that

[45] SCM's plenum hearing of 1 July 2020, available at https://csm.md/ro/arhiva-sedintelor-csm.html#/?playlistId=0&videoId=0.

initiation of the examination procedure by the Council amounted to interference with the administration of justice. The SCM dismissed—with the votes of nine to one—the judge's complaint about the procedure initiated by the Council against him, which was a positive sign, given that it is important that other state institutions recognize and accept that the Equality Council is an institution which is part of the structure ensuring the rule-of-law.[46] That being said, it is worrying that the lack of understanding of the Council's mandate and procedure and professionally unfriendly attitudes on the part of the judge from the Rîșcani Office of the Chișinău Court of first instance—which has the power to examine challenges against the Council's decisions—happened not only in that particular case, but also in other cases in which the courts were accused of discrimination.

A positive sign is that the SCM and the SCJ have started to explain the role of the Equality Council correctly. This is essential, considering the growing number of complaints of discrimination brought against judges, prosecutors, or police officers and complaints against these institutions filed with the Council. For example, in a case examined by the Equality Council, a judge complained against the Superior Council of Magistracy for discrimination based on disability after the SCM had issued an unfavorable decision concerning the judge's preliminary complaint.[47] The discrimination invoked showed the failure to ensure reasonable accommodation in relation to the work conditions of the judge and his workload and to observe the judge's right to the recalculation of pension and a pension for seniority in judicial service. The Council examined the complaint and found harassment based on disability in the legally prescribed accommodation procedure and discrimination based on disability in performance review, reasoning that the claims concerning the failure to provide reasonable accommodation were exhausted given the measures ordered by the SCM. In addition to the personalized recommendations for the SCM, the Council also issued general recommendations that could lay the basis for a dialogue between the two entities and help to integrate provisions concerning equality and non-discrimination in the Regulations on the randomized assignment of court cases for examination and the Regulations on the criteria, indicators, and procedure for reviewing judges' performance.[48]

A positive example in this regard came from the practice of the SCJ, which acknowledged the lack of equal protection in the investigation of allegations concerning the rape of

[46] SCM, decision no. 181/16 of 16 July 2020.

[47] SCM, decision no. 73/8 of 5 May 2020.

[48] Equality Council, decision of 3 July 2020, Case no. 56/20, available at http://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_56_2020.pdf?fbclid=IwAR1PeNy3-4kszlwEmd2soBV_BHzuUl8VEkk5zRLg8cLQIJi_lhRDKwXDHq4. The Council recommended the Superior Council of the Magistracy: 1) to complement the Regulations on the randomized assignment of court cases for examination to extend the categories that could benefit from smaller workload, particularly to include persons with disabilities, persons who combine work with a child-care leave, and those who come to work after a maternity leave; 2) to adjust the Regulations on the criteria, indicators, and procedure for reviewing judges' performance to adapt the performance indicators to judges working in different conditions, particularly to those with disabilities, those who combine work with a child-care leave, and those who come to work after a maternity leave.

a girl with disabilities when the claimant stated that prosecutors had not examined all circumstances of the case thoroughly and objectively and had appraised her statements skeptically due to her health state. In case no. 04/18,[49] the Equality Council showed that an efficient inquiry of a crime cannot rely on prejudice concerning the disability of the victim. In line with international standards and practices of conduct and investigation in cases entailing victims from vulnerable groups, the Council showed that "regardless of the mental capacity or the health of the victim, the prosecution authority should exercise all diligence to investigate the allegations objectively." The recommendation that prosecution authorities inform prosecutors about the Council's decision and take all possible actions to avoid similar situations in the future was challenged in court. Although the court of first instance—the Botanica Office of the Chișinău Court of first instance—annulled the decision of the Council, on 14 February 2019, the Department for Civil Cases of the Chișinău Court of Appeal quashed this judgment and upheld the decision of the Equality Council. On 19 June 2019, the SCJ's Department for Civil, Commercial, and Administrative Cases declared the cassation appeal of the Prosecution Office of Ialoveni inadmissible thus maintain the finding and the reasoning of the Council.

b.3 The Need for In-service Training on Non-discrimination for Judges

The research identified two factors of concern about the correct application of the antidiscrimination law by courts. The first one refers to judges' failure to accept the Council's role or perceiving the activity of the Council as an assault against the independence of the judiciary or and interference with justice.[50] The second factor of concern stems from the misunderstanding or a limited understanding of the rules of Law no. 121 as a *lex specialis* that allows different approaches from the general rules of the Civil Procedure Code and the Administrative Code and judges' poor balancing of prohibition of discrimination and freedom of expression. Both concerns could be addressed by ensuring a so much needed institutional dialogue between the Equality Council, the SCM, the SCJ, courts, and the Ministry of Justice and through qualitative in-service training on this topic.

In the NIJ's 2020 curriculum,[51] equality and non-discrimination were covered only by a one-day general training session entitled "Non-discrimination and Equality" and a three-day seminar entitled "Biomedicine and Human Rights—the Protection of Vulnerable Groups" offered jointly with the NGO IDOM. These training programs are available for 15 judges and 15 prosecutors. Likewise, the NIJ's 2019 professional training program contained an eight-hour module for 15 judges and 15 prosecutors entitled "Non-discrimination and

[49] Equality Council, decision of 6 March 2018, case no. 04/18, available at https://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_04_2018.pdf.

[50] See, for example, the request of Judge Paniș of the Rîșcani Office of the Chișinău Court of first instance, which was dismissed by the SCM's plenum. SCM's plenum hearing of 1 July 2020, available at https://csm.md/ro/arhiva-sedintelor-csm.html#/?playlistId=0&videoId=0.

[51] National Institute of Justice, Modular Yearly In-service Training Program for Judges and Prosecutors, semester I, year 2020, available at https://www.inj.md/sites/default/files/new/20/plans/20200128Plan%20calendaristic%20pentru%20jud%20si%20proc%20sem.%20I%202020.pdf.

Equality" and a one-day seminar entitled "Application of the Criminal and Contravention Laws to Crimes Motivated by Prejudice, Despisal, or Hatred."[52] The NIJ did not provide public data about its curriculum, the themes developed, the practical or theoretical nature of its training programs, training methods, or the assessment—including self-assessment—of training activities. According to the experience of other states and suggestions of the experts interviewed, the NIJ should allocate more days/hours to this subject, going deeply into it—including into aspects of procedure and into the relationship with plaintiffs from vulnerable groups—and include workshops with hands-on activities and on sensitive subjects, such as the relationship between freedom of expression and the prohibition of discrimination. Particularly, this latter field requires constantly keeping up to date with the latest information and maintaining discussion about international standards and practices. The NIJ would also do well to complement the module "Communication and Personal Development Skills" with a workshop on stereotypes, prejudice, and the relations with litigants from vulnerable groups and to include it as a mandatory element into the initial training curriculum for future judges as well as in the in-service training curriculum for judges. Hands-on activities for the NIJ's trainees, such as internship programs at the Equality Council, carried out under a cooperation agreement with the Council, the SCM, and the NIJ could have the twofold advantage of increasing qualified human resource for the Council by involving trainees in examination of the complaints and offering hands-on training for future judges to familiarize them with the antidiscrimination law.

ECRI's most recent country report recommends to the authorities to assess the impact of professional training programs on non-discrimination and bias motivated crimes to determine how these training programs help to identify bias motivated crimes efficiently and how they can be improved, if necessary.[53]

Another solution to ensure the correct and efficient application of the antidiscrimination law could take the form of joint events and workshops organized by the Equality Council in partnership with the courts to discuss international practice and developments in the international case law.

c. Relationship between the Council and Prosecution Bodies

The need for clear laws, the importance of correlating the Criminal Code and Law no. 121, and of having cooperation agreements signed between the Equality Council and prosecution authorities were the priorities mentioned by the interviewed lawyers and human rights defenders.

Under Article 15 (9) of Law no. 121, when the actions examined contain elements of a crime, the Council must send the materials to prosecution authorities immediately. Currently, the Equality Council does not have an internal procedure or an agreement with

[52] National Institute of Justice, Modular Yearly In-service Training Program for Judges and Prosecutors for 2019, Annex 1 to NIJ Board's Decision no. 11/2 of 30 November 2018, available at https://www.inj.md/sites/default/files/FC/planuri/plammodjp2019.pdf.

[53] ECRI, *Report on the Republic of Moldova, (fifth monitoring cycle),* June 2018.

the Prosecutor General's Office that would regulate the transfer of complaints filed with the Council that contain elements with potential for triggering criminal liability. Likewise, prosecution or law enforcement authorities do not have by-laws or procedures in place to investigate deeds based on discrimination and prejudice. In this regard, it would be useful to establish cooperation agreements between the Equality Council and relevant entities, to adopt specific methodologic rules, to introduce elements of antidiscrimination law in the in-service training for prosecutors, criminal investigation officers, and police officers, and to amend the law by suspending the time limit for the procedure before the Council under Article 15 of Law no. 121 and providing for the resumption of examination when prosecution authorities find no constituent elements of a crime and send the materials back to the Council. In its latest report concerning the Republic of Moldova, ECRI emphasized that the provisions of the criminal law should be clarified by adopting rules concerning "the public expression with a racist aim of an ideology which claims the superiority or which depreciates or denigrates a group of persons; the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes; the production or storage aimed at public dissemination or distribution, of written, pictorial or other material containing manifestations covered by GPR 7 § 18 a, b, c, d and e; the creation or leadership of a group which promotes racism, support for such a group or participation in its activities; and legal persons' liability."[54]

[54] ECRI, *Report on the Republic of Moldova, (fifth monitoring cycle)*, June 2018.

2. Forms of discrimination

The interviewed experts consider that the definitions of various forms of discrimination provided for in Law no. 121 and their interpretation by the Equality Council and courts generally correspond to international standards. To be fully aligned with ECRI's General Policy Recommendation no. 7,[55] Law no. 121 should define also the announcement of intention to discriminate, the orders to discriminate given to others, and assistance for others in discriminating as per the recommendation made by experts of the Council of Europe in 2016[56] and by ECRI in 2018.[57] Furthermore, to reflect developments in international practice, the law should also define hate speech and intersectional discrimination,[58] and definitions from Law no. 121 should be correlated with the provisions of the Contravention Code.

General Policy Recommendation no. 7 also includes the legal obligation of public authorities to promote equality as part of their institutional mandate. It might be presumed that such an explicit regulation is redundant considering that the principle of equality and non-discrimination is articulated so explicitly in the Constitution of the Republic of Moldova and in international human rights treaties the Republic of Moldova is a party to. However, an analysis of the Equality Council's recommendations in cases where public authorities acted as potential actors of discrimination shows that such an express provision is necessary specifically to encourage authorities to constantly reflect on the impact of their actions and inactions on vulnerable people and groups.

In what follows, we will give a detailed analysis of only those forms of discrimination that raised challenges in the process of establishing and punishing them.

---

[55] ECRI, General Policy Recommendation no. 7: National Legislation to Combat Racism and Racial Discrimination, adopted on 13 December 2002 (amended on 7 December 2017).

[56] Council of Europe, Ivana Roagna, Nevena Petrusic, *Assessment of the Law on ensuring equality in the Republic of Moldova in compliance with the Council of Europe antidiscrimination standards*, February 2016.

[57] ECRI, *Report on the Republic of Moldova, (fifth monitoring cycle),* June 2018.

[58] Council of Europe, Nadejda Hriptievschi, *Baseline study for assessing the national non-discrimination mechanisms in Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus,* October 2019, Council of Europe, Constantin Cojocariu, Niall Crowley, *Opinion on Draft Amendments to: Law on Ensuring Equality (Law no. 121); and Law on Activity of the Council for Prevention and Elimination of Discrimination and Ensuring Equality (Law no. 298)*, November 2019.

a. Direct Discrimination

Direct discrimination—defined in Article 2 of Law no. 121 as "treating a person in a less favorable way than another person in a similar situation, on account of any of the prohibited criteria"—did not pose challenges in the Equality Council's or courts' practice of finding discrimination.

b. Indirect Discrimination

Indirect discrimination is defined in line with European standards in Article 2 of Law 121 as "any apparently neutral provision, action, criterion, or practice that has the effect of disadvantaging a person in comparison with another person on account of the criteria listed in this law, unless that provision, action, criterion, or practice is objectively justified by a legitimate purpose and the means of achieving that purpose are proportionate, adequate, and necessary." In practice, the Council does a good job in correctly identifying cases of indirect discrimination. Take, for example, decision in case no. 21/18 of 21 August 2018 by which the Council found that paras. 5.2 through 5.12 of GD no. 314 of 23 May 2012 to approve the framework-regulation on the organization and functioning of the welfare service "Personal Assistant" represented direct discrimination by association (on ground of disability) in observing caseworkers' right to holidays and paras. 5.16 and 5.17 represented indirect discrimination by association (on grounds of sex and disability) in observing the right to holidays of caseworkers who were mothers.[59] In the same case, however, the courts failed to find and to punish gender-based discrimination against mothers who take care of dependents with disabilities, dismissing the complaint of Ms. Ciobanu as unfounded. In its turn, when examining this complaint, the UN Committee on the Elimination of all Forms of Discrimination Against Women found the violation of the UN Convention on the Elimination of All Forms of Discrimination Against Women.[60]

c. Harassment

Harassment is defined in Law no. 121 in line with international practice. However, the application of the law generates two distinct problems: lack of correlation between various regulations, which determines unjustified limitation of the prohibition of harassment only to workplace, even though harassment exists and must be punished also in education, access to goods and services, and other forms of interhuman relations, and failure to adequately punish sexual harassment because of lack of clarity about various applicable rules and regarding the powers of various institutions.

---

[59] Equality Council, decision of 21 August 2018, Case no. 21/18. The decision is available at https://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_21_2018_deperso-nalizat--1-1.pdf.

[60] CEDAW, Case no. 104/2016, *Natalia Ciobanu v. Moldova*, 4 November 2019, https://juris.ohchr.org/Search/Details/2664.

The first problem related to harassment consists in the discordance between the provisions of Law no. 121 that define and prohibit harassment overall and the provisions of Article 54[2] (2) of the Contravention Code that provide for sanctions exclusively against harassment at work. International standards, however, prohibit and sanction harassment in all areas, not just in relation to employment.[61]

The second concern is generated by the fact that, unfortunately, the Moldovan law does not respond to a real need as seen in the case law on sexual harassment. Sexual harassment is different from gender-based harassment, and although the former is defined in Article 2 of Law no. 5 of 9 February 2006 on Ensuring Equal Opportunities for Women and Men, the Labor Code, and Article 173 of the Criminal Code of the Republic of Moldova, sexual harassment is a dead letter without true applicability in real life, as the interviewed lawyers and experts have pointed out. This conclusion is confirmed by recent analyses of laws and practices, which emphasize that "the fragmented regulation of sexual harassment across various regulatory acts generates confusion both for the entities empowered to prevent and investigate sexual harassment and for victims who want to report incidents."[62]

It is also worth noting that the definition from Article 173 of the Criminal Code is narrower than that provided in the international standards, covering only the actions intended to convince a person to have sexual intercourse or other actions of unwanted sexual nature rather than the physical, verbal, or non-verbal behavior that injures someone's dignity or creates an unpleasant, hostile, degrading, humiliating, discriminatory, or offensive environment. By contrast, the Istanbul Convention of the Council of Europe defines sexual harassment as "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment." The current inefficient regulation of the mechanism for sanctioning sexual harassment necessitates a separate discussion to assess and identify the best mechanism for finding and punishing sexual harassment. A solution could be amending Law no. 121 and the Contravention Code to expressly provide for the Equality Council's power to find and sanction sexual harassment (unless the circumstances of the case suggest constituent elements of such crimes as abuse of service, blackmailing, rape, etc.).

According to analyses and surveys, one in five women in the Republic of Moldova experiences sexual harassment at work.[63] Such a system-wide problem requires a multidimensional strategy to identify coherent and efficient solutions. The Equality Council, the Prosecutor General's Office, the Ministry of Home Affairs, the Ministry of Health, Labor, and Social Protection, and the Ministry of Justice have therefore the

[61] ECRI, *Report on the Republic of Moldova, (fifth monitoring cycle)*, June 2018.

[62] WLC, Iurie Perevoznic, Arina Țurcan, Lilia Rusu; coordinator: Natalia Vâlcu, *Report on the analysis of the compatibility of Moldovan laws with the provisions of the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence*, 2019, available at http://cdf.md/files/resources/141/CDF%20Raport%20compatibilitate.pdf.

[63] Europa liberă, Diana Răileanu available at https://moldova.europalibera.org/a/%C3%AEn-r-moldova-fiecare-a-cincea-femeie-este-h%C4%83r%C8%9Buit%C4%83-sexual-la-locul-de-munc%C4%83/29257158.html.

positive obligation to proactively develop a strategy to fight sexual harassment, and in the short term, they can improve and harmonize the legal framework and adopt interagency cooperation agreements that would enable professional training on this topic, a clear delimitation of powers in finding and punishing sexual harassment, an effective investigation mechanism, and a mechanism for dissuasive, proportionate, and adequate punishment.

It is encouraging that the Equality Council and the courts acknowledge the importance of punishing harassment, especially gender-based harassment. The first notice of contravention prepared by the Equality Council in 2019 concerned the harassment of a chief of a criminal prosecution division due to her gender and marital status by the chief of the Police Inspectorate of Telenești.[64] The court of first instance, the Ciocana Office of the Chișinău Court of first instance,[65] and the Chișinău Court of Appeal all imposed the harshest punishment for contraventions—a penalty of MDL 10.000 (approximately EUR 517) and a six-month ban on holding offices at the General Police Inspectorate of the Republic of Moldova or at its subdivisions—to warn regarding the unacceptability of harassment.[66] In similar recent cases, the Equality Council maintained its approach.[67]

d. Incitement to Discrimination

Out of all the forms of discrimination defined in Article 2 of Law no. 121, incitement to discrimination has raised most controversies according to the interviewed lawyers and experts. This is because of the confusion between incitement to discrimination as a legal concept whose elements are clearly defined in Article 2 of Law no. 121 and the concept of incitement according to day-to-day language. Of course, it did not help that the Council and the courts did not have a sufficiently developed case law on cases in which freedom of expression is taken to the extreme and turned into an abuse of freedom of expression.

The constituent elements of incitement to discrimination are relatively simple to define: 1) any behavior whereby a person applies pressure or shows a deliberate attitude; 2) committed with intent; 3) with the purpose of discriminating a third party; and 4) based on the criteria that are protected by Law no. 121. The practical identification of these elements in concrete cases, however, produces inconsistent results. Some published articles or statements that affected the human dignity of a vulnerable group were interpreted as

---

[64] Equality Council, decision of 11 February 2019, Case no. 221/18, available at https://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_221_2018.pdf.

[65] Ciocana Office, Chișinău Court of first instance, judgment of 20 November 2019, Case no. 4-518/19, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/3978c91d-81c2-4e43-92a5-749cb1d0d05b.

[66] Chișinău Court of Appeal, decision of 30 January 2020, Case no. 4r-3196/19, available at https://cac.instante.justice.md/ro/pigd_integration/pdf/2e2a72fd-1884-47dc-9328-7622442b6857.

[67] Equality Council, decision of 21 January 2020, Case no. 208/19, gender-based harassment at work in the case of a Customs Service employee, available at https://egalitate.md/wp-content/uploads/2016/04/Decizie_neconstatare_208_2019.pdf.

incitement to discrimination. Take the case of the article "The Diversity of the Inclusion of the Handicapped," which criticized policies for the educational inclusion of children with mental or motor disabilities. In that case, the court of first instance and the Chișinău Court of Appeal upheld the finding of discrimination.[68]

On the other hand, in another recent case, the Rîșcani Office of the Chișinău Court of first instance disagreed with the Equality Council's finding and the categorization as incitement to discrimination given to a politician's public statements about another politician during an election campaign, statements mentioning women's role in politics depending on their marital status, practically suggesting that unmarried and childless women should be barred from politics. The complaint was filed by the Gender Equality Platform against Ilan ȘOR following his derogatory statements about the politician Maia SANDU (the Council's decision of 19 October 2018[69]). The court of first instance preferred to use the definition of incitement included in the dictionaries, failing to apply Law no. 121, which would require it to check the constituent elements described in the definition from Article 2 of that law. Thus, the trial court considered that "the action of inciting entails a call to action—that is, a call to discrimination against women in politics. The article in question, used as the basis by the entity responsible for finding such infringements, does not speak about incitement in the first place, but rather expresses an opinion, making use of the right to expression, in the context of an election campaign, and electoral campaigning may include such forms of expression."[70]

When considering incitement to discrimination in an electoral context and the press release of 4 November 2016 (the day before presidential election) organized by priests of the Mitropoly of Chișinău and the Entire Moldova, who used that occasion to incite to discrimination based on gender, public opinion, and sexual orientation in violation of their obligation not to express or show political preferences in public, the Chișinău Court of Appeal placed discrimination on a theoretical axis of rights and freedoms, and the Supreme Court of Justice continued such an approach both in this case[71] and in the case of a complaint filed by Maia SANDU against Nicolae MIHĂESCU (Bishop Marchel MIHĂESCU of Bălți and Fălești).[72]

"Incitement to discrimination stands at the boundary between several fundamental rights: the right to freedom of expression, the right to freedom of thought, conscience, and religion, and the general prohibition of discrimination and the promotion of the principle of tolerance and respect for equal dignity of all human beings—the fundamental rights considered essential

[68] Chișinău Court of Appeal, decision of 12 September 2017, *A.O. Center for Legal Assistance for People with Disabilities v. the Weekly Făclia and Vitalie Pastuh-Cubolteanu*.

[69] Equality Council, decision of 19 October 2018, Case no. 111/18, available at https://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_111_2018.pdf.

[70] Rîșcani Office, Chișinău Court of first instance, judgment of 28 November 2019, https://jc.instante.justice.md/ro/pigd_integration/pdf/261999b0-cf2c-4799-9d97-30a3beb67d8e.

[71] Supreme Court of Justice, order of 14 November 2018, Case no. 2ra-2254/18, available at http://jurisprudenta.csj.md/search_col_civil.php?id=47601.

[72] Supreme Court of Justice, order of 3 July 2019, Case no. 2ra-1214/19, available at http://jurisprudenta.csj.md/search_col_civil.php?id=51946.

elements in any democracy. The regulation of speech inciting to hatred is caused by the need of democracies to prevent and punish all forms of expression that spread, incite, promote, or justify hatred based on intolerance."[73]

Chișinău Court of Appeal, decision of 6 June 2018, Case no. 2ra-2254/18.

The junction between the protection of the right to dignity by prohibiting all forms of discrimination, including incitement to discrimination, on the one hand, and the protection of freedom of expression, on the other hand, poses constant challenges for national equality bodies and courts. They have to ensure a balance of rights and to perform an accurate analysis of how freedom of expression transgresses and turns from protected expression into an abuse of expression that would justify proportionate, adequate, and dissuasive sanctions even if such sanctions could entail a limitation of freedom of expression. The ECtHR's case law, ECRI's standards, and standards developed by various UN committees offer sufficient elements to help to calibrate this task of balancing that should be carried out by the Council and by the courts of law. To succeed in this difficult task—which is essential to improve the public space and to ensure the right to dignity and non-discrimination—judges and Equality Council representatives should be constantly involved in workshops on the limits of freedom of expression and in training seminars with updating hands-on activities. Such events could be conducted under the aegis of the NIJ or as joined specialized activities through partnership between interested courts and the Council.

e. Failure to Ensure Reasonable Accommodation and Ensuring Accessibility as Challenge

Starting from the General Comment no. 2 adopted in 2014 by the UN Committee on the Rights of Persons with Disabilities,[74] it is necessary to clarify the terminology fist. Thus, accessibility concerns a group of persons, and it should be ensured unconditionally before receiving individual requests specifically to ensure access to public places and services, whereas reasonable accommodation concerns individual persons. Law no. 121 defines reasonable accommodation in line with the definition provided by the UN Convention, and Article 177 (2) (i[1]) of the Contravention Code punishes "failure to adequately design buildings, installations, and rooms, including residential buildings, in line with effective rules to ensure their accessibility and use for people with disabilities." In practice, the Equality Council has found as discrimination both the failure to ensure reasonable accommodation in individual cases and the lack of accessibility of public services or places.

First, there is no correlation between the provisions of Law no. 121 and those of the Contravention Code, which punishes, in Article 56[1], only failure to reasonably accommodate

[73] Chișinău Court of Appeal, decision of 6 June 2018, Case no. 2ra-2254/18.

[74] UN Committee on the Rights of Persons with Disabilities, General Comment no. 2 on accessibility, 2014, paras. 25 and 26.

workplaces to ensure their accessibility and use for persons with disabilities, but does not mention the failure to ensure reasonable accommodation in other fields, such as access to education or justice. Therefore, Law no. 121 and the Contravention Code should be amended to explicitly provide for the obligation to ensure reasonable accommodation in other fields besides the workplace and to mention the Equality Council's powers to find and punish this form of discrimination. The importance of such an amendment is also exemplified by a decision issued by the Council in 2019 in respect of education for children with impaired hearing.[75] The complaint was based on the fact that special educational institutions for children with impaired hearing taught foreign languages only in grades II through V, even though the teaching plan for general educational institutions provided for this discipline from grade II until the completion of education. Analyzing the Guidelines on specific examination procedures for students with special educational needs (SEN) and the Regulations on the national baccalaureate examination approved by Order no. 47/2018 of the Ministry of Education, Culture, and Research, the Equality Council found also that the prescribed reasonable accommodation (the time allocated to the examination for foreign language) mentioned only students with severe motor, neuromotor, or vision disabilities, whereas hearing impaired students were not covered by these regulations and did not benefit of any accommodation. In this case, the Council found the indirect discrimination against persons with impaired hearing in the educational process and developed general recommendations for the Ministry of Education, Culture, and Research.

As for the obligation to ensure accessibility, Law no. 121 does not contain a clear definition of it or a description of the powers of the Council, and therefore an amendment might be helpful. Failure to comply with the obligation to ensure accessibility, however, may constitute discrimination and may be punished under Articles 177 (2) (i^1) and 71^1 of the Contravention Code.

The practice of the Equality Council and of nongovernmental organizations to check the accessibility of public agencies deserves to be commended. Improving accessibility is a long-term process that, in its first phase, requires awareness about, and the undertaking of the positive duty to increase the accessibility of public services and places regardless of the type of disability as well as the development of strategies to finance and support renovations aimed at improving accessibility.

It is regrettable that when, in 2017, the Equality Council found that the SCJ had infringed its legal obligations, leaving its premises inaccessible for people with motor disabilities,[76] the latter reacted not by acknowledging its obligation to ensure access to justice for all citizens, but by criticizing the Council and invoking independence and impartiality of justice.[77] Although many of the Moldovan courts have been found in the past to have major issues with accessibility, it is extremely encouraging to see the dialogue that has

[75] Equality Council, decision of 18 October 2019, Case no. 147/19, available at https://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_147_2019.pdf.

[76] Equality Council, decision of 24 February 2017, Case no. 510/16, available at http://egalitate.md/wp-content/uploads/2016/04/draft_decizie_constatare_510_2016_expediat___109234.pdf.

[77] Supreme Court of Justice, letter no. 102/2 of 31 March 2017.

formed between nongovernmental organizations, such as the Center for the Rights of People with Disabilities (CDPD), the SCM, and chief judges.[78] This dialogue—continued with support and coordination from the Equality Council and relevant authorities—can gradually improve accessibility and educate authorities about ensuring the rights of people with disabilities.

Another proactive element in the work of the Council is the sounding of alarm for authorities when people with disabilities have limited access to polling stations. In this regard, the Equality Council has recommended competent authorities "to take urgent actions to render accessible the offices of the public entities which serve not only for the exertion of voting rights, but also as providers of public services, so that persons with disabilities may exercise their rights."[79] The proactive monitoring of this obligation can be carried out through partnerships with associations that monitor electoral processes so that, in the medium term, the guarantee of the right to vote could become a reality for Moldovan citizens with disabilities as well.

The remedies ensured by the Council in cases of discrimination caused by failure to comply with the obligation concerning accessibility are complementary to remedies provided for in the Contravention Code and ensured by other authorities that establish and punish non-compliance with standards concerning labor, transport, and constructions, such as the State Labor Inspectorate, the National Agency for Motor Vehicles, the police, or the Agency for Technical Audit. The mandates of these entities do not overlap but rather complement one another, and in this relationship, the Council's role is to sensitize, educate, and support, through informed opinions, the other entities empowered to punish failure to ensure accessibility.

The ratification by Moldova of the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities has the potential to add value to the protection mechanisms for people with disabilities and would be beneficial.

f. Victimization

Although victimization is defined in Law no. 121 on Ensuring Equality, neither Law no. 121 nor the Contravention Code prohibit victimization as a way of protecting potential victims or witnesses in cases of discrimination. Although not a form of discrimination *per se*, victimization is defined and punished under the antidiscrimination law because this serves as a guarantee or additional protection for victims of discrimination, witnesses, and persons who participate in defending victims of discrimination formally or informally. Article 24 of Directive 2006/54/CE of 5 July 2006 of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment

[78] https://www.justitietransparenta.md/accesul-persoanelor-cu-dizabilitati-cadrul-judecatoriei-comrat-ce-aratat-evaluarea/.

[79] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

of men and women in matters of employment and occupation establishes the obligation of the states to adopt provisions "to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment." The CJEU underlined the importance of the proactive interpretation of victimization as an additional protection mechanism for victims of discrimination in 2019 in the case of Hakelbrach.[80] For that end, the Contravention Code should be complemented with the contravention "Victimization." For consistency, it is also necessary to explicitly mention the Equality Council's power to find and punish contraventions in cases of victimization.

g. Severe Forms of Discrimination

Article 4 of Law no. 121 described severe forms of discrimination—situations whose severity and impact require a different treatment. Unfortunately, as noted by experts of the Council of Europe back in 2016,[81] the provisions of Article 4 concerning the establishment of liability for discrimination and its proper punishing are not carried over and developed properly in Chapter IV of Law no. 121 or in the Contravention Code. Moreover, the provisions of Articles 4 and 176 of the Criminal Code, which punish inequality in treating citizens' rights, partially overlap. Practitioners have noted that Article 176 is not applied in practice and the two applicable types of liability—criminal and contraventional—need better coordination and delimitation.

In its practice, the Council has looked at cases where it found severe forms of discrimination—for example, harassment based on disability perpetrated by a local councilor—without being able to take other actions due to the lack of legal grounds. Since the Contravention Code does not contain provisions concerning harassment that happens in a context other than at work or rules concerning severe forms of discrimination, the Equality Council found that the victim had been harassed by a local councilor, who had humiliated and insulted him, but it could not issue the notice of contravention to the court in order to get the offender punished.[82] Practically, the finding of a severe form of discrimination in this case did not lead to any form of liability or any remedy due to the gap in the legislation.

---

[80] CJEU, C404/18, judgment of 20 June 2019 of the Court (Third Chamber, concerning request for a preliminary ruling from the Arbeidsrechtbank Antwerpen, Belgium) – *Tine Vandenbon, Jamina Hakelbracht, Instituut voor de Gelijkheid van Vrouwen en Mannen/WTG Retail BVBA*, available at http://curia.europa.eu/juris/document/document.jsf?docid=215248&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=RO&cid=17548138.

[81] Council of Europe, Ivana Roagna, Nevena Petrusic, *Assessment of the Law on ensuring equality in the Republic of Moldova in compliance with the Council of Europe antidiscrimination standards*, February 2016.

[82] Equality Council, decision of 20 February 2017, Case no. 495/16, available at https://egalitate.md/wp-content/uploads/2016/04/draft_decizie_constatare_495_2016_semnat_depersonalizat_3753496.pdf

In a case of harassment on grounds of gender and marital status at work perpetrated by the chief of a local police inspectorate, the Council found harassment and victimization, remitted the notice of contravention to the court to get the offender punished, but did not mention the aggravating circumstances.[83] The Ciocana Office of the Chișinău Court of first instance sanctioned the defendant with a penalty of 200 conventional units—that is, MDL 10,000 (approximately EUR 517)—and a six-month ban on holding offices at the General Police Inspectorate of the Republic of Moldova or its subdivisions in accordance with Article 542 (2) of the Contravention Code.[84] On 30 January 2020, the Chișinău Court of Appeal upheld this punishment.[85] Neither the trial court nor the appellate court noted the existence of aggravating circumstances even though the defendant had been exercising his powers as public authority and the discrimination had been based on two criteria.

These two examples in which representatives of the state perpetrated severe forms of discrimination in discharging their job duties and got away with disproportionately mild sanctions, indicate the need to clarify and correlate rules to enable punishment of severe forms of discrimination and to develop a special procedure the Council could apply in such cases.

[83] Equality Council, decision of 11 February 2019, Case no. 221/18, available at http://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_221_2018.pdf.

[84] Ciocana Office, Chișinău Court of first instance, judgment of 20 November 2019, Case no. 4-518/19, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/3978c91d-81c2-4e43-92a5-749cb1d0d05b.

[85] Chișinău Court of Appeal, decision of 30 January 2020, Case no. 4r-3196/19, available at https://cac.instante.justice.md/ro/pigd_integration/pdf/2e2a72fd-1884-47dc-9328-7622442b6857.

3. Criteria protected against discrimination

The case law of the Equality Council and of the courts provides positive examples of asserting and interpreting the open-ended nature of the list of criteria, characteristics protected against discrimination by using the open wording "any other similar criterion" in Article 1 (1) of Law no. 121, an interpretation which is in line with the ECtHR's case law. To align Law no. 121 with the latest European standards[86] and international practice, Article 1(1) can be amended to expressly mention all criteria protected under Article 21 of the Charter of Fundamental Rights of the European Union, namely: "sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation." The equivalent list in the Moldovan law omits social origin/social status, genetic features, property, sexual orientation, and birth. The practice of the ECtHR, courts, and the Council have revealed additional criteria that can trigger unfavorable treatment and require protection from authorities including: marital status, gender identity, state of health, and seropositive status.

The Equality Council's case law concerning these criteria gets ever more diverse, including a growing number of cases resolved by courts. The following analysis focuses on the criteria whose importance is underlined either by the prevalence and severity of violations or by controversies they raise in relation to relevant international standards.

a. Gender/Sex

The Equality Council's annual report for 2019 notes that in "25% of its decisions establishing the facts, the Council noted that the acts of discrimination were on grounds of sex."[87] The multitude of cases of gender-based discrimination—usually, against women—is explained by the widespread tolerance of misogyny and sexism and their presentation as the elements of cultural identity in a predominantly patriarchal society or as manifestations of free expression. The typology of cases reported to the Council reflects this patriarchal approach to women's role in society: the absence of proper measures enabling and encouraging balance between job duties and family duties; refusal

[86] European Union, Charter of Fundamental Rights of the European Union (2010/C 83/02).

[87] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

to hire persons with family commitments; the limitation of guarantees for persons whose employment relationship was suspended on the effective date of Law no. 270/2018; the production and dissemination of sexists advertisements; gender-based harassment at work from superiors; speech inciting to discrimination against women due to their work, especially if they hold leadership positions; discriminatory provisions in the by-laws of educational institutions.

The case law indicates a tension between radically different approaches the Equality Council and, respectively, courts follow in examining sexist statements. A relevant case was that of the complaint filed by the Gender Equality Platform concerning Ilan ȘOR's statements about the politician Maia SANDU during an electoral period, a statement that women who failed to arrange their own lives could not make a people happy. In its decision, the Council pointed out the prejudices underlying the politician's statements, the risk of generalizations, and the negative impact that statements concerning a concrete person—a female politician—could have on all women by deterring them from engaging in politics and sending out the message that unmarried or childless women should be pushed out of politics.[88] Instead, courts—starting with the court of first instance (Rîșcani Office, Chișinău Court of first instance)—annulled the Council's decision establishing discrimination and recommending Ilan ȘOR to issue a public apology to the leader of the Action and Solidarity Party (PAS) Maia SANDU for sexist statements inciting to discrimination against women in politics and to refrain from sexist statements inciting to discrimination in the future.

In addition to arguments regarding the breach of the legal time limits for examining complaints, the courts also cited Ilan ȘOR's right to freedom of expression. Ironically, the court ignored the legal provisions that would help it understand that the expressions and statements that present women and men in a humiliating, degrading, and violent way and offend their dignity represented sexist language under Law no. 5/2006 on Ensuring Equal Opportunities for Women and Men. Instead, the court defined sexism without considering the forms it can take and the deterring effect the perpetuation of gender stereotypes has on women's participation in public life and especially in politics. The trial court judge considered that "sexism entails sexual discrimination that usually works against women and in favor of men individually and institutionally. In this case, the statements examined in the challenged decision do not entail any element that would distinguish political actors based on their gender. This rules out even possible interpretation and/or indirect discrimination (any apparently neutral provision, action, criterion, or practice that has the effect of disadvantaging a person in comparison with another person on account of the criteria listed in this law)."[89] The court failed to apply even the definition it itself had proposed in this case—albeit that definition was not based on the law or gender studies and was rather a concoction that reflected judge's personal opinions and prejudices. In its

[88] Equality Council, decision of 19 October 2018, Case no. 111/18, available at https://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_111_2018.pdf.

[89] Rîșcani Office, Chișinău Court of first instance, judgment of 28 November 2019, https://jc.instante.justice.md/ro/pigd_integration/pdf/261999b0-cf2c-4799-9d97-30a3beb67d8e.

turn, the appellate court concluded that the deeds found by the Equality Council did not contain the elements of discrimination and Ilan ȘOR's statements were within the limits of freedom of expression.[90]

The Equality Council was more successful with cases concerning sexist advertising that objectified women to promote sales of goods and services—apparently, a frequent practice.[91] The same annual report of the Council shows that "in 50% of the decisions establishing the facts based on sex and/or gender criteria, issued in 2019, [the Council] noted the sexist nature of the advertising materials subject to examination."[92] The interviewed lawyers and experts highlighted the proactive position of the Council and underlined the need for thematic reports and public policy interventions, including the adoption of a guide on the production and dissemination of sexist outdoor advertisements so that authorities empowered to approve, monitor, and punish advertisements have solid guidelines from the Equality Council.

The Council issued decisions about gender-based and sexual harassment at work.[93] The criteria of gender and marital status underpin the Council's decision that arguably had the greatest impact in 2019, given the decision to refer the notice of contravention to court, which sanctioned the offender with a MDL 10,000 (approximately EUR 517) penalty and a six-month ban on holding offices at the General Police Inspectorate of the Republic of Moldova or its subdivisions.[94]

Unfortunately, courts were not just as quick in finding and punishing gender-based discrimination, especially against mothers who take care of dependents with disabilities. Although in 2014, the Equality Council found discrimination by association against women who take care of dependents with disabilities in acknowledging their right to social pension and recommended the Ministry of Health, Labor, Social Protection to adopt required measures, the courts dismissed Ms. Ciobanu's complaint as unfounded. Instead, the UN Committee on the Elimination of Discrimination Against Women admitted the complaint and found the violation of the UN Convention.[95]

---

[90] Department for Civil, Commercial, and Administrative Cases, Chișinău Court of Appeal, decision of 12 February 2019, available at https://cac.instante.justice.md/ro/pigd_integration/pdf/49619f8d-d976-4a97-aa59-a03413d316ac.

[91] Equality Council, decision of 18 October 2019, Case no. 154/19, available at https://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_154_2019.pdf.

[92] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

[93] See the discussion in Chapter 2, Section a above.

[94] Ciocana Office, Chișinău Court of first instance, judgment of 20 November 2019, Case no. 4-518/19, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/3978c91d-81c2-4e43-92a5-749cb1d0d05b. The Chișinău Court of Appeal upheld the judgment on 30 January 2020 in Case no. 4r-3196/19, available at https://cac.instante.justice.md/ro/pigd_integration/pdf/2e2a72fd-1884-47dc-9328-7622442b6857.

[95] CEDAW, Case no. 104/2016, *Natalia Ciobanu v. Moldova*, 4 November 2019, https://juris.ohchr.org/Search/Details/2664.

b. Sexual Orientation and Gender Identity

Law no. 121 mentions the prohibition of discrimination based on sexual orientation in Article 7 concerning discrimination at work, but not in Article 1 (1). The CCRM had the possibility to clarify the applicability of that prohibition including in cases of discrimination based on sexual orientation back in 2013, following the challenge regarding the constitutionality raised by Igor DODON.[96] The CCRM specified that the list of criteria protected under Article 1 (1) was not exhaustive and that national regulatory provisions were complemented by international human rights obligations taken by the country.

Both the Equality Council and the courts of all levels[97] justly interpreted the general prohibition under Article 1 of the law as covering discrimination based on sexual orientation due to the open-ended wording—"any other similar criterion"—which is comparable with Article 14 of the European Convention on Human Rights (ECHR) and the Additional Protocol no. 12 to the ECHR.

In one of the Council's first high-profile cases, a representative of the Orthodox Church sprinkled the complainant representing an LGBT organization with holy water at a televised show.[98] The Council found discrimination based on sexual orientation and beliefs and recommended the defendant to issue a public apology to the LGBT community. As the defendant Ghenadie VĂLUȚA failed to apply the Council's recommendation, the complainant took the case to court, forcing him to apologize and to pay moral damages for the discriminatory behavior as found by the Equality Council. On 28 June 2018, the Anenii Noi Court of first instance ordered Ghenadie VĂLUȚA to issue a public apology for incitement to discrimination based on sexual orientation and beliefs and to pay the victim MDL 5,000 (approximately EUR 254) in moral damages. The Chișinău Court of Appeal upheld the trial court's judgment on 7 March 2019,[99] and the Department for Civil, Commercial, and Administrative Cases of the SCJ upheld it on 19 June 2019.[100]

Another recent decision of the Equality Council indicates the attention given to the gender dimension and its forms of expression, including in relation to indirect discrimination. In that case, the Vasile Alecsandri Theoretical High School, Ungheni, was charged with gender-based discrimination in the educational process because the management and the teaching staff prohibited boys to have their hair longer than 3 cm and

[96] Constitutional Court, Decision no. 14 of 8 October 2013 to dismiss application no. 27a/2013 for the verification of the constitutionality of some provisions of Law no. 121 of 25 May 2012 on Ensuring Equality, available at http://www.constcourt.md/ccdocview.php?tip=decizii&docid=124&l=ro.

[97] Supreme Court of Justice, order of 19 June 2019, Case no. 2ra-1073/19, *Angela Frolov v. Ghenadie Văluță*, available at http://jurisprudenta.csj.md/search_col_civil.php?id=51698.

[98] Equality Council, decision of 19 May 2014, Case no. 064/14, available at https://egalitate.md/wp-content/uploads/2016/04/decizie_cauza_064_14_6276731.pdf.

[99] Chișinău Court of Appeal, decision of 7 June 2019, Case no. 2a-3142/18, available at https://cac.instante.justice.md/ro/pigd_integration/pdf/4e8a8c2f-1d5d-e911-80d8-0050568b7027.

[100] SCJ, order of 19 June 2019, Case no. 2ra-1073/19, *Angela Frolov v. Ghenadie Văluță*, available at http://jurisprudenta.csj.md/search_col_civil.php?id=51698.

to wear earrings in accordance with the high school's internal regulations, which included such provisions in an attempt to define the concept of decent outfit.[101] In its decision, the Council explained the importance of respecting individual identities and the mechanism that allows the limitation of rights—including the right to decide about one's own image—strictly on the basis of a test that proves the legitimacy of the objective pursued and the proportionality and appropriateness of the measures to be taken.

> *"The Council considers that the detailed regulation of the length or color of hair or the number of earrings, without taking into account the diversity of students' personalities, should be avoided because such limitations are not relevant for the general objective for which they are established. The Council considers that requirements concerning outfit and appearance should refer only to hygiene and, potentially, the affiliation to an educational institution and never to personality. If a boy has long hair, this does not mean the violation of hygiene rules. Likewise, if a student wears earrings, this is not equivalent to indecent or provocative outfit. Moreover, the Council emphasizes that the length and color of hair has nothing to do with academic performance. The Council stresses that students who choose to be different given the length of hair should not be excluded or punished, as long as they observe the rules of hygiene and are respectful toward teachers and peers. Likewise, the Council urges teachers to refrain from labeling or blaming students in public and in the presence of other students for their physical appearance because this could prompt adverse, malicious reactions from their peers.*
>
> Equality Council, decision of 19 March 2019, Case no. 23/19[102]

c. Language

According to the Council's report, discrimination based on the state language accounted for 22.5% of all decisions in which the Council found discrimination in 2019.[103] The multitude of cases may be explained by the multiethnic and multinational specificity of the Republic of Moldova and by the potential of multilingualism to be used not as cultural opportunity and advantage, but as vulnerability and opportunity for marginalizing or challenging the identity of those who are considered to be different. The cases established by the Council cover a wide range of situations, including the impossibility of members of national minorities to use Russian in courts, failure to respect national minorities' right to receive answers in the language in which they submit communication, unjustified emphasis on ethnicity in printed media, discriminatory

[101] Equality Council, decision of 19 March 2019, Case no. 23/19, available at http://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_23_2019-1.pdf.

[102] Equality Council, decision of 19 March 2019, Case no. 23/19, available at http://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_23_2019-1.pdf.

[103] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

access to information on medication package inserts, and differentiated behavior based on the lack of knowledge of the state language.

Interestingly, the Council considered that public entities' failure to ensure reasonable accommodation for linguistic needs in interactions with the public represented discrimination based on language in observing the right to answer in the language of communication[104] and recommended for example to the Mayor's Office of Chișinău to take necessary actions to ensure that all persons it interacts with enjoy the rights provided for in the law, including the right to receive answers in the language of communication.

One of the outstanding subjects remains access to courts where statements of the claim written in Russian get returned without examination because they are not in the state language. This sensitive issue has already been examined in the past,[105] but it keeps recurring and needs coordinated intervention in line with international standards and free of politicized rhetoric. The Council underlined that "out of the total complaints ascertaining discrimination based on the criteria of language, 63.6%" were cases that referred to the courts of law.[106] Considering the recurring character of these cases, it is advisable to clarify and coordinate the legal provisions concerning the use of languages in legal proceedings, to establish a joint task force with the Ministry of Justice, the SCM, the SCJ, and the Equality Council that would establish applicable procedures, the conditions when Russian is accepted in statements of claim, and the responsibilities of each individual actor. Likewise, the legal framework could be improved by the ratification of the European Charter for Regional or Minority Languages of the Council of Europe and the revision of legal provisions concerning the rights of national minorities to align the national law with the provisions of the Charter.

d. Religion

In 2019, 6.25% of all decisions in which the Council found discrimination concerned discrimination on grounds of religion or beliefs.[107] Recent cases brought before the Council and its case law show that, by preventing and fighting discrimination, the Council has become a guarantor of the neutrality of public service and of secularism. This is an important function that allows the cohabitation of persons with different religious faiths or opinions and beliefs as it fosters and maintains tolerance, so much necessary in a democracy.

[104] Equality Council, decision of 27 December 2018, Case no. 136/18, available at https://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_136_2018.pdf.

[105] LRCM – ECRI, Pavel Grecu, Nadejda Hriptievschi, Romanița Iordache, Iustina Ionescu, Sorina Macrinici, *Compatibility analysis of Moldovan legislation with the European standards on equality and nondiscrimination,* July 2015, Section 6.5.2.

[106] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

[107] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

In practice, the Council has adjudicated on the refusal to adapt the procedure for filing declarations of assets and interests in accordance with religious beliefs, the use of educational materials with indoctrinating content favoring one religion, the construction of religious buildings within the perimeter of educational institutions, and the failure to observe the neutrality of the public service and to observe the principle of secularism by installing religious symbols in the premises of public authorities.

The most notorious case in this regard was the installation of a crucifix in the premises of a public authority, which violated the principle of neutrality and secularism of public entities. On 16 December 2019, the Equality Council found that the installation of a crucifix and the speech of Minister Andrei NĂSTASE during the event constituted incitement to discrimination on grounds of beliefs and recommended to the management of the Ministry of Home Affairs to remove the religious symbols installed in the hall of the ministry in order to protect the neutrality of the public service and the principle of secularism.[108] The Rîșcani Office of the Chișinău Court of first instance annulled the Council's decision in the part concerning Andrei NĂSTASE, invoking arguments that referred to both procedural and substantive law aspects.[109] This judgment was appealed against.

The Council's role as a guarantor of secularism and laicity of the state is also highlighted in decisions concerning the content of educational materials. In a case concerning a handbook for moral and spiritual education which contained elements of religious indoctrination and favored one religion, the Council recommended to the Ministry of Education, Culture, and Research "to draw up a Methodological Guideline establishing the criteria for the assessment of the correspondence of alternative educational materials to the quality standards for the 'Moral and Spiritual Education' subject, and to the education institutes to review the auxiliary materials used by the teachers, in view of the findings and explanations submitted in the decision."[110]

A similar position of asserting the secularism of educational institutions is revealed by a case in which the Council adjudicated that building and setting up places of worship[111] as well as holding religious ceremonies inside educational institutions or within their perimeter was unacceptable.[112]

---

[108] Equality Council, decision of 16 December 2019, Case no. 184/19, available at https://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_184_2019-1.pdf.

[109] Rîșcani Office, Chișinău Court of first instance, judgment of 31 July 2020, Case no. 3-293/2020.

[110] Equality Council, decision of 29 November 2019, Case no. 172/19, available at http://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_172_2019-1.pdf.

[111] Equality Council, decision of 6 November 2019, Case no. 177/19, available at http://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_177_-2019.pdf.

[112] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

"The Council notes that public education in the Republic of Moldova is secular and therefore education should be based on the principle of freedom of thought and independence from ideologies, religious dogmas, and political doctrines. The construction of places of worship inside educational institutions or within their perimeters is not compatible with this principle and should not be admitted. Their presence could suggest the public entity's affiliation to a religion, which would violate the obligation of the state to ensure religious neutrality in public education. The Council underlines that the principle of secular education is meant to contribute to educating children without any religious influence. The Council considers that, in educating children, educational institutions should emphasize the variety of values in society, without influencing their option concerning the values they should or should not share. The Council notes that religious ceremonies in educational institutions should be prohibited. Educational institutions should pursue the goal of educating children in the spirit of pluralism and critical thinking, without imposing on them any set of values as having priority over others."

Equality Council, decision of 6 November 2019, Case no. 177/19[113]

e. Opinion

One of the criteria that was flagged as a concern right from the adoption of the law is opinion.[114] While Article 14 of the ECtHR mentions "opinions and political opinions," Law no. 121 speaks distinctly about "political affiliation" and "opinion," thus raising questions about the content of this concept when it is referred to as a criterion protected against discrimination. The annual report of the Council for 2019 shows that quite a few decisions (3.75% out of all decision issued) concerned discrimination based on this criterion. The cases brought for examination concerned especially establishing a climate of fear at work for people who had spoken out on issues they considered illegal.[115]

In practice, both the Council and the courts considered plaintiffs' allegations of differentiated treatment due to opinion sufficient, without analyzing the substance of the opinion to identify whether it was so defining for the victim's identify as to require

[113] Equality Council, decision of 6 November 2019, Case no. 177/19, available at http://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_177_-2019.pdf.

[114] LRCM – ECRI, Pavel Grecu, Nadejda Hriptievschi, Romanița Iordache, Iustina Ionescu, Sorina Macrinici, *Compatibility analysis of Moldovan legislation with the European standards on equality and nondiscrimination,* July 2015.

[115] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

legal protection.[116] The Council's case law contains, however, cases where opinion is not identified as such and it is rather replaced with other categories, such as "pacifist beliefs."[117]

The challenge for the Council consists in clearly defining and delimitating the criterion of opinion so that it could have the content suggested in the ECtHR's case law: "Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristics, or 'status', by which persons or groups of persons are distinguishable from one another."[118]

[116] Supreme Court of Justice, order of 4 of September 2019, Case no. 2ra-1509/19.

[117] Equality Council, decision of 22 November 2018, Case no. 87/18, available at https://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_87.pdf.

[118] ECtHR, judgment on *Clift v. the United Kingdom*, 13 July 2010, para. 55, available at http://hudoc.echr.coe.int/eng?i=001-99913.

4. Legal exceptions from the prohibition of discrimination

Although, as highlighted in earlier analyses,[119] additional exceptions from the prohibition of discrimination introduced in Article 1 (2) of Law no. 121 are not in line with international standards and have themselves the potential to lead to discrimination by law, in practice, the application of these provisions did not raise problems.

In its judgment on the challenge of constitutionality of Article 1 (2) (c) of Law no. 121, the CCRM found that this article should be applied to the extent that it "refers to teachings, canons, and traditions of religious faiths whose rules apply to their own worshippers and sacerdotal actions in places designated for this purpose so that they do not violate effective laws and do not affect fundamental human rights and freedoms."[120]

Balance between the Prohibition of Discrimination and Freedom of Expression

In line with applicable international standards, the legal framework of the Republic of Moldova offers solutions to situations where the prohibition of discrimination is perceived as conflicting with freedom of expression. The establishment of "a just balance between the protected interest, freedom of expression, and the public's freedom to be informed"[121] is a legal requirement. Article 3 (5) of Law no. 64 of 2010 on Freedom of Expression takes the wording used by the UN and the ECtHR, underlying that the guarantees of freedom of expression do not extend to speech that incites to hatred or violence. Article 2 of Law no. 64 defines hate speech as "any form of expression that provokes, propagates, promotes, or justifies racial hatred, xenophobia, antisemitism, or other forms of hatred based on intolerance." The legal solution stems from the need for balance between rights and implicitly from the importance of protection against discrimination when freedom

[119] LRCM – ECRI, Pavel Grecu, Nadejda Hriptievschi, Romanița Iordache, Iustina Ionescu, Sorina Macrinici, *Compatibility analysis of Moldovan legislation with the European standards on equality and nondiscrimination*, July 2015.

[120] Constitutional Court, Judgment no. 14 of 16 May 2016 on the objection of unconstitutionality concerning Article 1 (2) (c) of Law no. 121 of 25 May 2012 on Ensuring Equality, available at http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=578&l=ro.

[121] Law no. 64 of 23 April 2010 on Freedom of Expression, Article 3, available at https://www.legis.md/cautare/getResults?doc_id=83916&lang=ro.

of expression is abused and employed with the purpose or effect of affecting the right to dignity of a person or a group.

The national legal framework also uses the triple test established in the ECHR.[122] Thus, in applying Article 10 (2) of the Convention, national authorities may restrict freedom of expression when all of the following three conditions are met: the intervention (condition, restriction, or penalty) is prescribed by law; the intervention is meant to protect one or more interests or values, such as national security, territorial integrity or public safety, the protection of order, crime prevention, the protection of others' health, morality, reputation, or rights, the prevention of disclosure of confidential information, or the guarantee of the authority and impartiality of the judiciary; and the intervention is necessary in a democratic society. In its practice, the Council tried to apply this test coherently, particularly to analyze the need for restrictions on freedom of expression and the proportionality of the actions taken.

Considering that 2019 was an election year, the monitoring of printed and online media was visibly a priority for the Equality Council, which followed election candidates' compliance with equality and non-discrimination standards in the media. The Council communicated publicly about campaign speeches identified as inciting to hatred and discrimination and about behaviors generated by gender stereotypes and prejudice and, jointly with the Ombudsperson's Office and the Office for Interethnic Relations, released a statement condemning hate speech and providing recommendations for each of the actors involved.[123]

Regrettably, the courts' practice does not look just as encouraging. When courts must rule on challenges from decisions in which the Council had found incitement to discrimination or on civil cases brought directly before them, they fail to ascertain the principle that freedom of expression may not be employed to violate the rights and freedoms guaranteed under the ECHR[124] and fail to apply the test developed in the ECtHR's case law to analyze whether the finding or punishing of incitement to discrimination and discriminatory speech constitute a restriction of freedom of expression that meets the criteria described in Article 10 (2) of the ECHR. Some of the identified cases did not include even a basic analysis of the criteria: the prescription of the restriction by law, the restriction's purpose of protecting public interest described in Article 10 (2) of the ECHR, and the need for the restriction in a democratic society. For example, in a case where the Rîșcani Office of the Chișinău Court of first instance annulled

---

[122] Council of Europe, Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights, A handbook for legal practitioners*, 2017.

[123] The Ombudsperson's Office, the Council for Preventing and Eliminating Discrimination and Ensuring Equality, and the Office for Interethnic Relations, Joint statement on the conduct and coverage of the election campaign without discrimination and hate speech, 20 September 2019, available at http://egalitate.md/wp-content/uploads/2019/09/declaratie-comuna.pdf.

[124] ECtHR, Decision of 16 November 2004 on *Norwood v. the United Kingdom*,, available at http://hudoc.echr.coe.int/eng?i=001-67632; judgment on *Vejdeland and Others v. Sweden,* 9 February 2012, available at http://hudoc.echr.coe.int/eng?i=001-109046; judgment on *Beizaras and Levickas v. Lithuania,* 14 January 2020, available at http://hudoc.echr.coe.int/eng?i=001-200344.

the decision by which the Equality Council had found the periodical *Ziarul de Gardă* guilty of incitement to discrimination against Russian speakers and encouragement to discriminatory behavior, the trial court considered only procedural aspects, briefly noting in the end of the judgment that the Council had failed to consider the legality of the restriction on freedom of expression. Ironically, the court did not support this conclusion with sound arguments about the restriction of freedom of expression and about how the triple test could be applied in that case.[125]

The practice of courts indicates that freedom of expression is fetishized at the expense of other rights and that courts do not understand that, when freedom of expression encroaches on the rights of other persons, it should be considered carefully because it entails restrictions as it is not an absolute right. Moldovan courts suggest that some professional categories—such as journalists or politicians—enjoy wider freedom and protection. Unlike the ECtHR's case law however, the courts fail to consider the professional accountability of these professions. For example, in a legal action against the stigmatization of a minority religious group and on incitement to interreligious hatred taken to civil court by the religious group Biserica Unificării, which complained about incitement to discrimination on grounds of religious beliefs through a TV program on Publika TV,[126] the defendants' mere status of journalists seemed to secure them a cheque in blank, without any distinction between facts and opinions. The courts also failed to take into consideration the content of the incriminated messages, their accuracy, impact, and the context of the TV program. The mere quality of journalist was considered sufficient and replaced an assessment of the substance of the statements that had prompted the complaint: "the produced evidence shows that... on the date of the alleged incitement to religious discrimination against the plaintiffs, [the defendants] were performing their job duties, namely journalistic work... journalists' statements do not qualify as incitement to hatred and discrimination because the role of a journalist is to inform the public about less-known facts."[127]

Effectively, from the ECtHR's case law, the Chișinău Court of Appeal got hold solely of the increased guarantees for the freedom of expression for journalists, but not of the increased accountability for reporting accurate information which does not incite to discrimination.

Likewise, in annulling the Equality Council's decision that found Ilan ȘOR guilty of incitement to discrimination, the Rîșcani Office of the Chișinău Court of first instance, as trial court, focused its reasoning on the Council's failure to comply with the legal time limits and only barely skimmed over the test for the legitimacy of the limitation of freedom of expression.

---

[125] Rîșcani Office, Chișinău Court of first instance, judgment of 11 February 2020, Case no. 3-3222/2019, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/f341c540-3688-42b5-8f6d-0eb0ac5c0765.

[126] Chișinău Court of Appeal, decision of 3 July 2018, Case no. 2a-1073/18, available at https://cac.instante.justice.md/ro/pigd_integration/pdf/8263aff8-ef8b-e811-80d6-0050568b7027.

[127] Chișinău Court of Appeal, decision of 3 July 2018, Case no. 2a-1073/18, available at https://cac.instante.justice.md/ro/pigd_integration/pdf/8263aff8-ef8b-e811-80d6-0050568b7027.

The trial court argued that the allegedly discriminatory statements had been part of electoral propaganda and used this as another excuse[128] to absolve politicians, as influencers, of increased accountability: "The Council's conclusion that the plaintiff is a political/public figure and therefore others will receive and apply his message accordingly is a fallacious categorization of the defendant. Even more, it does not entail the violations found by the decision in question."[129] The courts failed to consider the role of the politicians as political figures, their visibility, and the impact of discriminatory messages on the public and ignored the core principle of the ECtHR's case law that the fight against all forms of intolerance and hate speech is an integral part of human rights protection and it was extremely important that politicians avoid comments with potential for encouraging intolerance.[130] The trial court and the cassation court[131] failed to consider and explain how the Council's recommendation for a politician "to issue a public apology, to be more aware in public statements, and to refrain from sexist and discrimination-inciting comments in the future" violated freedom of expression and could represent a disproportionate limitation of freedom of expression.

The argument that the discriminatory statements inciting to hatred and discrimination were just the expression of an opinion and did not require punishment contradicts the case law of the ECtHR, which found that an incident amounts to a violation of Articles 14 and 8 of the Convention because national authorities failed to fulfill their positive obligation to properly investigate and punish incitement to hatred and hate speech published online and degrading messages that damaged someone's dignity.[132]

---

[128] Rîșcani Office, Chișinău Court of first instance, judgment of 28 November 2019. "The article in question, used as a basis by the entity responsible for finding such infringements, does not speak about incitement in the first place, but rather expresses an opinion, making use of the right to expression, in the context of an election campaign, and electoral propaganda may include such forms of expressions. If the person this complaint refers to, namely Maia SANDU, considers that she has suffered damages because of these statements and/or that these statements have affected her dignity and/or professional reputation, she can seek appropriate remedy in law. However, these statements do not qualify as incitement to discrimination. Moreover, the decision found that this incident represented discrimination against women in politics. The article in question, however, contains absolutely nothing that would indicate that. As the complaint referred to the incident that had happened in the described context, it does not have any element of gender-based discrimination in politics."

[129] Rîșcani Office, Chișinău Court of first instance, judgment of 28 November 2019, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/261999b0-cf2c-4799-9d97-30a3beb67d8e.

[130] ECtHR, judgment in *Erbakan v. Turkey*, 6 October 2006, available at http://hudoc.echr.coe.int/eng?i=001-76232; judgment in *Leroy v. France*, 2 September 2008, available at http://hudoc.echr.coe.int/eng?i=001-88657; judgment in *Feret v. Belgium*, 16 July 2009, available at http://hudoc.echr.coe.int/eng?i=001-93626; judgment in *Vona v. Hungary*, 9 July 2013, available at http://hudoc.echr.coe.int/eng?i=001-122183.

[131] Chișinău Court of Appeal, decision of 12 February 2019, available at https://cac.instante.justice.md/ro/pigd_integration/pdf/49619f8d-d976-4a97-aa59-a03413d316ac.

[132] ECtHR, judgment in *Beizaras and Levickas v. Lithuania*, 14 January 2020, available at http://hudoc.echr.coe.int/eng?i=001-200344.

Considering the above, it is advisable to correlate the legal provisions that define and punish hate speech and incitement to hatred and discrimination and to include the definition of hate speech in Law no. 121. For consistency, Law no. 121, Law No 298, and the Contravention Code should be amended to provide for the Council's power to identify, examine, and punish cases of hate speech.[133]

[133] Council of Europe, Constantin Cojocariu, Niall Crowley, *Opinion on Draft Amendments to: Law on Ensuring Equality (Law no. 121); and Law on Activity of the Council for Prevention and Elimination of Discrimination and Ensuring Equality (Law no. 298)*, November 2019.

5. Remedies

Article 17 of Law no. 121 states that discrimination entails disciplinary, civil, contraventional, and criminal liability in line with the legal framework in force, but there is not a single specification concerning adequate, efficient, and dissuasive remedies in accordance with European directives and the CJEU's clarifications.[134] Based on Article 15 of the Racial Equality Directive, the CJEU's case law[135] articulates the connection between the finding of a violation of equal treatment and the payment of compensation or the imposition of a punishment with compensatory and deterring effect. Furthermore, the ECtHR underlined how important it is for the remedies provided in cases of rights infringed to be practicable rather than purely theoretical.[136] In light of these principles, the mechanism of remedies established by Law no. 121 is deficient because the Equality Council cannot impose penalties and the Contravention Code does not provide for sanctions in relation to some forms of discrimination.

a. Remedies Granted by the Equality Council

Under Article 15 of Law no. 121 on Ensuring Equality, after examining a complaint, the Council adopts a reasoned decision with **recommendations** aimed at restoring the victim's rights and preventing similar deeds in the future. Under para. 65 of the Equality Council's Rules of Procedure approved by Law no. 298, once final, the Council's decisions become official, enforceable acts for the subjects they refer to, and under Article 71^2 of the Contravention Code, deliberately not taking into consideration and the failure to implement the recommendations of the Council is sanctionable. What many fail to understand, however, is that recommendations are, in fact, mandatory. Because of the low visibility of the mechanism for monitoring the compliance with the Council's recommendations under Article 71^2, most practitioners interviewed consider that the Equality Council cannot issue decisions with mandatory effect and its recommendations are merely symbolic. Some of that misunderstanding is caused by terminology. Whatever the case, an efficient mechanism for implementing the Council's "recommendations" as

[134] CJEU, C-81/12, *Coman and Others v. General Immigration Inspectorate.*

[135] Case C30/19 *Diskrimineringsombudsmannen v. Braathens Regional Aviation*, Opinion of Advocate General Saugmandsgaard Øe of 14 May 2020.

[136] ECtHR, judgment in *Nardone v. Italy*, 25 November 2004, available at http://hudoc.echr.coe.int/eng?i=001-63108, and *Centro Europa 7 S.R.L. and Di Stefano v. Italy (Grand Chamber)*, 7 June 2012, available at http://hudoc.echr.coe.int/eng?i=001-111399.

direct remedy is needed in order to give them weight. Another ambiguity concerns the value of the Council's mediation carried out as part of its mandate. Under Law no. 121, discrimination offenders must inform the Council within 10 days about the measures they take to implement its recommendations, and if the Council does not agree with them, it may address a hierarchically higher body for appropriate measures and/or inform the public. These two courses of action are also hardly practicable.

In case of harassment, incitement to discrimination, failure to make reasonable accommodations in other fields than employment relations, victims cannot receive an effective remedy through the Council. Even when the Equality Council finds the existence of discriminatory deeds, its decisions are considered as mere recommendations, despite the provisions of para. 65 of the Rules of Procedure.

Based on a restrictive reading of Article 12 (1) (f) of Law no. 121 and para. 32 (a) of the Rules of Procedure of the Council for Preventing and Eliminating Discrimination and Ensuring Equality, approved by Law no. 298, which empower the Council to issue general recommendations for public authorities, some have challenged the Council's **individual recommendations** concerning established discriminatory deeds in court, arguing that they exceeded the scope of the Council's mandate. This reading overlooks the general wording of Article 15 (4), which states that the Equality Council is empowered to issue "recommendations to ensure the restoration of victims' rights and to prevent similar deeds in the future" regardless of whether offenders are individuals or legal entities and whether the recommendations are individual or general. Therefore, it is not clear why some courts concluded that some recommendations of the Council were not legal, just because they did not prescribe punitive measures and addressed identified situations in a concrete way in order to prevent similar situations in the future (for example: "the defendant shall stop acting intimidatingly toward the complainant and shall apologize at a meeting of the department" or "the defendant shall inform the Council about the actions that they took or will take to implement the Council's recommendations within 10 calendar days of receiving this decision").[137] Unfortunately, ambiguity about the value and role of the Council's recommendations issued as part of its mandate also appears in some court judgments. For example, in its reasoning concerning the case of Andrei NĂSTASE and the Ministry of Internal Affairs, the Rîșcani Court of first instance wrongly interprets one of the Equality Council's recommendation as optional and *ultra vires* and applies an extremely narrow reading of the concept of apology.[138]

„Under Article 15 (4) of the Law on Ensuring Equality, to ensure the restoration of the rights of the victim of discrimination and to prevent similar deeds in the future, the Council may recommend—but never impose by force—a certain behavior. Otherwise, it risks acting ultra

[137] Rîșcani Office, Chișinău Court of first instance, judgment of 17 October 2019, Case no. 3-1048/2019.

[138] Rîșcani Office, Chișinău Court of first instance, judgment of 31 July 2020, Case no. 3-293/2020, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/ab637c78-739e-471a-9654-cf33acea9637.

vires. *Moreover, in line with Article 1 of the Law on Freedom of Expression, the concept of apology is defined as a statement by which someone expresses their regret for an offence or information about the private or family life, as the case may be. However, in the case in question, the plaintiff has never made such statements.*

Rîșcani Office, Chișinău Court of first instance, judgment of 31 July 2020, Case no. 3-293/2020[139]

Article 15 (8) also describes the procedure for more serious cases, when the Council finds elements of a contravention in the deeds described in a complaint and remits the **notice of contravention** and the case file to competent authorities for the examination of the merits. This detour duplicates litigation and wastes time in situations where finding discrimination and obtaining efficient remedies in short time is of the essence to redress victims' situations and to educate and deter offenders. The Council's mandate is limited and requires the additional step of appearing before court, including in cases where the Equality Council's work is not observed as provided for in Article 71^2.

Law no. 121 states that, when the examined actions contain elements of a crime, the Council must send the materials to prosecution authorities immediately. However, no such procedure was put in place so far.[140]

It is commendable that the Council can, and is ready to, extrapolate from individual cases and identify systemic approaches to prevent similar situations of discrimination by issuing **general recommendations** that can foster the dialogue with responsible authorities. An example of such a facilitation of dialogue and education of authorities to prevent the risk of discrimination in the future was the rewording of the provisions of the Internal Regulations of the public institution Vasile Alecsandri Theoretical High School that detailed the concept of decent outfit, after the Council found that the original wording constituted gender-based discrimination.[141] In that case, the Council recommended to the Ministry of Education, Culture, and Research to revise the framework regulation on the organization and functioning of primary and secondary education institutions to explain the concept of decent outfit.

The analysis of the **implementation of the recommendations** issued by the Council in 2018 and 2019 shows that, from 2018, the Council issued 84 decisions finding discrimination and issued 110 recommendations based on them.[142] 72.8% of

[139] Rîșcani Office, Chișinău Court of first instance, judgment of 31 July 2020, Case no. 3-293/2020, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/ab637c78-739e-471a-9654-cf33acea9637.

[140] See the discussion in Chapter 1, Section c.

[141] Equality Council, decision of 19 March 2019, Case no. 23/19, available at http://egalitate.md/wp-content/uploads/2016/04/Decizie_constatare_23_2019-1.pdf.

[142] Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO. Of those 110 recommendations: 10 concerned education; 8, justice; 6, breach of dignity; 45,

all recommendations were general. The Council considered that their implementation could bring up improvements in terms of equality for a group of persons. Another 27.2% were individual recommendations and were meant to redress the individual situations of victims of discrimination. According to the annual activity report of the Council 40.9% of the recommendations were implemented, 46.5% are under ongoing monitoring as recommendations on due diligence to prevent similar deeds in the future, and 12.5% were not implemented.[143] The Council's recommendations issued in 2019 follow a similar pattern. To be specific, in 2019, the Council issued 122 recommendations,[144] 66.3% of which were general and 33.7%, individual. The Council's annual report notes that "out of the total recommendations submitted, 24 were challenged in the court of law" and "30.6% were implemented, 11.2% have not been implemented, and 57.1% are being monitored, given the fact that the process was recently initiated or that the term granted for implementation has been extended."[145]

Focusing on unimplemented decisions, the Council notes in its report that, in 2019, 52% of them concerned the failure of central public authorities to amend the legal framework to bring it in line with non-discrimination standards, and 14% concerned local public authorities' failure to implement individual recommendations. The Council notes that the other category of defaulters on the Council's recommendations—making up 14% of the total—is composed of public persons, who should have offered public apologies for their discriminatory behavior and/or statements.

In conclusion, the powers of the Equality Council should be reviewed to improve the efficiency and efficacy of its remedies by revising Law no. 121/2012 on Ensuring Equality, Law no. 298/2012 on the work of the Council for Preventing and Eliminating Discrimination and Ensuring Equality, and the Contravention Code where they refer to the establishment of punishment and the adoption of remedial measures by the Council, their immediate enforcement, and additional procedures.

employment relations; 38, access to public goods and services; and 3, other topics that do not fall under any of the previous categories.

143 Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

144 Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO. The 122 recommendations issued in 2019 concerned the following topics: 40, access to public goods and services; 29, breach of dignity; 24, education; 21, employment relations; and 7, justice.

145 Equality Council, *General Report on the Situation in the Area of Prevention and Fight against Discrimination in the Republic of Moldova for 2019*, Chișinău, April 2020, available at http://parlament.md/LinkClick.aspx?fileticket=r0HeiZ%2bfK%2fw%3d&tabid=202&language=ro-RO.

b. Remedies Granted by Courts

The possible remedies provided for in Article 18 (1) of Law no. 121 include: a) the finding of the infringement of rights; b) the prohibition of further infringement of rights; c) the restoration of the situation that existed before the infringement of rights; d) the reparation of inflicted material and moral damages and the reimbursement of court costs; e) the invalidation of the act that led to discrimination. The law does not provide expressly for injunctions issued by the courts to stop the perpetuation of discrimination against victims where there is such risk, but Article 16 of the Civil Code of the Republic of Moldova presents a variety of methods to defend civil rights that courts can proactively adopt to redress the balance affected by discrimination.

It is worth noting that court remedies should be adequate, proportional, and dissuasive and should deter similar behaviors in the future and have an educational role. Therefore, it is important that courts establish remedies in accordance with the specific circumstances of each case, and it is recommended that the provisions of the antidiscrimination law be correlated and complemented with other relevant legal provisions.

The tension in applying adequate remedies is illustrated by a case of incitement to discrimination against children with mental and motor disabilities by promoting the idea of social segregation of children with disabilities in an article published by the magazine *Făclia*.[146] In that case, after finding discrimination, the Centru Office of the Chișinău Court of first instance ordered the removal of the issue of *Făclia* that contained the discriminatory article from all libraries and educational institutions of the Republic of Moldova and from the media, including from the website of the author of the article. However, the trial court dismissed the plaintiff association's request to have the defendants publish public apologies in the same media outlets that had been used to publish the discriminatory article as unfounded.[147] Later, the trial court's reasoning that cited the lack of express provisions concerning this remedy in Article 18 of Law no. 121 was challenged. The Chișinău Court of Appeal refuted this reasoning and noted that the possibility to order public apologies is provided for in Article 7 (1) and (7) of Law no. 64 on Freedom of Expression, thus complementing the pool of remedies provided for in Law no. 121 with the ordering of public apologies—a measure with great educational and remedial impact.[148] As justly noted by the Chișinău Court of Appeal, the restoration of the situation that existed before the infringement of rights is possible in many ways, including by "offering public

[146] Centru Office, Chișinău Court of first instance, judgment of 22 March 2017, Case no. 2a-1972/2017, *A.O. Center for Legal Assistance for People with Disabilities v. the Weekly Făclia and Vitalie Pastuh-Cubolteanu*. Chișinău Court of Appeal, decision, Case no. 2a-1972/2017, *A.O. Center for Legal Assistance for People with Disabilities v. the Weekly Făclia and Vitalie Pastuh-Cubolteanu*.

[147] Centru Office, Chișinău Court of first instance, judgment of 22 March 2017, Case no. 2a-1972/2017, *A.O. Center for Legal Assistance for People with Disabilities v. the Weekly Făclia and Vitalie Pastuh-Cubolteanu*.

[148] Chișinău Court of Appeal, decision, Case no. 2a-1972/2017, *A.O. Center for Legal Assistance for People with Disabilities v. the Weekly Făclia and Vitalie Pastuh-Cubolteanu*.

apology in the same media outlets."[149] The practice in this field is not consistent yet. For example, in the case of the crucifix Andrei NĂSTASE installed in the premises of the Ministry, the Rîșcani Court of first instance refused the idea that a public apology could serve as a remedy against established discriminatory deeds.[150]

The restoration of the situation that existed before the infringement of rights is possible in many ways, including by offering a public apology in the same media outlets... Once the perpetrator apologizes in the same media outlet that was used to discriminate a person, the public opinion and the victim's feelings change for the better.

Chișinău Court of Appeal, decision, Case no. 2a-1972/2017, A.O. Center for Legal Assistance for People with Disabilities v. the Weekly Făclia and Vitalie Pastuh-Cubolteanu

The most positive sign coming from courts is the undertaking of their role in establishing remedies that have impact in each case and on society. In this respect, it is commendable how the Ciocana Office of the Chișinău Court of first instance—alerted by the Equality Council about a case of discrimination based on gender and marital status accompanied by abuse in office—established the severity of the identified facts, taking into account the offender's position, and imposed sanctions proportionally to the severity of the deeds, including a six-month ban on holding public offices at the General Police Inspectorate of the Republic of Moldova or its subdivisions.[151]

"...the court considers it is reasonable that the defendant receives a contraventional sanction in accordance with the contraventions perpetrated and their severity, in the form of a penalty whose amount shall correspond to the punishment prescribed in the applicable substantive rule of the contravention law, accompanying it by a complementary ban on holding other offices. The sanction of banning a certain activity consists in the temporary prohibition for an individual to perform a certain activity and may be imposed if the activity was a contravention or if the contravention consisted in the violation of the rules for performing this activity, which applies to this contraventional case. In establishing the punishment to be imposed, the court will take into account the nature and degree of harm inflicted by the contravention perpetrated, the offender, the mitigating or aggravating circumstances, and the fact that the contraventional punishment is a state-imposed constraint and a way of correcting and reeducating the offender, which courts must impose on offenders in the name of the law,

[149] Chișinău Court of Appeal, decision, Case no. 2a-1972/2017, *A.O. Center for Legal Assistance for People with Disabilities v. the Weekly Făclia and Vitalie Pastuh-Cubolteanu*.

[150] Rîșcani Office, Chișinău Court of first instance, judgment of 31 July 2020, Case no. 3-293/2020, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/ab637c78-739e-471a-9654-cf33acea9637.

[151] Ciocana Office, Chișinău Court of first instance, judgment of 20 November 2019, Case no. 4-518/19, available at https://jc.instante.justice.md/ro/pigd_integration/pdf/3978c91d-81c2-4e43-92a5-749cb1d0d05b.

forfeiting and restricting some of their rights. Moreover, the punishment is intended to redress social justice, to correct the offender, and to prevent the perpetration of new contraventions by the offender and other individuals."
Ciocana Office, Chișinău Court of first instance, judgment of 20 November 2019, Case no. 4-518/19

In conclusion, the Equality Council's mandate to apply penalties is extremely limited, any potential penalty requiring a detour through administrative court. The Council's recommendations are still perceived as purely symbolic and lacking any direct enforcement and monitoring mechanism. Some types of discrimination described in Law no. 121 do not have any punishment provided for in the Contravention Code, and courts interpret the remedies they may impose restrictively.

Regrettably, some courts do not understand that the law provides for a range of remedies and that it is interested parties, not courts, who may decide on the preferred remedy in law and the form of liability that would satisfy their interest where discrimination is found.

The law enforcement mechanism is incomplete, fragmented, incoherent, and cumbersome, which makes it inefficient. This inefficiency has already been noticed in prior independent legal analyses and requires the adoption of legal amendments, methodologies, and internal procedures and the organization of professional training events for Council members and judges to ensure that the remedies provided in cases of discrimination are real, efficient, and proportional to the negative impact of discrimination.

Legal Resources Center from Moldova (LRCM) is a nonprofit organization that contributes to strengthening democracy and the rule of law in the Republic of Moldova with emphasis on justice and human rights. Our work includes research and advocacy. We are independent and politically non-affiliated.

Legal Resources Centre from Moldova

A. Șciusev street, 33, MD-2001 Chișinău,
Republic of Moldova
+373 22 843601
+373 22 843602
contact@crjm.org
www.crjm.org
CRJM.org
CRJMoldova
CRJM