

### **3. THE LEGAL AND POLICY FRAMEWORK RELATED TO EQUALITY**

This chapter of the report examines the legal and policy framework related to equality in the Republic of Moldova (Moldova). It examines both Moldova's international legal obligations and the domestic legal and policy framework which protects the rights to equality and non-discrimination. In respect of domestic law, it examines the Constitution, specific anti-discrimination laws, and non-discrimination provisions in other areas of law. It also examines government policies which have an impact on inequality, before turning to an assessment of the enforcement and implementation of existing laws and policies aimed at ensuring equality, including an examination of the most significant specialised body whose functions are related to equality, the Council on the Prevention and Elimination of Discrimination and Ensuring Equality. Finally, this chapter reviews existing judicial practice related to discrimination. In order to assess the full picture of the Moldovan legal and policy framework as it relates to equality, this part should be read together with, and in the context of, the previous part, which contains an appraisal of laws that discriminate overtly or are subject to discriminatory application.

#### **3.1 International and Regional Law**

Moldova has signed and ratified (or acceded to) a number of international treaties since its independence in 1991. Through these ratifications, Moldova has committed to respect, protect and fulfil the rights contained in these instruments, and to be bound by the legal obligations contained therein.

##### **3.1.1 Major United Nations Treaties Related to Equality**

Moldova has a mixed record of participation in the UN human rights treaty system. While it has ratified seven of the nine core UN human rights treaties, State Party Reports are often delivered late,<sup>1</sup> while a report to the Committee against Torture (CAT) is currently outstanding. The UN human rights treaties that Moldova has ratified are: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimina-

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1 State Party Reports have been submitted late to the HRC, CRC, CEDAW, CERD, CESCR and CRPD.

tion of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of Persons with Disabilities (CRPD); and the Convention on the Rights of the Child (CRC).

Individual complaints may be made to several Treaty Bodies; specifically, the Human Rights Committee under the first Optional Protocol to the ICCPR; the Committee on the Elimination of Racial Discrimination under Article 14 of the ICERD; the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the CEDAW; and the Committee against torture under the Optional Protocol to the CAT.

<b>Instruments Relevant to Equality<sup>524</sup></b>	<b>Signed</b>	<b>Ratified/Acceded Succeeded</b>
International Covenant on Civil and Political Rights (1966)	n/a	26 January 1993 (Acceded)
Optional Protocol to the International Covenant on Civil and Political Rights (1966)	16 September 2005	23 January 2008 (Ratified)
Second Optional Protocol to the International Covenant on Civil and Political Rights (1989)	n/a	20 September 2006 (Acceded)
International Covenant on Economic, Social and Cultural Rights (1966)	n/a	26 January 1993 (Acceded)
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008)	n/a	No
Convention on the Elimination of All Forms of Racial Discrimination (1965)	n/a	26 January 1993 (Acceded)
Declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (allowing individual complaints)	n/a	8 May 2013
Convention on the Elimination of All Forms of Discrimination against Women (1979)	n/a	1 July 1994 (Acceded)
Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (1999)	n/a	28 February 2006 (Acceded)

2 Excluding acceptance of communication procedures. Where a cell is highlighted in grey, Moldova has submitted a declaration or reservation to the relevant treaty.

Instruments Relevant to Equality	Signed	Ratified/Acceeded Succeeded
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	n/a	28 November 1995 (Acceded)
Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2002)	16 September 2005	24 July 2006 (Ratified)
Convention on the Rights of Persons with Disabilities (2006)	30 March 2007	21 September 2010 (Ratified)
Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)	No	No
Convention on the Rights of the Child (1989)	n/a	26 January 1993 (Acceded)
Optional Protocol I to the Convention on the Rights of the Child (2000) (involvement of children in armed conflict)	8 February 2002	7 April 2004 (Ratified)
Optional Protocol II to the Convention on the Rights of the Child (2000) (sale of children, child prostitution and child pornography)	8 February 2002	12 April 2007
Optional Protocol III to the Convention on the Rights of the Child (2011) (communicative procedure)	No	No
Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	No	No
International Convention for the Protection of All Persons from Enforced Disappearances (2006)	6 February 2007	No

During its most recent performance at the Universal Periodic Review (UPR), Moldova committed to study the implications of ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), as well as the Optional Protocols to the ICESCR, the International Convention for the Protection of All Persons from Enforced Disappearances (CED), CMW and CRPD. However, to date, no progress has been made.<sup>3</sup>

<sup>3</sup> Human Rights Council, Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review: Moldova, Addendum*, UN Doc. A/HRC/19/18/Add.1, 2012, Para 3.

Likewise, despite Moldova's commitment to ratify CED at the UPR, this has not yet happened.<sup>4</sup>

Moldova has made declarations to the first and second Optional Protocols to the ICCPR and the second Optional Protocol to the CRC (on the sale of children, child prostitution and child pornography). These declarations limit the territorial application of the Protocols in the Transnistrian region of Moldova. The European Court of Human Rights has determined that Moldova owes a positive obligation to secure the rights of those persons within its jurisdiction, including nationals in the Transnistrian region.<sup>5</sup> It follows that the denial of rights contained within the protocols to those individuals contravenes both the object and the purpose of the protocols and could amount to a violation of Article 1 of the European Convention on Human Rights (ECHR).

### 3.1.2 Other Treaties Related to Equality

Moldova has a good record in relation to other international treaties which have a bearing on the enjoyment by all of the rights to equality and non-discrimination. Moldova ratified the 1951 Convention Relating to the Status of Refugees in 2002. Moldova has also ratified the key Conventions relating to statelessness: the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

In the field of labour standards, Moldova has ratified all eight of the fundamental International Labour Organisation (ILO) Conventions including the Equal Remuneration Convention and the Discrimination (Employment and Occupation) Convention. In the field of education, Moldova has ratified the 1960 UNESCO Convention against Discrimination in Education.

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4 Human Rights Council, Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review: Moldova*, UN Doc. A/HRC/19/18, 2011, Para 75.1.

5 *Ilașcu and Others v Moldova and Russia*, European Court of Human Rights, Application No. 48787/99, 8 July 2004, Para 335.

<b>Instruments Relevant to Equality</b>	<b>Signed</b>	<b>Ratified/Acceeded Succeeded</b>
Convention relating to the Status of Refugees (1951)	n/a	31 January 2002 (Acceeded)
Convention relating to the Status of Stateless Persons (1954)	n/a	19 April 2012 (Acceeded)
Convention on the Reduction of Statelessness (1961)	n/a	19 April 2012 (Acceeded)
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)	n/a	No
UN Convention against Transnational Organised Crime (2000)	14 December 2000	16 September 2005 (Ratified)
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)	14 December 2000	16 September 2005 (Ratified)
Rome Statute of the International Criminal Court (1998)	8 September 2000	12 October 2010 (Ratified)
UNESCO Convention against Discrimination in Education (1960)	n/a	17 March 1993 (Succeeded)
Forced Labour Convention (1930) (ILO Convention No. 29)	n/a	23 March 2000 (Ratified)
Equal Remuneration Convention (1951) (ILO Convention No. 100)	n/a	23 March 2000 (Ratified)
Discrimination (Employment and Occupation) Convention (1958) (ILO Convention No. 111)	n/a	12 Augusts 1996 (Ratified)
Worst Forms of Child Labour Convention (1999) (ILO Convention No. 182)	n/a	14 June 2002 (Ratified)
Indigenous and Tribal Peoples Convention (1989) (ILO Convention No. 169)	n/a	No

Moldova has made reservations to the UN Convention against Transnational Organised Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, stating that until full territorial integrity has been established, the provisions of the Convention and Protocol will only be applied on territory controlled by State authorities.

### 3.1.3 Regional Human Rights Treaties (Council of Europe)

Moldova has ratified several European treaties which have a bearing on the rights to equality and non-discrimination. In particular, Moldova ratified the European Convention on Human Rights in 1997.

Instruments Relevant to Equality	Signed	Ratified/Acceded Succeeded
European Convention on Human Rights (1950)	13 July 1995	12 September 1997
Protocol No. 12 to the European Convention on Human Rights (2000)	4 November 2000	No
European Social Charter (revised) (1996)	3 November 1998	8 November 2001
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)	2 May 1996	2 October 1997
European Charter for Regional or Minority Languages (1992)	11 July 2002	No
Framework Convention for the Protection of National Minorities (1995)	13 July 1995	20 November 1996
European Convention on Nationality (1997)	3 November 1998	30 November 1999
Convention on Action against Trafficking in Human Beings (2005)	16 May 2005	19 May 2006
Convention on Preventing and Combating Violence against Women and Domestic Violence (2011)	No	No

As with other international instruments, Moldova has made several declarations restricting the application of rights to the Transnistrian region.<sup>6</sup> In its instrument of ratification to the European Convention, Moldova declared:

*The Republic of Moldova (...) will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs*

<sup>6</sup> See, for example, the Convention on Action against Trafficking in Human Beings, C.E.T.S. No. 197, 2005.

*of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the conflict in the region is finally settled.*<sup>7</sup>

However, the European Court of Human Rights has held that this declaration is not valid within the meaning of Article 57 of the Convention.<sup>8</sup> Even “in the absence of effective control over the Transnistrian region”, Moldova has a positive obligation “to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.”<sup>9</sup> The Moldovan Government should therefore review its commitment to apply international human rights instruments only in territory controlled effectively by the authorities of Moldova.

In addition, Moldova has not yet ratified Protocol 12 to the ECHR, which provides a freestanding right to non-discrimination, despite recommendations from the Council of Europe.<sup>10</sup> Similarly, Moldova has not ratified the European Charter for Regional or Minority Languages. In March 2016, the Parliamentary Assembly of the Council of Europe urged Moldova to ratify the Charter.<sup>11</sup>

### 3.1.4 Treaties Not Ratified by Moldova

While the few treaties which have not been ratified by Moldova do not bind the state they, together with comments of their respective treaty bodies, do have an important interpretative function when determining the obligations

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7 Decision approving Ratification of the Convention on Human Rights and Fundamental Freedoms (Parliament Decision No. 1298-XIII of 24 July 1997), Para 1, available at: [www.lhr.md/docs/hot.parl.1298.doc](http://www.lhr.md/docs/hot.parl.1298.doc).

8 See above, note 5, Para. 324.

9 Ibid., Para 331. This finding has been reaffirmed in recent case law. See *Catan and Others v Moldova and Russia*, European Court of Human Rights, Application Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012, Para. Para 110; and *Mozer v Republic of Moldova and Russia*, European Court of Human Rights, Application No. 11138/10, 23 February 2016, Para 100.

10 European Commission against Racism and Intolerance, *ECRI Report on the Republic of Moldova (Fourth Monitoring Cycle)*, 2013, p. 8, available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Moldova/MDA-CbC-IV-2013-038-ENG.pdf>.

11 Parliamentary Assembly of the Council of Europe, *Application of the European Charter for Regional or Minority Languages: Biennial Report by the Secretary General of the Council of Europe to the Parliamentary Assembly*, 2016, p. 7, available at: [https://www.coe.int/t/dg4/education/minlang/sgreports/SGreport2015\\_en.pdf](https://www.coe.int/t/dg4/education/minlang/sgreports/SGreport2015_en.pdf).

of Moldova. They should be used to elucidate: (i) Moldova's obligations under the treaties to which it is a party, to the extent that the treaties to which it is not a party can explain concepts which are also found in those treaties to which it is a party; (ii) the content of the right to equality and non-discrimination for persons covered by the ratified treaties who are vulnerable to multiple discrimination on grounds which include those protected by other treaties or in areas of life covered by other treaties; and (iii) Moldova's obligations under customary international law.

### 3.1.5 Customary International Law

Under international law, binding legal obligations on states derive from customary international law as well as from treaty law. Customary international law is deduced over time from the practice and behaviour of states.<sup>12</sup> Customary international laws are particularly significant when they reach a level at which certain norms known as peremptory norms are binding on all states and from which there can be no derogations.<sup>13</sup> It is largely accepted that the prohibition of racial discrimination is a peremptory norm of international customary law.<sup>14</sup> In addition, it can be said that the prohibition of discrimination on other grounds, such as gender and religion, may now be part of customary international law, although not yet reaching the status of a peremptory norm.<sup>15</sup> Some argue, and it has been stated by the Inter-American Court of Human Rights, that the broader principle of non-

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12 Shaw, M., *International Law*, Fifth edition, Cambridge University Press, 2003, p. 69.

13 Para 153; Parker, K. And Neylon, L. B., "Jus Cogens: Compelling the Law of Human Rights", *Hastings International and Comparative Law Review*, Vol. 12, 1988–1989, p. 417. See also Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 1969, Article 53.

14 De Schutter, O., *International Human Rights Law: Cases, Materials, Commentary*, Cambridge University Press, 2010, pp. 64–68 and the materials referred to therein; Pellett, A., "Comments in Response to Christine Chinkin and in Defense of Jus Cogens as the Best Bastion against the Excesses of Fragmentation", *Finnish Yearbook of International Law*, Vol. 17, 2006, p. 85; cf Shaw, M., *International Law*, Sixth edition, Cambridge University Press, 2008, p. 287, who refers to it as part of customary international law, with no reference to it being a peremptory norm.

15 *Ibid.*, Shaw, p. 287; *Ibid.*, Pellett, p. 85; and Cassel, D., "Equal Labor Rights for Undocumented Migrant Workers", in Bayefsky, A. (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton*, Martius Nijhoff Publishers, 2006, pp. 511–512.



discrimination is a peremptory norm of customary international law<sup>16</sup> but this is subject to debate.<sup>17</sup> Accordingly, it is clear that, as a matter of customary international law, Moldova cannot derogate from the obligation to protect, respect and fulfil the right to be free from racial discrimination; it is obliged to protect, respect and fulfil the right to be free from gender and religious discrimination; and it is arguably obliged to protect, respect and fulfil the right to be free from discrimination on other grounds.

### 3.1.6 Status of International Obligations in National Law

While Moldova's Constitution does not expressly state that international treaties to which it is a party automatically form part of domestic legislation, the provisions discussed below establish that international treaties are privileged over domestic legislation, even in the absence of statutes formally incorporating such treaties into national law.

The commitment of Moldova to abide by international law is introduced in Article 8(1) of the Constitution. While framed in broad terms, there is no jurisprudence suggesting that the undertaking is merely aspirational. Article 8(1) provides:

*The Republic of Moldova pledges to observe the Charter of the United Nations Organisation and the treaties to which it is a party, to institute relationships with other states on the basis of unanimously recognized principles and norms of the international law.*

The relationship between the Constitution and international treaties is addressed in Article 8(2), which provides that “[t]he coming into force of an international treaty containing provisions contrary to the Constitution shall be preceded by a revision of the latter.” At least theoretically, therefore, a ratified treaty

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16 *Juridical Condition and Rights of Undocumented Migrants*, Inter-American Court of Human Rights, Advisory Opinion OC-18/03, No. 18, 17 September 2003, p. 23. See also, by way of example, Martin, F.F. and others, *International Human Rights and Humanitarian Law: Cases, Treaties and Analysis*, Cambridge University Press, 2006, pp. 34–35.

17 See Bianchi, A., “Human Rights and the Magic of Jus Cogens”, *The European Journal of International Law*, Vol. 19, 2008, p. 506; see Cassel, above, note 15, pp. 511–512; see Pellett, above, note 14, p. 85.

cannot come into force until inconsistent provisions of the Constitution have been amended accordingly. However, there are no examples of constitutional revisions having been effected in order to ensure the entry into force of an international treaty. Further, in the absence of a decision of the Constitutional Court, it is difficult to determine whether any Constitutional provisions would be read as incompatible with any treaty provisions. As such, it may be that the obligation in Article 8(2) is a superficial one, consisting in the government refraining from ratifying treaties which are obviously inconsistent with the Constitution.

Article 4(1) of the Constitution states that “constitutional provisions on human rights and freedoms shall be interpreted and enforced in accordance with the Universal Declaration of Human Rights, other conventions and treaties to which the Republic of Moldova is a party”. Of course, if such provisions are clearly incompatible with an international treaty then pursuant to Article 8(2) of the Constitution the treaty should not have entered into force. The effect of Article 4(1) is to ensure that at a general level, the Constitution is interpreted in the spirit of the UDHR and that more specifically, to the extent that the language permits it, constitutional provisions are interpreted in accordance with international treaties, such that the question of inconsistency and its consequences is avoided.

The supremacy of international human rights law over domestic law is effected in Article 4(2), which provides that: “[w]herever disagreements appear between the conventions and treaties on fundamental human rights to which the Republic of Moldova is a party and its domestic laws, priority shall be given to international regulations.” The Constitutional Court has recognised that the provisions of the ECHR must be enforced in the same manner as national legislation and prevail to the extent of any inconsistency with domestic law.<sup>18</sup> In accordance with Article 4(2) of the Constitution, provisions of other international human rights treaties to which Moldova is a party enjoy a similar status.

The status of domestic law that is inconsistent with international treaties that do not concern human rights is unclear. If Moldova’s pledge in Article 8(1) of the Constitution establishes a binding obligation on the legislature not to deviate from international law then it may render inconsistent domestic legislation invalid – however, there has been no jurisprudence to this

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18 Constitutional Court, Decision No. 55 of 14 October 1999.

effect. In any case, the national laws considered in this report concern discrimination, and are considered from the perspective of the unified human rights framework so Article 4(2) applies to the interpretation of the laws which are discussed herein.

## 3.2 National Law

In addition to a certain degree of protection from discrimination in the Constitution, Moldova has comprehensive anti-discrimination legislation, two further pieces of legislation which specifically seek to tackle inequality on the basis of gender and disability respectively, and a variety of standalone non-discrimination provisions within pieces of legislation regulating various fields of activity. This section contains an analysis of constitutional and legislative provisions both in terms of their substance and their impact in practice.

### 3.2.1 The Constitution

The Constitution of the Republic of Moldova was adopted on 29 July 1994 and entered into force on 27 August 1994.<sup>19</sup>

Title 1 of the Constitution establishes the general principles in pursuance of which the Constitution was drafted. One of these general principles, as set out in Article 1(3), is that:

*The Republic of Moldova is democratic and governed by the rule of law, in which human dignity, his/her [sic] rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed.*

The substantive text of the Constitution contains a number of provisions regarding the right to equality and non-discrimination. Article 16, headed “Equality”, provides in its first paragraph that “[t]he foremost duty of the

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<sup>19</sup> Between Moldova’s independence from the Soviet Union in 1991 and the introduction of the current Constitution, the Constitution of the Moldavian Soviet Socialist Republic, adopted in 1978, remained its governing statute.

State shall be the respect and protection of the human person.” This provision imposes both a positive and a negative duty on the government, such that it is both prohibited from taking actions which might infringe a person’s right to equality and required to take action to prevent those within its jurisdiction facing inequality or discrimination.

The right to equality itself is conferred in Article 16(2):

*All citizens of the Republic of Moldova shall be equal before the law and public authorities, regardless of the race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, property or social origin.*

The Constitutional Court has considered the scope of Article 16 in several cases.<sup>20</sup> In a recent case about whether differential insurance payments between lawyers, notaries and bailiffs was unconstitutional, the applicant argued that Article 16 includes both the right to non-discrimination and the right to equality. In its judgment, the Court did not differentiate between these two principles, stating that:

*[T]he violation of the principle of equality and non-discrimination occurs when a treatment is applied differently in cases equal, without any objective and reasonable motivation, or there is a disproportion between the aims and means used.<sup>21</sup>*

However, on no occasion has the Court provided a comprehensive analysis of the full extent of Article 16 and its above comment did not amount to a statement that this was the only circumstance in which Article 16 would apply. It would be problematic if the Court were to hold that Article 16 only imports a right to non-discrimination: as is shown in Part 1 of this report, the right to

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20 In 2014 it ruled that the Article protects the right of persons deprived of legal capacity to petition the Ombudsman: Constitutional Court, Decision No. 42 of 8 June 2014. In 2015 it held that certain age limits as to eligibility for doctoral studies infringed Article 16: Constitutional Court, Decision No. 14 of 15 June 2015, available at: <http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=540&l=ro>.

21 Constitutional Court, Decision No. 16 of 12 June 2007.

equality is wider than that of non-discrimination, encompassing as it does equal enjoyment of all human rights as well as equal protection of law.<sup>22</sup> Nevertheless, in the absence of any judgment construing Article 16 in its entirety, it is unclear whether the provision would be interpreted in line with international law and best practice.

The list of protected characteristics in Article 16(2) is shorter than lists found in international instruments to which Moldova is a party. For example, Article 14 of the ECHR prohibits discrimination on grounds of colour and language. Further, the list of protected grounds in Article 14 of the ECHR includes the words “or other status” and is thus open-ended; Article 2(1) of the ICCPR is similarly framed.<sup>23</sup> The protected characteristics in Article 16(2) of the Constitution, in contrast, are exhaustive, making it difficult to apply the protection to persons marginalised because of characteristics not considered at the time of drafting. Additional criteria omitted from Article 16(2) include place of domicile, disability status, sexual orientation, HIV/AIDS status and gender identity.<sup>24</sup>

The text of the Constitution does not make clear whether the effect of Article 16 is that all rights must be afforded without discrimination on the protected grounds, regardless of their source, or whether only those rights conferred in the Constitution itself must be granted without discrimination. The Constitutional Court of Moldova has found that Article 16 only concerns the application of rights found elsewhere in the Constitution, stating that:

*Article 16 (...) supplements other substantial provisions of the Constitution and does not exist independently, being applicable only in relation with the en-*

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22 The content of the right to equality is set out in Part 1 of this report.

23 Article 2(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that rights are to be provided “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

24 See, for example: United Nations General Assembly, *Declaration of Commitment on HIV/AIDS*, G.A. Res S-26/2, 27 June 2001; Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S. 3, 2006, Article 1; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, 1965, Article 1; Convention for the Protection of Human Rights and Fundamental Freedoms, C.E.T.S. No. 005, 1950 (European Convention on Human Rights), Article 14.

*joyment of rights and freedoms guaranteed by the constitutional provisions. Consequently, Article 16 shall be combined with another constitutional Article that guarantees a right.*<sup>25</sup>

Article 16 is also problematic in that it expressly applies only to “citizens of the Republic of Moldova”, and not to stateless persons or foreign citizens. Refusal to afford protection from discrimination to non-citizens is at odds with international treaties to which Moldova is a party. For example, Article 5 of the ECHR affords the right to liberty and security to “everyone” and Article 1 of UDHR provides that “[a]ll human beings are born free and equal.” Article 26 of the ICCPR provides that “all persons are equal before the law” and that the law should guarantee “to all persons equal and effective protection against discrimination”. Article 5 of CERD similarly requires state parties to guarantee “the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law”.

Article 19 of the Constitution provides that foreign citizens enjoy “similar” rights to Moldovan citizens unless an exception is provided by law. The legislature has enacted several statutes conferring rights on citizens only: for example, the Electoral Code of the Republic of Moldova (No. 1381-XIII of 21 November 1997) excludes non-citizens from voting. This appears to be in compliance with Article 19 of the constitution. In a 1996 case, the Constitutional Court held that the constitutional right to equality was not absolute and therefore non-citizens could be limited in their rights under domestic legislation.<sup>26</sup>

The following table shows whether a constitutional right is enjoyed by all or just citizens.

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25 Constitutional Court, Decision No. 14 of 8 October 2013, available at: <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=350284>.

26 Constitutional Court, Decision No. 168 of 21 February 1996.

## Constitutional Rights and Rights Holders in the Constitution of Moldova

Article	Right	Right-Holders
16	The right to equality before the law (...)	Citizens
20	Access to justice	Everyone
21	Presumption of innocence	Everyone
23	The right to know their rights and duties	Everyone
24	The right to life and physical integrity	Everyone
25	The right to freedom and personal security	Everyone
26	The right to defence	Everyone
27	Freedom of movement	Citizens
28	The right to private life and family	Everyone
29	Inviolability of the domicile	Everyone
30	Secrecy of correspondence	Everyone
31	Freedom of conscience	Everyone
32	Freedom of opinion and expression	Citizens
33	Freedom of creation (intellectual property)	Citizens
34	Right to information	Everyone
35	Right to education	Everyone
36	Right to health	Everyone
37	The right to a healthy environment	Everyone
38	The right to vote and to be elected	Citizens
39	Right to administration	Citizens
40	Freedom of assembly	Everyone
41	Freedom of parties and other socio-political organisations	Citizens
42	The right to form and to join unions	Everyone
43	The right to work and labour protection	Everyone
45	The right to strike	Everyone
46	The right to private property and its protection	Everyone
47	The right to social assistance and protection	Citizens
49	Protection of family and orphaned children	Everyone
50	Protection of mothers, children and young people	Everyone

Article	Right	Right-Holders
51	Protection of the handicapped persons	Everyone
52	Right to petition	Citizens

### ***Positive Action***

The Constitution does not expressly provide that positive action is to be taken by the state in order to overcome past disadvantage and accelerate progress towards equality of marginalised groups. However it does contain provisions which, on their face, require the enactment of measures designed to protect certain historically disadvantaged groups. For example, Article 43(2), which regulates the right to work and labour protection, provides that:

*All employees shall have the right to social protection of labour. The protecting measures shall bear upon labour safety and hygiene, working conditions for women and young people, the introduction of a minimum wage per economy, weekends and annual paid leave, as well as the difficult working conditions and other specific situations.*

By stipulating that “protecting measures” should bear upon “working conditions for women and young people”, the Constitution provides the foundation upon which laws that overcome past disadvantage of women and young people can be based. Indeed, the Parliament of Moldova relied on this Constitutional provision when enacting the Labour Code of the Republic of Moldova (Law No. 154 of 28 March 2003) (Labour Code), Article 62 of which prohibits employers from dismissing individuals during their probationary period where those individuals fall within specific groups who are considered to be in a different position from others or more vulnerable, including pregnant women, people with disabilities and young professionals. Article 62 has been seen as an important measure through which to tackle practices such as employers in Moldova using probationary periods as a means through which to dismiss women from their jobs once they announce that they are pregnant.

However, the instruction to implement measures to “protect” women is problematic and has, in practice, been seen as justifying paternalistic measures



which discriminate unjustifiably against women. The promotion of equality for women should not include measures curtailing the agency or autonomy of women. In practice, several Moldovan laws which purport to be positive action actually amount to direct discrimination. For example, Article 103(5) of the Labour Code prohibits women from working at night, and Article 105(1) prevents pregnant and postnatal women from working overtime. These laws should be repealed.

Article 51 of the Constitution provides for the protection of the rights of persons with disabilities. As with Article 43, it appears to provide for positive action:

*Handicapped persons shall enjoy special protection by the whole society. The State shall ensure normal conditions for medical treatment and rehabilitation, education, training and social integration of handicapped persons.*

The injunction that persons with disabilities will receive “special protections”, along with the Moldova’s ratification of the CRPD on 21 September 2010, has led to the enactment of laws aimed at accelerating progress towards the quality of persons with disabilities. For example, the Law on Social Inclusion of Persons with Disabilities (Law No. 60 of 30 March 2012) provides that persons with disabilities shall receive favourable treatment in terms of access to mainstream education<sup>27</sup> and employment.<sup>28</sup>

While the direction in Article 51 to afford “special protections” to persons with disabilities is positive, the language used throughout the Constitution to refer to persons with disabilities is inconsistent with international best practice. For example, Article 51 uses the term “handicapped persons”, a collocation at odds with the CRPD’s use of the phrase “persons with disabilities.”<sup>29</sup>

A further problem with Article 51 is that the obligation to ensure “normal conditions” is insufficiently clear. What constitutes “normal conditions” is unquan-

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27 Law on Social Inclusion of Persons with Disabilities (Law No. 60 of 30 March 2012), Article 29.

28 *Ibid.*, Article 34.

29 The Labour Code of the Republic of Moldova (Code No. 154 of 28 March 2003) also uses the term “handicapped”.

tifiable and subjective, and it is difficult to see how one can measure whether this standard has been met.

### ***Restriction of Fundamental Rights and Liberties***

Article 54 of the Constitution deals with the circumstances in which rights or freedoms may be curtailed. Paragraph 1 contains a blanket prohibition on laws which “curtail or restrict the fundamental rights and liberties of the person and citizen.” There is nothing in the language of this provision to suggest that only those rights and freedoms conferred in the Constitution are protected.

Paragraph 2 of Article 54 limits the prohibition in paragraph 1, setting out various objectives in pursuance of which rights and freedoms can be curtailed:

*The pursuit of the rights and freedoms may not be subordinated to other restrictions unless for those provided for by the law, which are in compliance with the unanimously recognised norms of the international law and are requested in such cases as: the defence of national security, territorial integrity, economic welfare of the State, public order, with the view to prevent the mass revolt and felonies, protect other persons’ rights, liberties and dignity, impede the disclosure of confidential information or guarantee the power and impartiality of justice.*

Paragraph 4 of Article 54 qualifies this limitation, providing that even where legitimate aims are pursued, laws curtailing rights and freedoms must be “proportional to the situation that caused it and may not affect the existence of that right or liberty.”

### **3.2.2 Special Laws in the Field of Equality and Non-Discrimination**

As a party to the ICCPR and the ICESCR, Moldova has an obligation to provide protection from discrimination by state and non-state actors through the adoption of equality legislation. The HRC has stated that under Article 26 of the ICCPR, all states parties have an obligation to ensure that the

“law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds.”<sup>30</sup> It has also noted that Article 2 “requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”.<sup>31</sup> The CESCR has stated that “[s]tates parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights”.<sup>32</sup> Under the ECHR, Moldova is required to prohibit discrimination on the same list of grounds in respect of the enjoyment of other rights enshrined in the Convention.

### ***Law on Ensuring Equality***

The Law on Ensuring Equality (Law No. 121 of 25 May 2012) (the Law on Ensuring Equality) is the primary non-discrimination statute in Moldova. It prohibits discrimination on a number of grounds and in all spheres of life, subject to limited exceptions. The Law also establishes the regulatory body charged with hearing complaints of discrimination and promoting equality.

The Law provides protection for all people in Moldova from discrimination on a wide variety of grounds, in a large number of areas regulated by law and prohibits a range of conduct understood to fall within the international right to be free from discrimination. Its exceptions are relatively limited. Accordingly, the Law goes some way to meeting the abovementioned international obligations.

The Law regulates the prohibition of discrimination in “political, economic, social, cultural and other spheres of life.”<sup>33</sup> However, it does not include discrimination in the areas of family (including marriage), adoption relations and religious institutions.<sup>34</sup> Chapter 2 of the Law contains specific provisions

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30 Human Rights Committee, *General Comment No. 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.1 at 26, 1989, Para 12.

31 Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Para 7.

32 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc. E/C.12/GC/20, 2009, Para 37.

33 Law on Ensuring Equality (Law No. 121 of 25 May 2012), Article 1(1).

34 *Ibid.*, Article 1(2).

on the prohibition of discrimination in respect of three areas of life, namely employment,<sup>35</sup> access to goods and services<sup>36</sup> and education.<sup>37</sup>

Article 1 specifies that the Law prohibits discrimination on grounds of “race, colour, nationality, ethnic origin, language, religion or belief, sex, age, disability, opinion, political view, or any other similar criteria.” Accordingly, various important grounds of discrimination are not explicitly covered by the Law. It does not explicitly prohibit discrimination on grounds of citizenship, place of domicile, gender identity, sexual orientation, health and HIV/AIDS status. However, the phrase “or any other similar criteria”, means that further grounds of discrimination may be protected insofar as they can be shown to be similar to the included grounds. This is to be contrasted with the Constitution, Article 16(2) of which prohibits discrimination in respect of an exhaustive list of grounds.

Pursuant to Article 3, “natural and legal persons in the public and private sectors” incur obligations under the Law. Thus, while the Law goes on in Article 4(a) to designate the “promotion or practice of discrimination by public authorities” as among the “worst forms of discrimination”, it also regulates the activity of private actors. There is nothing to suggest that private actors performing public functions fall within the term “public authorities” for the purpose of Article 4(a) and whether quasi-public institutions such as statutory corporations are covered by the provision is unclear.

The Law protects “all persons in the Republic of Moldova”.<sup>38</sup> It is not limited to Moldovan citizens; rather, all those within the state’s jurisdiction may avail themselves of rights conferred under the Law.

Discrimination is defined in Article 2 as:

*[A]ny distinction, exclusion, restriction or preference in the rights and freedoms of an individual or a group of*

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35 *Ibid.*, Article 7.

36 *Ibid.*, Article 8.

37 *Ibid.*, Article 9.

38 *Ibid.*, Article 1(1).

*individuals, as well as the support of the discriminating behaviour based on real or supposed criteria stipulated in the current law.*

This definition resembles definitions of discrimination used in international instruments including the CEDAW.<sup>39</sup> While the ECHR does not include a definition of discrimination,<sup>40</sup> the European Court of Human Rights has provided a definition of discrimination and its elements.<sup>41</sup> For example, in *Willis v United Kingdom*,<sup>42</sup> the Court stated that discrimination involves applying differential treatment to persons in similar situations without a reasonable and objective reason.

Article 2 of the Law lists five forms of prohibited discrimination: direct discrimination, indirect discrimination, discrimination by association, racial segregation, harassment, incitement to discrimination and victimisation. Direct discrimination is defined as treating a person less favourably than another person in a comparable situation, based on any of the protected characteristics. Indirect discrimination is defined in Article 2 of the Law as:

*[a]ny provision, action, criteria or practice, apparently neutral, which has as effect the disadvantaging of an individual towards another person, based on the criteria stipulated in the present Law, except where such provision, action, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are proportionate, appropriate and necessary.*

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39 Article 1 describes discrimination as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

40 See, for example, European Convention on Human Rights, Article 14.

41 *Abdulaziz, Cabales and Balkandali v United Kingdom*, European Court of Human Rights, Application Nos. 9214/80, 9473/81, and 9474/81, 24 April 1985; *Nachova and Others v Bulgaria*, European Court of Human Rights, Application Nos. 43577/98 and 43579/98, 6 July 2005; *D.H. and Others v Czech Republic*, European Court of Human Rights, Application No. 57325/00, 7 February 2006.

42 *Willis v United Kingdom*, European Court of Human Rights, Application No. 36042/97, 11 June 2002.

Both of these definitions are broadly in line with international best practice and the Declaration on Principles of Equality.<sup>43</sup> However, the Law has not yet been applied often enough to determine whether the courts will apply these definitions in line with international law and best practice. In order for the definitions to be interpreted in line with best practice it will, for example, be necessary to ensure that the comparator they both require, need not be actual, and may be hypothetical.<sup>44</sup>

The Law defines the term “reasonable accommodation” in accordance with international best practice as including modifications and adjustments that are necessary and appropriate for assuring to each person the exercise of rights and freedoms on an equal basis with others. Unlike the Declaration of Principles on Equality, the term does not expressly include anticipatory measures.<sup>45</sup> The law does not refer to the term “reasonable accommodation” beyond its definition in Article 2. However, a failure to make a reasonable accommodation has been held to violate the Law in jurisprudence, with the Council on the Prevention and Elimination of Discrimination and Ensuring Equality (CPEDEE) finding in one decision that a lack of reasonable accommodation on the part of Chisinau Centre District Court and Chisinau Court of Appeal resulted in discrimination in respect of access to justice.<sup>46</sup>

Positive action – or to use the term employed in the statute, “positive measures” – is also identified in the Law as a means of achieving substantive equality, with Article 5(a) stating that discrimination can be eliminated through the

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43 *Declaration of principles on equality*, Equal Rights Trust, London, 2008, Principle 5.

44 See, for example, the definitions of direct and indirect discrimination found in the European Union Equality Directives, which allow for hypothetical comparators: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Articles 2(2)(a) and (b); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Articles 2(2)(a) and (b); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Articles 2(a) and (b); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 2(1)(a) and (b).

45 See above, note 43, Principle 13.

46 Council on the Prevention and Elimination of Discrimination and Ensuring Equality, Decision No. 176/14 of 30 December 2014.

erection of positive measures to protect persons at a particular disadvantage when compared to others. However, it is unclear whether the Law mandates (as would accord with the requirements of international best practice) or merely permits positive measures being taken.

The Law contains specific exceptions to the prohibitions of discrimination in the areas of employment and education. Article 7(5) provides that distinctions based on criteria that are essential to the particular requirements of a job do not constitute discrimination:

*Any distinction, exclusion, restriction or preference regarding a particular job does not constitute discrimination, in the case when by the specific nature of those activities or conditions in which these activities are carried out, it requires certain and determined professional requirements, with the condition that the aim is legitimate and the requirement is proportionate.*

Article 7(6) creates a further exception to discrimination in employment, stipulating that in the official business of religions, differential treatment on the ground of religion does not constitute discrimination so long as a person's religion is an essential requirement of the role and the requirement itself is legitimate and justified.

Such exceptions correspond with international and regional law. Differential treatment in these circumstances is in line with Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.<sup>47</sup> Paragraph 23 of the Council Directive states that, in "very limited circumstances", differences in treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a "genuine and determining occupational requirement", so long as the objective is legitimate and the requirement is proportionate.

Article 9(4) preserves the right of religious educational institutions to refuse to admit a person to study if his or her religious status does not meet the re-

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<sup>47</sup> The Labour Code of the Republic of Moldova (Code No. 154 of 28 March 2003), Article 8(2), contains a similar exception and is explored later in this section of the report.

quirements for access to the institution. Unlike Article 7(6), the exception is not qualified by a direction that the requirement be legitimate and justified. The absence of this qualification leaves room for such institutions to discriminate in a way which is not in accordance with international best practice, which would require that a requirement that the applicant adhere to a particular belief must be a genuine requirement.

Chapter 3 of the Law establishes the institutional framework through which discrimination is to be combatted. It stipulates that three actors are responsible for addressing discrimination in Moldova, namely the CPEDEE, public authorities (the identities of which are not specified), and courts.<sup>48</sup> The CPEDEE is constituted in Article 11 of the Law as an independent and impartial body empowered to protect against discrimination and ensure equality.<sup>49</sup> Its functions include:

- examining the compliance of legislation with non-discrimination standards and proposing amendments to non-discrimination legislation;
- collecting data on trends in discrimination at the national level and developing reports on this topic;
- give proposals to public authorities to prevent and combat discrimination, raising awareness in the community about discrimination and collaborating with international organisations specialising in non-discrimination; and
- examining the complaints of persons who consider themselves to be victims of discrimination, submitting recommendations to the relevant authorities with regard to the initiation of disciplinary measures, detecting offences under the Contravention Code (Law No. 218 of 24 October 2008) and notifying the prosecutor's office in cases of criminal liability.

The CPEDEE is able to hear complaints of discrimination from individuals and legal entities; it can also examine potential discriminatory conduct on

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48 See above, note 33, Article 10.

49 The operation of the CPEDEE is also regulated under the Law on the Council's Work on Preventing and Eliminating Discrimination and Ensuring Equality (Law No. 298 of 21 December 2012), available at: <http://lex.justice.md/md/346943>.



its own initiative.<sup>50</sup> The CPEDEE has availed itself of this power to investigate acts of discrimination in the absence of complaints. For example, in 2013 it initiated three cases<sup>51</sup> and in 2014 it initiated 12.<sup>52</sup>

It should be noted that victims of discrimination are not confined to lodging complaints with the CPEDEE: they may file civil claims in court as well.<sup>53</sup> The filing of a complaint with CPEDEE is not a precondition to pursuing judicial redress.<sup>54</sup> A case examined by the CPEDEE can also be examined in civil proceedings under Article 18 of the Law; a court can also review a CPEDEE decision administratively or to see whether an offence under the Contravention Code has occurred.

The remedies available under the Law on Ensuring Equality differ according to the type of discrimination that has occurred and the forum in which the victim chooses to pursue their claim. If a victim files a civil discrimination claim, the court is empowered to:

- declare that the claimant's rights were violated;
- prohibit the continuation of the prohibited practice;
- order the reinstatement of the situation prior to the violation of rights;
- order compensation for material and moral damage and recovery of court costs; or
- declare that a discriminatory document is null and void.<sup>55</sup>

Where the CPEDEE examines a complaint and considers that unlawful discrimination has occurred, it can make recommendations aimed at ensuring the restoration of the victim's rights and preventing similar acts from occur-

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50 See above, note 33, Article 13(1).

51 See, for example, Council on the Prevention and Elimination of Discrimination and Ensuring Equality, *Activity Report*, 2013, available at: <http://egalitate.md/index.php?pag=page&id=850&l=ro>.

52 See, for example, Council on the Prevention and Elimination of Discrimination and Ensuring Equality, *Activity Report*, 2014, available at: <http://egalitate.md/index.php?pag=page&id=850&l=ro>.

53 See above, note 33, Article 18.

54 *Ibid.*, Article 13(3).

55 The classes of documents in respect of which a court can make a declaration of invalidity are left unspecified. For example, it is unclear whether the court may declare a private contract invalid.

ring in the future.<sup>56</sup> Where such recommendations are ignored, the CPEDEE can propose to the relevant authority that disciplinary measures be imposed.<sup>57</sup> Finally, in respect of certain types of discrimination amounting to administrative offences as specified in the Contravention Code (Law No. 218 of 24 October 2008), the CPEDEE can record minutes regarding the contravention and send them to court, which may choose to apply the administrative penalty provided for in the Code. The CPEDEE cannot itself impose sanctions.

The CPEDEE also lacks the power to challenge the validity of laws and regulations that it considers discriminatory in the Constitutional Court. Thus, although the CPEDEE is empowered in Article 12(a) to examine the compliance of legislation with standards of non-discrimination, it cannot take steps to render such laws invalid.

### ***Law on Ensuring Equal Opportunities between Women and Men***

The Law on Ensuring Equal Opportunities between Women and Men (Law No. 5-XVI of 9 February 2006) (the Equal Opportunities Law)<sup>58</sup> was enacted prior to the Law on Ensuring Equality and remains the primary piece of legislation through which gender equality is pursued. It promotes gender equality, primarily through the imposition of duties on public bodies to make decisions and policies consistent with the notion of equal opportunities between women and men. The Law does not include any enforcement mechanisms or remedies for breach of duty, however, and it is therefore primarily a statement of principle. Indeed the Law's final Article calls for the government to enact legislation giving effect to the rest of the Law.

Due to the lack of any enforcement mechanism or remedies under the Law, victims of gender discrimination will need to rely on the Law on Ensuring Equality and not the Equal Opportunities Law (which, as stated above, allows for the filing of a complaint with the CPEDEE or court) to vindicate their right to freedom from discrimination on grounds of gender. However, a complainant in such proceedings may make reference to the duties imposed in the Equal Opportunities Law when bringing a claim.

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56 See above, note 36, Article 15(4).

57 *Ibid.*, Article 15(6).

58 Available at: <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=315674&lang=1>.

The application of the Equal Opportunities Law extends to the “political, economic, social, cultural and other spheres of life”<sup>59</sup> and includes specific duties with respect to gender equality in public office<sup>60</sup> (including in the electoral sphere),<sup>61</sup> employment,<sup>62</sup> education<sup>63</sup> and healthcare.<sup>64</sup>

The Law protects both women and men: Article 24 provides that “persons” subject to discrimination on grounds of sex are entitled to damages, and neither the definition of direct discrimination nor indirect discrimination stipulate that victims must be women.<sup>65</sup>

The Law imposes obligations on the state, legal persons and natural persons (regardless of age),<sup>66</sup> as well as several public institutions, namely: Parliament, the government, the Governmental Committee for Equality Between Women and Men, the Ministry of Health and Social Protection, ministries and other central administrative authorities and local public administration authorities.<sup>67</sup>

The Law introduces several general prohibitions on actions amounting to discrimination on grounds of sex. It states that competent public authorities shall not promote policies or allow the performance of actions that do not ensure equal opportunities between men and women;<sup>68</sup> it stipulates that actions that restrict or exclude equal treatment of men and women are prohibited;<sup>69</sup> and it provides that any legal document containing discriminatory provisions based

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59 Law on Ensuring Equal Opportunities between Women and Men (Law No. 5 of 9 February 2006), Article 1.

60 *Ibid.*, Article 6.

61 *Ibid.*, Article 7.

62 *Ibid.*, Articles 9–12.

63 *Ibid.*, Article 13.

64 *Ibid.*, Article 14.

65 *Ibid.*, Article 2.

66 *Ibid.*, Article 3.

67 *Ibid.*, Article 15.

68 *Ibid.*, Article 5(2).

69 *Ibid.*, Article 5(4).

on sex “shall be declared null by the competent bodies.”<sup>70</sup> This reference to legal documents includes private contracts.

Chapter 2 of the Law then imposes a number of duties on the participants in six areas of social activity, namely public office,<sup>71</sup> electoral politics,<sup>72</sup> mass-media,<sup>73</sup> employers,<sup>74</sup> educational and training institutions,<sup>75</sup> and healthcare providers.<sup>76</sup> An example of a duty in the area of public office is that the heads of central and local public administration authorities must ensure equal access to public office, without differentiation as to sex.<sup>77</sup> Duties in relation to electoral politics include that the Central Election Commission, election councils and district bureaus shall ensure the observance of gender equality in the electoral sphere.<sup>78</sup> Mass-media is subject to a duty to contribute to the promotion of equality within society by developing materials to overcome gender stereotypes.<sup>79</sup> Employers are subject to numerous duties, including the duty to hire staff through methods which ensure equal access of women and men to a position.<sup>80</sup> Educational and training institutions are enjoined to ensure equality between men and women, for example, “through developing didactic materials and curricula in conformity with the principle of equality between women and men.”<sup>81</sup> Finally, healthcare providers are prohibited from discriminating on grounds of sex with respect to access of women and men to medical assistance.<sup>82</sup>

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70 *Ibid.*, Article 5(5).

71 *Ibid.*, Article 6(3).

72 *Ibid.*, Article 7(2).

73 *Ibid.*, Article 8.

74 *Ibid.*, Articles 9–11.

75 *Ibid.*, Article 13.

76 *Ibid.*, Article 14.

77 *Ibid.*, Article 6(3).

78 *Ibid.*, Article 7(1).

79 *Ibid.*, Article 8(1).

80 *Ibid.*, Article 9(1).

81 *Ibid.*, Article 13(1)(d).

82 *Ibid.*, Article 14.

The Law prohibits both direct and indirect discrimination on grounds of sex.<sup>83</sup> Direct discrimination is defined as “any action that in similar situations discriminates against a person in comparison to another person of another sex, also by reason of pregnancy, maternity or paternity”.<sup>84</sup> Indirect discrimination is defined as “any action, rule, criterion, or practice, identical for women and men, but with an effect or result that is unequal for one of the sexes, except for affirmative action”.<sup>85</sup>

The definition of direct discrimination is circular, defining discrimination as an action which discriminates. The Law offers a definition of discrimination on the basis of sex distinct from direct and indirect discrimination, stating that “any distinction, exception, or preference aimed at or followed by a limitation or impediment of recognition, exercise, and implementation on an equal gender rights and fundamental freedoms” is discrimination. This definition is arguably problematic in light of international best practice, as the definition of the harm of discrimination as “limitation or impediment of recognition, exercise, and implementation” could be interpreted in a restrictive way. Prevailing models of discrimination tend to define the harm of discrimination broadly, as “less favourable treatment”.<sup>86</sup> In addition, it risks unnecessary confusion and misinterpretation to offer a distinct definition of discrimination, and it would be preferable to provide a clear definition of the conduct which amounts to direct discrimination.

The definition of indirect discrimination is largely in line with international best practice. However, the requirement that the effect of the facially neutral provision or practice is “unequal” may be interpreted in a restrictive manner. As with direct discrimination, it would be preferable to define the “harm” of indirect discrimination broadly, as “particular disadvantage”<sup>87</sup> or equivalent.

Several exceptions to discrimination on grounds of sex are provided for in Article 5(6):

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83 *Ibid.*, Article 5(3).

84 *Ibid.*, Article 2.

85 *Ibid.*, Article 2.

86 See above, note 43, Principle 5 and note 32, Para. 10.

87 See above, note 43, Principle 5.

- measures to ensure special conditions for women during pregnancy, recuperation or breastfeeding;
- qualification requirements for activities in which characteristics based on sex constitute a decisive factor;
- advertisements for employments of persons of a certain sex where, given the nature of the job, characteristics of a particular sex are decisive; and
- affirmative measures.

To date, the application of these exceptions has not been explored by the courts. The characterisation of positive action (or affirmative measures) as an exception to indirect discrimination is inconsistent with international best practice, which acknowledges that positive action is necessary for and not inconsistent with non-discrimination. For example, the Declaration of Principles on Equality states that positive action is “a necessary element within the right to equality.”<sup>88</sup> Accordingly, international best practice mandates positive action rather than merely giving authorities permission to take such action.

Chapter 5 of the Equal Opportunities Law establishes the institutional framework through which it is envisioned that equal opportunities between women and men will be achieved. The Governmental Committee for Equality between Women and Men (Governmental Committee) is established under Article 18. Described as a “consultative body”, the Committee’s duties are to:

- promote equality between men and women;
- coordinate the activity of central and local public administration authorities with regard to issues of equality between men and women; and
- develop cooperation between state structures and civil society on issues of equality between men and women.

Article 21 of the Law states that the Ombudsmen shall ensure the guarantee and observance of equality between men and women.

Despite imposing duties on a plethora of public bodies and classes of private actors such as employers, and despite empowering the Governmental

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88 See above, note 43, Principle 3.

Committee and the Ombudsman to promote gender equality, the Equal Opportunities Law creates nothing in the way of remedies for breach of duty. Article 24(1) of the Law states that persons subject to discrimination based on sex are “entitled to reparation (...) according to conditions established by legislation”. Similarly, Article 24(2) provides that those whose conduct amounts to discrimination based on sex “shall bear liability established by law for the breach of legislation in the field of equality between women and men”. The law was intended to be a precursor to the enactment of further legislation providing a means of redress for victims of gender discrimination. This intention is made explicit in Article 25, which provides that within six months, the government shall submit to Parliament “proposals for bringing (...) legislation into conformity with this Law”. As no such Law was then enacted, as discussed above, there is no mechanism for enforcing rights contained within the Law, other than seeking to raise complaints under the Law on Ensuring Equality.

The Law on Ensuring Equality, to the extent that it prohibits discrimination on grounds of sex, does to a large extent supply the remedies that are lacking in the Equal Opportunities Law. It would, for example, enable a person who has been refused employment on the basis of sex (prohibited in Article 11(1)(b) of the Equal Opportunities Law) to challenge such a decision in court or at the CPEDEE. However certain duties imposed under the Equal Opportunities Law go beyond the rights and obligations in the Law on Ensuring Equality. For example, Article 10(1) states that employers shall cooperate with employees and trade union representatives to establish internal regulations to prevent cases of discrimination at work. There is currently no way for an aggrieved person under these wider provisions to obtain relief.

### ***Law on Social Inclusion of Persons with Disabilities***

The Law on Social Inclusion of Persons with Disabilities was intended to make major progress in the protection of the rights of persons with disabilities and to bring the law in line with Moldova’s obligations under international law, in particular the CRPD. Article 5 of the Law states that the implementation of the law is to be guided by principles of, *inter alia*, “non-discrimination”,<sup>89</sup>

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89 See above, note 27, Article 5(e).

“equality”,<sup>90</sup> and “respect for inherent dignity [and] individual autonomy”.<sup>91</sup> The Law creates ostensibly robust and far-reaching protections of persons with disabilities, including provisions on access to education, healthcare and employment, the prohibition of discrimination, legal capacity, and social and political participation of persons with disabilities. In practice, however, it is difficult for persons with disabilities to benefit from these protections, and there are a number of significant unresolved conflicts with other areas of Moldovan law.

One of the most significant changes made by the Law is its definition of disability, which is in line with the CRPD’s endorsement of a social model of disability. The Law defines a disabled person as “a person with physical, mental, intellectual or sensory disabilities which in interaction with various barriers or obstacles may hinder their full and effective participation in society on an equal basis with others”.<sup>92</sup>

Article 8 of the Law provides a number of protections against discrimination for persons with disabilities. Discrimination is defined as:

*[A]ny distinction, exclusion, marginalisation, restriction or preference, and the refusal to create favourable conditions and reasonable accommodation, that lead to the failure or complication of the recognition, enjoyment or use of civil, political, economic, social or cultural rights and is prohibited and punishable by law.*<sup>93</sup>

This is a broad definition of discrimination, encompassing both direct and indirect discrimination and requiring positive action and reasonable accommodation of disability. In addition, the Law requires the state to “endeavour to ensure that all categories of persons with disabilities (...) are not subject to

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90 *Ibid.*, Article 5(b).

91 *Ibid.*, Article 5(h).

92 *Ibid.*, Article 2.

93 *Ibid.*, Article 8(6).



multiple discrimination”,<sup>94</sup> an important recognition of the growing international consensus on multiple discrimination.<sup>95</sup>

However, Article 8 provides little clarity on the obligations that this prohibition of discrimination creates. It is clear that it places obligations on the state to refrain from discrimination but obligations extend to others only in certain contexts, such as employment. While Article 8(13), provides that the state undertakes to prevent the occurrence of discrimination on the basis of disability, this obligation is not linked to any mechanisms for preventing discrimination.

The Law includes a number of provisions dealing with the integration of persons with disabilities into society and their ability to live independently. Under Article 6(2), Moldova assumes responsibility of drawing up and implementing policies for social inclusion of persons with disabilities. Article 7 of the Law protects the right of persons with disabilities to participate in political and public life on an equal basis with others, including the right to vote and stand for election.<sup>96</sup>

Article 11 imposes a duty on the state and legal persons governed by public and private law<sup>97</sup> to take measures to raise awareness about persons with disabilities. This includes:

- promoting a positive perception and an active social role for people with disabilities;<sup>98</sup>
- cultivating a respectful attitude towards persons with disabilities in the education system;<sup>99</sup>

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94 *Ibid.*, Article 8(12).

95 See, for example: Convention on the Rights of Persons with Disabilities, Article 6; *Alyne da Silva Pimentel Teixeira v Brazil*, Committee on the Elimination of Discrimination against Women, Communication No. 17/2008, UN Doc. CEDAW/C/49/D/17/2008, 2011; and Committee on the Elimination of Racial Discrimination, *General Recommendation No. 25: On Gender-Related Dimensions of Racial Discrimination*, UN Doc. A/55/18, 2000, Annex V, p. 152.

96 See above, note 27, Article 7(2)(b).

97 Limited to public authorities, legal entities, and NGOs.

98 See above, note 27, Article 11(2)(a).

99 *Ibid.*, Article 11(2)(b).

- promoting the recognition of skills, merits and abilities of persons with disabilities, as well as the contribution made by them at their workplaces;<sup>100</sup>
- encouraging media outlets to report on people with disabilities in a manner that would contribute to their social inclusion;<sup>101</sup> and
- conducting public awareness programs regarding persons with disabilities and their rights.<sup>102</sup>

A major development for the ability of persons with disabilities to integrate into society is Article 8(2), which provides that persons with disabilities shall enjoy legal capacity on an equal basis with others, in all areas of life. It also states that, where necessary, protective measures and legal aid must be afforded to disabled persons so as to enable them to enjoy such legal capacity on an equal basis.

Article 8(7) imposes an obligation on the state, through central and local public authorities and the human rights Ombudsman, to:

*[E]nsure that persons with disabilities are provided with the right to benefit from legal capacity on an equal basis with other persons, in all areas of life, and guarantees them equal and effective legal protection against discrimination on any grounds.*

This commitment is however substantially undermined by the continued use of Article 24 of the Civil Code (No. 1107 of 22 June 2002),<sup>103</sup> which allows, in certain circumstances, courts to deprive persons with “intellectual disabilities” of legal capacity in certain circumstances. In practice persons with disabilities are regularly deprived of their legal capacity using the Civil Code without adequate safeguards.<sup>104</sup>

As is discussed in Part 2.5 above, the continued use of Article 24 is deeply problematic in light of Moldova’s obligations under Article 12 of the CRPD and the

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100 *Ibid.*, Article 11(2)(c).

101 *Ibid.*, Article 11(2)(d).

102 *Ibid.*, Article 11(2)(e).

103 Available at: <http://lex.justice.md/md/325085>.

104 See above, Discrimination on the Basis of Disability.

constitutional requirement that international law has precedence over domestic law to the extent of inconsistency.<sup>105</sup> Article 12(2) of the CRPD provides that “States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”. The Committee on the Rights of Persons with Disabilities has clarified that this requires that states “should refrain from any action that deprives persons with disabilities of the right to equal recognition before the law”<sup>106</sup> and to move from a “substitute decision-making paradigm to one that is based on supported decision-making”.<sup>107</sup>

The effect of this is to require the abolition of “denials of legal capacity that are discriminatory on the basis of disability in purpose or effect”.<sup>108</sup> This is an extensive prohibition, as the Committee made clear that:

*Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the “best interpretation of will and preferences” must replace the “best interests” determinations.*<sup>109</sup>

Recent comments by the Committee on the Rights of Persons with Disabilities make clear that Article 12 prohibits all deprivations of legal capacity in relation to persons with disabilities.<sup>110</sup> This emphasis on the preferences of the individual, even where the individual’s preference cannot be determined, is entirely inconsistent with the practice of depriving persons with disabilities of legal capacity.

The European Court of Human Rights has not explicitly incorporated the “paradigm shift”<sup>111</sup> of the CRPD towards a supported decision-making model

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105 Constitution of the Republic of Moldova, 29 July 1994, Article 4.

106 Committee on the Rights of Persons with Disabilities, *General Comment: No. 1: Article 12: Equal recognition before the law*, UN Doc. CRPD/C/GC/1, 2014, Para 24.

107 *Ibid.*, Para 3.

108 *Ibid.*, Para 25.

109 *Ibid.*, Para 21.

110 Committee on the Rights of Persons with Disabilities, *Concluding Observations: Ukraine*, UN Doc. CRPD/C/UKR/CO/1, 2 October 2015, Para 27; Committee on the Rights of Persons with Disabilities, *Concluding Observations: Czech Republic*, UN Doc. CRPD/C/CZE/CO/1, 15 May 2015, Para 22.

111 Council of Europe Commissioner for Human Rights, *Who gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, 2012, p. 24, available at: [https://www.coe.int/t/commissioner/source/prems/IP\\_LegalCapacity\\_GBR.pdf](https://www.coe.int/t/commissioner/source/prems/IP_LegalCapacity_GBR.pdf).

in respect of legal capacity but nevertheless is deeply suspicious of deprivations of legal capacity. In *Salontaji-Drobnjak v Serbia*,<sup>112</sup> the Court held that any deprivations of legal capacity should be a proportionate means of achieving a legitimate aim.<sup>113</sup> In recent cases, the Court has subjected deprivations of the legal capacity of persons with disabilities to heavy scrutiny, in line with the CRPD.<sup>114</sup> Other bodies of the Council of Europe have made it clear that persons with disabilities should enjoy legal capacity on an equal basis, and “[...] when assistance is needed to exercise that legal capacity [...] that this is appropriately safeguarded by the law”.<sup>115</sup>

Some attempts have been made to minimise the effects of deprivations of legal capacity. On 7 May 2015, Parliament passed the Law Amending and Supplementing Certain Laws,<sup>116</sup> which guaranteed the right to vote to persons deprived of legal capacity. However, the President of the Republic of Moldova refused to promulgate the Law, due to the mistaken belief that Article 12 of the CRPD ensured equal access to legal aid, not legal capacity. It appears that this phrase was erroneously translated as “legal aid” when referenced in the Law.<sup>117</sup>

Accordingly, while the Law on Social Inclusion of Persons with Disabilities contains important protections, there remain significant issues with its implementation. In addition, while much of the Law incorporates the CRPD into national law, Article 19 of the CRPD, guaranteeing the right to an independent life and integration into the community, is notably absent. As the CRPD Committee has noted, the possibility of living independently and the ability to make one’s own choices are pre-requisites for the fulfilment of the right to

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112 *Salontaji-Drobnjak v Serbia*, European Court of Human Rights, Application No. 36500/05, 13 October 2009.

113 *Ibid.*, Para 144.

114 *Stanev v. Bulgaria*, European Court of Human Rights, Application No. 36760/06, 17 January 2012, Paras 244–250.

115 Council of Europe Committee of Ministers, *Recommendation Rec (2006) to Member States on the Council of Europe Action Plan to Promote the Rights and the Full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006–2015*, 2006, Para 3.12.

116 Law Amending and Supplementing Certain Laws (Law No. 87 of 7 May 2015).

117 President of the Republic of Moldova, Note No. 01/1-06-50 of 22 July 2015.

legal capacity of disabled persons on an equal basis with others.<sup>118</sup> The EIDHR has also commented that the provisions of Articles 12 and 19 of the CRPD are yet to be fully implemented in practice in Moldova.<sup>119</sup>

A substantial part of the Law is concerned with improving accessibility in key areas such as employment, healthcare, and education for persons with disabilities. Primarily obligations in these parts of the Law fall on the State, though some provisions have a much wider scope, imposing obligations on others, including employers, legal entities, and NGOs.

Chapter 3 of the Law contains provisions that pertain to the creation of state policies on accessibility and the design and construction of social infrastructure so as to meet the needs of persons with disabilities. The Chapter refers to the need for disabled persons to access public transport,<sup>120</sup> housing,<sup>121</sup> cultural and touristic sites<sup>122</sup> and information.<sup>123</sup> The Chapter also imposes liability for breach of the duty to provide accessibility to persons with disabilities. Despite the obligations imposed under this Chapter, lack of access to many goods and services<sup>124</sup> remains a problem for persons with disabilities in Moldova.<sup>125</sup>

Chapter 4 of the Law regulates education, training and professional development of persons with disabilities. It provides for equal access to all lev-

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118 See above, note 106, Para 44.

119 United Nations Development Programme, *Report on Preventing and Combating Torture in Residential and Neuropsychiatric Institutions: Analysis of the National Legal Framework and International Standards*, 2015, pp. 30–31, available at: [http://www.md.undp.org/content/dam/moldova/docs/Publications/Proiect\\_Raport\\_legislatia\\_nationala\\_tortura\\_in\\_institutii\\_psihiatrice\\_draft\\_27%2011%202015\\_2.pdf](http://www.md.undp.org/content/dam/moldova/docs/Publications/Proiect_Raport_legislatia_nationala_tortura_in_institutii_psihiatrice_draft_27%2011%202015_2.pdf).

120 See above, note 27, Article 20.

121 *Ibid.*, Article 22.

122 *Ibid.*, Article 23.

123 *Ibid.*, Article 25.

124 See Section 2.4 of this report.

125 Association “Motivation”, *Report on Regulatory Acts and Technical Standards in the Accessibility Area for the Persons with Locomotor Disabilities*, 2012, p. 34, available at: <http://www.soros.md/files/Raport%20analiza%20MOTIVATIE.pdf>. See also, Human Rights Council, Report of the Special Rapporteur on the Rights of Persons with Disabilities on her Mission to the Republic of Moldova, UN Doc. A/HRC/31/62/Add.2, 2016, Paras 28–31.

els of education by imposing obligations on the Ministry of Education and local authorities to create the conditions necessary for children to access education.<sup>126</sup> This is a broad obligation that includes ensuring there are adequately trained teachers,<sup>127</sup> and other reasonable accommodations.<sup>128</sup> The Chapter supplements provisions in the Education Code of the Republic of Moldova (No. 152 of 17 July 2014),<sup>129</sup> discussed below, which regulate the education of persons with disabilities. The Law seems to offer a greater level of protection than the Education Code in some ways, for instance it provides for “persons with disabilities [to] follow general education, specialised secondary education and higher education in educational institutions, as established by the Government”.<sup>130</sup>

Chapter 5 of the Law is concerned with employment and provides for a range of protections, including the right to work from home,<sup>131</sup> availability of leave and opportunities for professional development,<sup>132</sup> and obligations on employers to make arrangements for employees who have lost their capacity to work.<sup>133</sup>

Of particular note, is Article 34(4) of the Law which places a positive obligation on employers with at least 20 staff to create or reserve jobs for disabled people amounting to 5% of their total number of employees. This is broadly in line with the proportion of persons with disabilities in the general population, 5.2% in 2015.<sup>134</sup> However, the efficacy of this provision is substantially undermined by the failure to establish how this quota will be implemented or provide for any sanctions for employers who do not comply. It has been

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126 See above, note 27, Article 27(2).

127 *Ibid.*, Article 27(5).

128 *Ibid.*, Article 27(6)(a).

129 Education Code of the Republic of Moldova (Code No. 152 of 17 July 2014), Article 634.

130 See above, note 27, Article 29(2).

131 *Ibid.*, Article 35.

132 *Ibid.*, Articles 39 and 40.

133 *Ibid.*, Article 37.

134 National Bureau of Statistics of the Republic of Moldova, *The Situation of People with Disabilities in Moldova*, 2015, available at: <http://www.statistica.md/newsview.php?l=ro&id=4976&idc=168>.

observed that these deficiencies have compromised the achievement of the 5% standard in enterprises to which the duty applies.<sup>135</sup>

Chapter 6 of the Law includes a provision establishing a right to healthcare for persons with disabilities. The right is wider than any of the rights conferred on disabled persons in the Law on Healthcare,<sup>136</sup> discussed below. Article 42 sets out a range of rights for persons with disabilities, including the right to make decisions about healthcare,<sup>137</sup> the right to accommodation of their disability in how healthcare is accessed.<sup>138</sup>

In summary, the Law provides important provisions to ensure the realisation of the rights of persons with disabilities. However, perhaps in part due to the fact that the Law was only promulgated in 2012, the Law's existence has not yet resulted in any major reduction in the discrimination faced by people with disabilities in Moldova.

### ***Law on Amendments and Addenda to Certain Legislative Acts***

The Law on Amendments and Addenda to Certain Legislative Instruments (Law No. 180 of 15 May 2014) (the Amendment Law) has been approved in Parliament and is, at the time of writing, awaiting promulgation by the President. If enacted, it will make several important amendments to existing legislation in relation to equality and non-discrimination, including the Electoral Code of the Republic of Moldova (No. 1381-XIII of 21 November 1997), the Equal Opportunities Law and several other statutes.<sup>139</sup>

The Equal Opportunities Law will be amended in several material ways. Firstly, Article 5(3) will be amended to add discrimination by association and victimisation to the types of discrimination prohibited. Secondly, Article 5(5),

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135 IDIS Viitorul, *Social Monitor No. 16: Inclusion of Persons with Disabilities on the Labour Marketing: Realities and Perspectives*, 2012, p. 48, available at: <http://www.viitorul.org/download.php?file=cHVibGljL3B1YmxpY2F0aW9ucy80MDY5MzUzX21kX21vbml0b3J1bF9zb2NpLnBkZg%3D%3D>.

136 Law on Healthcare (Law No. 411 of 28 March 1995), Article 373.

137 See above, note 27, Article 42(7).

138 *Ibid.*, Article 42(5).

139 Law on Government (Law No. 64 of 31 May 1990).

which currently provides that discriminatory provisions “shall be declared null by the competent bodies”, will now specify that such provisions are to be declared null by the “court”.

Thirdly, if the Amendment Law is promulgated, exceptions to discrimination under the Equal Opportunities Law will be altered. Article 6(b) currently provides that qualification requirements for activities in which “special characteristics based on sex constitute a decisive factor” are exempted. The new Article 6(b) will narrow this exemption, such that the sex-related characteristic must be a “genuine” occupational requirement, the objective must be legitimate and the requirement must be proportional. Similar qualifications will apply to Article 6(c), which creates an exemption in respect of employment advertisements for occupations in which characteristics of a particular sex are a requirement.

Thirdly, an obligation will be added in Article 10 for employers to provide information to all employees on the prohibition of acts of discrimination and sexual harassment in the workplace and on the rights available to employees for addressing situations of discrimination.

The Law on Government (Law No. 64-XII of 31 May 1990) will be amended so as to include a quota with respect to election lists.<sup>140</sup> Specifically, Article 27 will be altered so as to provide that 40% of the members on each party’s list must be women. However, the amendment will not stipulate where on the election list the female candidates must be placed. For candidates lower down the list, a larger share of the vote must be won by the party in order for them to become Members of Parliament. If women are placed at the bottom then it is commensurately less likely that they will end up as representatives.

It will also amend the Law on Advertising (Law No. 1227-XIII of 27 June 1997) to prohibit “sexist advertising”. Article 11 of the Law will define sexist advertising as adverts that:

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140 An election list is a form on which each political party registers its candidates in an upcoming election. The number of votes won by each party will determine the number of candidates on the election list for that party who become Members of Parliament. For example, if a party gets 10 mandates then the first 10 candidates on its election list will become Members of Parliament.



- show a woman or man as a sexual object, in humiliating, degrading or violent circumstances, and which offends human dignity; or
- promote sexist stereotypes for discriminatory purposes, including the depiction of women as weak, vulnerable and dependent.

Finally, if enacted, the Law will amend Article 124 of the Labour Code to provide for a right of paid paternity leave of 14 calendar days. This leave must be requested within the first 56 days of the birth of the child.

### **3.2.3 Non-Discrimination Provisions in Other Legal Fields**

The Law on Ensuring Equality is the primary piece of legislation with respect to combatting discrimination in Moldova and, subject to several exceptions, covers all spheres of activity. The Equal Opportunities Law and the Law on Persons with Disabilities both concern the rights of marginalised groups, again across various spheres. There are also, however, important provisions with regard to equality and non-discrimination in legislation that regulates specific fields of activity. This section will set out the provisions pertaining to non-discrimination in the civil, criminal and civil procedure codes, labour, education, family law, broadcasting, mental health and religion.

#### ***Civil Code***

The Civil Code of the Republic of Moldova (Law No. 1007 of 6 June 2002) (Civil Code) is a key aspect of Moldovan anti-discrimination law, as it sets out a set of remedies available where there has been a finding of unlawful discrimination using another statute. The Civil Code is silent on substantive issues of discrimination – it does not offer a definition of discrimination and it is not concerned with particular grounds of discrimination – but it has a crucial supportive function.

The scope of the Civil Code is wide. It applies to any statute that does not fall within administrative or criminal law. This includes many of the Laws relevant to discrimination law discussed in this section, including the Law on Equal Opportunities, the Law on Ensuring Equality and the Law on Social Inclusion of Persons with Disabilities.

Article 11 sets out the remedies available under the Code. These include: damages,<sup>141</sup> including for non-pecuniary loss;<sup>142</sup> invalidation of judicial acts<sup>143</sup> and acts of public authorities;<sup>144</sup> recognition of the right at issue;<sup>145</sup> injunctive relief to suppress acts which violate or threaten to violate the right and restoration of the individual to the condition existing before the violation of the right.<sup>146</sup> Accordingly, a variety of remedies may be available to victims of discrimination.

However, the Civil Code also contains provisions which hinder rather than advance equality in Moldova. The Civil Code also includes provisions regulating the circumstances in which a person's legal capacity can be revoked. As discussed above, these have serious implications for persons with disabilities in Moldova, as they are disproportionately subject to deprivations of legal capacity in a discriminatory manner.

Article 24 states that "a person, who is not able to realise or control his/her actions because of a psychiatric condition (mental illness or deficiency), may be declared incapable by court. This person shall be put under guardianship." It also provides that when the grounds on which the individual was declared incapable no longer exist, the guardianship will be revoked by court order.

As has been discussed above, Article 24 of the Civil Code, to the extent that it facilitates the deprivation of legal capacity of those with "mental disabilit[ies]"<sup>147</sup> without reference to other facts, is in violation of Article 12 of CRPD, as discussed above. It is also inconsistent with Articles 1 and 5 of the Law on Ensuring Equality and Articles 5, 8 and 10 of the Law on of Persons with Disabilities. National authorities and courts tend to prioritise the Civil Code over these statutes. This is despite the injunction in Article 4 of the Constitution and Article 7 of the Civil Code itself, both of which state

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141 Civil Code of the Republic of Moldova (Code No. 1007 of 6 June 2002), Article 11(g).

142 *Ibid.*, Article 11(h).

143 *Ibid.*, Article 11(c).

144 *Ibid.*, Article 11(d).

145 *Ibid.*, Article 11(a).

146 *Ibid.*, Article 11(b).

147 *Ibid.*, Article 24(1).

that international treaties apply at the expense of national law when the two are inconsistent.<sup>148</sup>

### ***Civil Procedure Code***

Article 22 of the Civil Procedure Code<sup>149</sup> is concerned with non-discrimination in access to justice. It provides that:

*In civil cases, justice shall be carried on the principle of equality of all persons, without any regard to citizenship, race, nationality, ethnic origin, language, religion, sex, opinion and political affiliation, wealth, social origin, domicile, place of birth, as well as on the principle of equality of all organisations, without any regard to the type of property and legal organizational form, subordination, registered office and other circumstances.*

This list of protected characteristics is broader than that found in other pieces of legislation. Citizenship, job, domicile, and place of birth, are not found in the Law on Ensuring Equality,<sup>150</sup> for instance. As with Article 1 of the Law on Ensuring Equality, the list of characteristics of is open-ended.

The Code also contains provisions relevant to the issue of the deprivation of legal capacity of persons with disabilities, as discussed above in relation to the Civil Code and the Law on Social Inclusion of Persons with Disabilities. Article 305 of the Civil Procedure Code provides that judicial orders that a person be forcefully referred to psychiatric care are not subject to appeal. Article 18 of the Declaration of Principles on Equality states that persons subject to discrimination have the right to “have a right to seek legal redress and an effective remedy”. The denial of appeals from orders forcefully referring people to psychiatric care has a profound impact on both access to justice and the right to liberty, and as such is deeply problematic in light of international human rights law and national constitutional law. The UNHRC, in consider-

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148 See above, note 105, Article 4; *Ibid.*, Article 7.

149 Civil Procedure Code of the Republic of Moldova (Code No. 225 of 30 May 2003).

150 See above, note 33, Article 1.

ing the compliance of psychiatric detention with the ICCPR, stressed the importance of the fact that the detention at issue was “regularly reviewed”<sup>151</sup> by courts to its finding no violation of Article 9(4).<sup>152</sup> The Committee on the Rights of Persons with Disabilities has taken a stronger position, requiring that laws allowing for deprivations of liberty that are “linked to an apparent or diagnosed disability”<sup>153</sup> should be repealed. The Committee has not directly considered whether a right to appeal any decision depriving a person with disability of liberty is necessary, but in light of the high level of scrutiny of deprivations of liberty, it seems likely that they would require robust protections of access to justice in this context.

While Article 5(1) of the European Convention of Human Rights expressly allows for the “lawful detention (...) of persons of unsound mind”, this permission relates to the state of mind of the individual, not to their disability status and the Convention requires robust safeguards. In particular, it requires that any person deprived of liberty has a right for their detention to be subject to regular review by courts.<sup>154</sup> The European Court of Human Rights has held “a key guarantee under Article 5(4) is that a patient compulsorily detained for psychiatric treatment must have the right to seek judicial review on his or her own motion”<sup>155</sup> and that the failure to provide a remedy to challenge the lawfulness of detention in psychiatric care violated Article 5(4).<sup>156</sup> Similarly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), has found that “a person who is involuntarily placed in a psychiatric establishment by a non-judicial authority must have the right to bring proceed-

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151 *A v New Zealand*, Human Rights Committee, Communication No. 754/1997, UN Doc. 66/CCPR/C/D/754/1997, 1999, Para 7.3.

152 Article 9(4) of the ICCPR provides that “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.

153 Committee on the Rights of Persons with Disabilities, *Concluding Observations: Spain*, UN Doc. CRPD/C/ESP/CO/1, 19 October 2011, Para 36.

154 European Convention on Human Rights, Article 5(4); see, for example, *D. D. v Lithuania*, European Court of Human Rights, Application No. 13469/06, 14 February 2012, Para 165.

155 *Gorshkov v Ukraine*, European Court of Human Rights, Application No. 67531/01, 8 November 2005, Para. 44.

156 *Stanev v Bulgaria*, European Court of Human Rights, Application No. 36760/06, 17 January 2012.

ings by which the lawfulness of his detention shall be decided speedily by a court”.<sup>157</sup>

It seems clear that this right to challenge the lawfulness of detention must include a right of appeal for the right to be effective. The Committee of Ministers of the Council of Europe, for instance, has recommended in the context of detention of “incapable adults”<sup>158</sup> that any system of dentation must provide for “adequate rights of appeal”.<sup>159</sup>

As well as these concerns stemming from international and regional law, Article 305 of the Civil Procedure Code seems to violate the Constitution of the Republic of Moldova. Article 20 of the Constitution guarantees the right of free access to justice for every person, without discrimination. It further provides that no law may deny or limit this right. Given the vulnerability of persons with disabilities, particularly mental and intellectual disabilities, to forced psychiatric care, the denial of an appeal in Article 305 of the Civil Procedure Code is clearly discriminatory on the basis of disability.

Also of concern is Article 306 of the Civil Procedure Code, which stipulates that the hearing of an application for a declaration of legal capacity does not require the person whose capacity is being contested present, instead requiring only the presence of a representative from the Guardianship and Trusteeship Body. This is in direct contravention of the right to a fair trial in Article 6(1) of the European Convention on Human Right. The European Court of Human Rights has consistently held that “Article 6(1) of the Convention must be interpreted as guaranteeing in principle that anyone who has been declared partially incapable (...) has direct access to a court to seek restoration of his or her legal capacity”<sup>160</sup>

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157 Council of Europe Committee on the Prevention of Torture, *Report to the United Kingdom Government on the visit to the Bailiwick of Jersey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, CPT/Inf (2010) 35, 19 November 2010, Para. 53.

158 Council of Europe Committee of Ministers, *Recommendation No. R (99) 4 On Principles Concerning the Legal Protection of Incapable Adults*, 1999.

159 *Ibid.*, Principle 14(3).

160 See above, note 156, Para 245. See also *Kędzior v Poland*, European Court of Human Rights, Application No. 45026/07, 16 October 2012.

## ***Contravention Code***

The Contravention Code of the Republic of Moldova (Code No. 218 of 24 October 2008) (Contravention Code)<sup>161</sup> sets out administrative offences, contraventions of which give rise to administrative sanctions. Liability in respect of an administrative offence is separate from both criminal and civil liability: contravention does not need to be established in court. Rather, the Code gives various administrative bodies jurisdiction to establish particular offences.<sup>162</sup> However, at least in the case of the administrative offences relating to discrimination described below, only courts may impose sanctions.

The Code covers all spheres of life and all persons within the jurisdiction of Moldova are subject to the Code. It imposes separate penalties according to whether the contravener is an individual, a legal entity such as a company or a “responsible person”.<sup>163</sup> In accordance with Article 7, persons that have committed administrative offences are equal before the law and the same conduct will attract the same liability regardless of “race, nationality, language, religion, sex, political affiliation, wealth, social origins or any other situation.”

The Contravention Code contains several administrative offences relevant to equality and non-discrimination. Each offence is punishable by a certain number of penalty units, with each unit amounting to MLE 20 (USD 1).<sup>164</sup>

Under Article 65-1, it is an offence to make a distinction, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion or belief, sex, age, disability, political affiliation or any other criteria, manifested in:

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161 Available at: <http://lex.justice.md/md/330333>.

162 Contravention Code of the Republic of Moldova (Code No. 218 of 24 October 2008), Article 374(2).

163 A responsible person is defined in Article 16 of the Contravention Code as a person with certain rights and obligations in relation to exercising the functions of a public authority, or in relation to the administrative, organisational or economic actions of a company, institution, state organisation or central or local public authority. Such persons will be liable if they intentionally used their authority contrary to work duties, clearly exceeded rights and powers granted by law, or failed to fulfil their work duties.

164 See above, note 162, Article 34(1).

- the provision of access to educational institutions of any type and level;
- the setting of admission principles based on certain restrictions;
- the educational process, including the evaluation of the learnt knowledge; or
- scientific and educational activity.

Persons found to have committed this offence may be fined 100–140 conventional penalty units for individuals, 200–350 units for responsible persons and 350–450 conventional penalty units for legal entities.

Under Article 54-2(1), it is an administrative offence to make a distinction, exclusion, restriction or preference based on grounds of race, nationality, ethnic origin, language, religion or belief, sex, age, sexual orientation, disability, political affiliation or other criteria, which has the effect of undermining equality of opportunity in employment, manifested in:

- advertising for positions using criteria excluding or favouring certain individuals;
- the groundless refusal to hire;
- the groundless refusal to admit individuals into training courses;
- differentiated remuneration for the same type of work; or
- differentiated distribution of tasks so as to treat certain persons less favourably.

Persons found to have committed this offence may be fined 100–140 conventional penalty units for individuals, 200–350 units for responsible persons and 350–450 units for legal entities.

Pursuant to Article 54-2(2), it is an administrative offence for an employer to harass an employee. Harassment is defined as an expression based on race, nationality, ethnic origin, language, religion or belief, sex, age, disability, political affiliation or any other criteria that could create an intimidating or offensive environment at work. Persons found to have contravened this Article are liable for 130–150 conventional penalty units and 250–400 if they are responsible persons.

Under Article 71-1, it is an administrative offence for a public authority to effect any difference, exclusion, restriction or preference based on grounds of

race, nationality, ethnic origin, language, religion or belief, sex, age, disability, political affiliation or any other criterion, manifested in access to health services, social services, banking and finance, transportation, cultural and recreational activity, sale or rental of property and other services. Persons found to have committed this offence are liable for 100–140 units for individuals, 200–350 units for responsible persons, and 350–450 units for legal entities. Under Article 71-2, it is an administrative offence for a person to prevent the CPEDEE from working to prevent and eliminate discrimination in an attempt to influence its decisions, to fail to submit within the prescribed timeframe information required to examine complaints, to ignore CPEDEE guidelines or to prevent any other form of its activity. Persons found to have committed this offence are liable for 50–100 conventional penalty units for individuals and 75–150 units for responsible persons.

Article 260 provides that “discrimination of any kind” against the users of public services in electronic communications, postal and information technology is an administrative offence. Public services found to have committed this offence are liable for 50–100 conventional penalty units for individuals and 200–400 units for legal entities. The Code does not define the term “discrimination of any kind” and therefore the type of conduct prohibited under this Article is unclear.

The CPEDEE is empowered to establish contravention of the administrative offences contained in Articles 65-1, 54-2, 71-1 and 71-2. However, only a court can impose the sanctions provided for in respect of each offence. If the contravener pays half the fine within 72 hours from its establishment, the fine is considered to have been executed. If a person fails to pay the fine within 30 days, a court may replace it with:

- a fine that is double the amount but which shall not exceed the maximum limit of the sanction;
- deprivation of the right to carry out certain activities from six months to a year;
- unpaid community work, with an hour of work amounting to one penalty unit; or
- arrest.<sup>165</sup>

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165 See above, note 162, Article 34(4).



Ostensibly, the Contravention Code is an important component in the legislative framework to combat discrimination in Moldova. It gives some teeth to the CPEDEE, empowering it to establish that administrative offences have been committed. Further, under Article 72-2, the Code penalises various forms of conduct that interfere with or otherwise undermine the directions of the CPEDEE. Where no such offences have occurred, the CPEDEE's powers are relatively insipid: under the Law on Ensuring Equality it is able to make recommendations as to the restoration of rights and to propose disciplinary measures to the competent bodies.

In practice, however, courts routinely strike out referrals from the CPEDEE in respect of administrative offences. Indeed, as discussed in part 3.4.2 below, the CPEDEE has aborted the practice of making such referrals. There are other problems with the Contravention Code. Certain administrative offences are ill-defined and therefore potentially unenforceable. In particular, what constitutes “discrimination of any kind” in Article 260 is unclear.

### ***Criminal Code***

The Criminal Code of the Republic of Moldova regulates and defines all forms of criminal conduct punishable by law. Article 176 of the Code prohibits aggravated discrimination. Under Article 77, social, national, racial, or religious hatred is to be considered an aggravating factor in the commission of an offence. Further, under Article 346, “hate-speech” is criminalised.

International best practice requires that, for the most part, discrimination be dealt with as a matter of civil rather than criminal law.<sup>166</sup> However, adequate protection from discrimination demands that certain severe manifestations of discrimination be recognised as a criminal offence:

*Any act of violence or incitement to violence that is motivated wholly or in part by the victim having a characteristic or status associated with a prohibited ground constitutes a serious denial of the right to equality. Such motivation must be treated as an aggravating factor in the commission of offences of violence and incitement to*

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166 See, for example, Organisation for Security and Cooperation in Europe, *Opinion on Draft Amendments to the Moldovan Criminal Code related to Hate Crimes*, 2010, Para 10.

*violence, and States must take all appropriate action to penalise, prevent and deter such acts.*<sup>167</sup>

Where violence is committed on the basis of an individual's personal characteristics, criminal legislation may provide harsher sanctions than the civil law. However, the Moldovan Criminal Code differs from this standard; criminalising discrimination *per se*, including for otherwise civil or administrative offences.

Under Article 176(1) of the Code:

*Any distinction, exclusion, restriction or preference of rights and freedoms of the person or group of persons, any discriminatory behaviour in political, economic, social, cultural and other spheres of life, based on grounds of race, nationality, ethnic origin, language, religion or belief, sex, age, disability, political affiliation or any other criteria that:*

- (a) is committed by a person in a position of accountability;*
- (b) causes considerable damage;*
- (c) is committed by means of placing discriminatory symbols in public places;*
- (d) is committed on the basis of two or more protected characteristics; or*
- (e) is committed by two or more people.*

*Is punishable by fine (...) community service (...) or imprisonment for up to two years.*

Increased penalties apply under Article 176(2) and (3) where mass media is used to promote discrimination or where such acts result in death or suicide.

The ambit of Article 176 is wide, potentially capturing many forms of discriminatory acts. Having such a wide reaching provision of the Criminal

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<sup>167</sup> See above, note 43, Principle 7.

Code is at odds with international law and best practice which recognizes that many acts of discrimination are more appropriately dealt with in the civil law and that criminal law should be reserved for a small number of particularly egregious acts such as inciting hatred against particular groups. It is also a misnomer to categorise multiple discrimination as necessarily more severe than single status-based discrimination, which is the approach taken by Article 167(1)(d). In practice, it appears that Article 167 is being used only very rarely. According to the General Prosecutor’s Office, there have never been any convictions for racial discrimination under this provision for example.<sup>168</sup>

*Offences Motivated by Hatred*

Unlike a general prohibition on discrimination, hate crimes ought to be regulated under criminal law. Under Article 77(d) of the Criminal Code, social, national, racist or religious hatred shall be considered an aggravating factor in sentencing. Additionally, five Articles contain penalty enhancing provisions:

- Deliberate Murder (Article 145(l));
- Intentional Severe Bodily Injury or Damage to Health (Article 151(i));
- Intentional Less Severe Bodily Injury or Damage to Health (Article 152(i));
- Deliberate Destruction or Damaging of Goods (Article 197(b)); and
- Profanation of Graves (Article 222 (2)(b)).

*Penalty Enhancing Provisions*

Article	Offence	Regular Sentence	Aggravated Sentence
145 (1)(l)	Deliberate Murder	10–15 years of imprisonment	15–20 or life imprisonment
151(2) (i)	Intentional Severe Bodily Injury or Damage	5–10 years of imprisonment	10–12 years of imprisonment

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168 Council on Prevention and Elimination of Discrimination and for Equality, *Assessment of the Laws and Practices on Crimes Motivated by Bias*, 2014, p. 17.

Article 152 (2)(i)	Intentional Less Severe Bodily Injury or Damage to Health	200–240 hours of community service or to 5 years of imprisonment	5–7 years of imprisonment
Article 197 (2) (b)	Deliberate Destruction or Damaging of Goods	Up to 1000 conventional units fine or 240 hours of community service	Up to 6 years of imprisonment
<b>Article</b>	<b>Offence</b>	<b>Regular Sentence</b>	<b>Aggravated Sentence</b>
Article 222 (2)(b)	Profanation of Graves	200–500 conventional units fine 180–240 hours of community service, or Up to 1 year of imprisonment	400–600 conventional units fine 200–240 hours of community service, or Up to 3 years of imprisonment

Article 77(d) contains a closed list of protected grounds, and does not include several characteristics such as sex, gender identity, or sexual orientation. Draft amendments to the Criminal Code, which have not yet been passed, would extend the list of characteristics included under Article 77; with the addition of penalty enhancing offences for 37 crimes. These developments are encouraging. However, the total number of penalty-enhancing provisions is very high, reducing their social impact. Moldova should limit the number such sentencing provisions to only “the most frequent forms of hate crimes”.<sup>169</sup>

### *Incitement to Hatred*

Under Article 346 of the Criminal Code deliberate actions aimed at inciting hatred, national, ethnic, racist or religious hostility or discord are prohibited:

*Deliberate actions, public calls including through printed or electronic mass-media aimed at inciting hatred, national, ethnic, racist or religious hostility or discord, for the humiliation of national honour and dignity, as*

<sup>169</sup> See Organisation for Security and Cooperation in Europe, *Opinion on Draft Amendments to the Moldovan Criminal and Contravention Codes Relating to Bias-Motivated Offences*, 2016, Paras 28–30, available at: [www.legislationline.org/documents/id/19901](http://www.legislationline.org/documents/id/19901).

*well as for the direct or indirect limitations of rights, or for establishing direct or indirect advantages to citizens based on their national, ethnic, racist, or religious affiliations shall be punished by a fine of up to 250 conventional units or by unpaid community service for 180 to 240 hours or by imprisonment for up to 3 years.*

This provision is insufficiently clear, increasing the likelihood of discriminatory application of the law and potentially violating the right to freedom of expression.<sup>170</sup> Proposed amendments to the law do not address the lack of clarity in wording, with phrases such as “national honour and dignity”, “direct or indirect limitations”, and “direct or indirect advantages for citizens” retained.<sup>171</sup>

### ***Labour Code***

The Labour Code<sup>172</sup> is one of many laws regulating labour relations in Moldova. Other relevant Laws include the Law on Ensuring Equality and the Law on Social Inclusion of Persons with Disabilities, both of which are discussed elsewhere in this section. The Labour Code applies to all employers who engage employees under an individual contract of employment.

Article 5 of the Labour Code sets out the basic principles of labour relations, several of which are concerned with non-discrimination in the workplace. Key principles include:

- the prohibition of forced labour and discrimination in employment relations;<sup>173</sup>
- equal rights and opportunities for employees;<sup>174</sup> and
- equality of access to career promotion, without discrimination, taking into account merit.<sup>175</sup>

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170 *Ibid.*, Paras 66–67.

171 *Ibid.*, Para 66.

172 See above, note 29.

173 *Ibid.*, note 32, Article 5(b).

174 *Ibid.*, Article 5(e).

175 *Ibid.*, Article 11(d).

Article 8(1) prohibits discrimination in the sphere of labour and employment:

*Any direct or indirect form of discrimination of the employee on grounds of sex, age, race, skin colour, ethnic origin, political convictions, social origin, place of residence, disability, HIV status, memberships of trade unions or participation in trade-union's activity, and also on other criteria which have not been connected to professional qualities of the worker shall be prohibited.*

The list of protected characteristics includes some that are not protected under the Law on Ensuring Equality, namely social origin, HIV status, place of origin, membership of trade unions, and participation in trade union activities. Where a characteristic is covered by both the Law on Ensuring Equality and the Labour Code, it is common for people to make a discrimination claim based on both laws.

Of potential concern are several exceptions contained in Article 8(2), which states it is not discrimination to establish “distinctions, exceptions, preferences or separate rights of the employees determined by the specific requirements of the given kind of work” or the “special care of the state towards persons requiring increased social and legal protection”. This suggests that there is scope for minimising the protection from discrimination under the Labour Code by classifying discriminatory criteria as “specific requirements” of the work in question. While “genuine occupational requirements” are permitted in many non-discrimination laws,<sup>176</sup> in so far as they permit direct discrimination, they must be limited to exceptional circumstances where the discrimination “can be justified against strictly defined criteria”.<sup>177</sup>

The Labour Code also provides that employers have an obligation to take measures to prevent sexual harassment in the workplace,<sup>178</sup> to ensure equal opportunities and equal treatment of all,<sup>179</sup> to take measures to prevent victimisation,<sup>180</sup>

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176 See, for example, Council Directive 2000/78/EC, note 44, above, Article 4(1).

177 See above, note 43, Principle 5.

178 See above, note 172, Article 10(2)(f3).

179 *Ibid.*, Article 10(2)(f1) and (f2).

180 *Ibid.*, Article 10(2)(f3).

to ensure that men and women have equal opportunity to combine work and family obligations,<sup>181</sup> and to ensure equal pay for work of equal value.<sup>182</sup>

The Code also includes a number of protections for working women, particularly pregnant women and women with young children. Article 251 prohibits the dismissal of pregnant women, women with children under the age of six, and workers who take parental leave, except in the circumstances defined in Article 86 of the Labour Code, which sets out “fair” reasons for dismissal. Article 247 prohibits employers from refusing to employ or reducing the wages of pregnant women or women with children under six.

Alongside these protections, however, are some problematic provisions, which reflect paternalistic presumptions that women are inherently less capable of certain work. Article 248 sets out a range of work that women are prohibited from undertaking, including “hard labour and hurtful and underground works”<sup>183</sup> and manual labour involving loads with weight “exceeding the maximum standards established for them”.<sup>184</sup> The UN CEDAW Committee has recently found that similar laws in Russia, which prohibited women undertaking work classed as “arduous [or] with harmful or dangerous working conditions”,<sup>185</sup> violated the rights to equal employment opportunities and to freely choose a profession under Articles 11(1)(b) and (c), respectively of the CEDAW.<sup>186</sup>

Article 250 provides that pregnant women and women with young children (aged up to three years) may be transferred to lighter work, while maintaining their average wage. While this provision is valuable in accommodating the needs of pregnant women, the use of pregnancy and maternity as shorthand for capacity is worrying and contravenes international non-discrimination standards.

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181 *Ibid.*, Article 10(2)(f4).

182 *Ibid.*, Article 10(2)(g).

183 *Ibid.*, Article 248(1).

184 *Ibid.*, Article 248(2).

185 *Svetlana Medvedeva v Russian Federation*, Committee on the Elimination of Discrimination against Women, Communication No. 60/2013, UN Doc. CEDAW/C/63/D/60/2013, 2016, Para 2.1.

186 *Ibid.*, Para 11.5.

The Labour Code is largely silent on the question of remedies available for breach of the various rights it covers. Therefore remedies contained in the Civil Code, including damages and injunctive relief, are available to employees seeking to vindicate their rights under the Labour Code.

### ***Education Code***

The Education Code of Moldova (Code No. 152 of 17 July 2014)<sup>187</sup> regulates the education system Article 2 of the Code refers to numerous relevant sources of international law, including the CRC, the CRPD, and the UNESCO Convention against discrimination in education.

Non-discrimination is a key aspect of the underlying purpose of the Code. Article 5(d) of the Code provides that the “mission” of education in Moldova includes “promoting dialogue, intercultural spirit of tolerance, non-discrimination and social inclusion”. Article 7 of the Education Code provides that the “fundamental principles of education” include access to education without discrimination,<sup>188</sup> social inclusion,<sup>189</sup> and ensuring equality.<sup>190</sup> Article 9 makes clear that access to education is available on an equal basis to all, regardless of citizenship or nationality.<sup>191</sup> Nevertheless, there is no general prohibition of discrimination found in the Education Code, nor are the provisions on equality of access defined in terms of forms of discrimination or the characteristics protected.

Despite this commitment to equal access and non-discrimination, the Code does not provide for specific causes of action or remedies for those denied access to education and subject to discrimination in education. However, the general remedies in the Civil Code are available.

### ***Family Code***

The Family Code of the Republic of Moldova (Code No. 1316 of 26 October 2000) (Family Code)<sup>192</sup> regulates a broad range of matters relating to the fam-

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187 Available at: <http://lex.justice.md/md/355156>.

188 See above, note 172, Article 7(a).

189 *Ibid.*, Article 7(g).

190 *Ibid.*, Article 7(h).

191 *Ibid.*, Articles 9(1) and 9(11).

192 Available at: <http://lex.justice.md/md/286119>.



ily, including marriage,<sup>193</sup> children's<sup>194</sup> and parent's rights,<sup>195</sup> and the protection of children without parents.<sup>196</sup>

The Family Code contains scant references to equality, non-discrimination and tolerance. By contrast, it evidences Moldova's placing of a marriage between a man and a woman at the centre of family in Moldova. This approach not only discriminates against same-sex couples but also those for whom marriage is not the centre of their family relationships. Articles 5 and 16 establish the equality of spouses in marriage, with the former providing that "[a]ll married persons have equal rights and obligations in family relationships, regardless of gender, race, nationality, ethnic origin, language, religion, opinion, political affiliation, wealth and social origin". However, Article 2 defines marriage as only being between a man and a woman. Marriage is also limited in this way under Article 1 of the Law on Ensuring Equality. As such, the right to equality does not extend to same-sex couples: indeed, in Article 15, same-sex marriage is expressly prohibited. Accordingly, rather than providing a legal basis for non-discrimination, much of the Family Code contributes to ongoing discrimination against "non-traditional" family relationships.<sup>197</sup> The deficiencies in the Family Code should be mitigated somewhat by the instruction in Article 1 that in the event of divergence between the Code and international conventions and treaties regarding family relations, those international instruments shall prevail. However, there is no jurisprudence in which Article 1 has been applied to interpret progressively some of the Code's more discriminatory provisions.

### ***Broadcasting Code***

The Broadcasting Code of Moldova (Code No. 260 of 27 July 2006)<sup>198</sup> regulates a broad area in relation to TV and radio broadcasts, including their

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193 Family Code of the Republic of Moldova (Code No. 1316 of 26 October 2000), Title II.

194 *Ibid.*, Chapter 10.

195 *Ibid.*, Chapter 11.

196 *Ibid.*, Title V.

197 For more discussion please see Part 2.2 of this report.

198 Available at: [http://lex.justice.md/document\\_rom.php?id=041D82D8:3A07C731](http://lex.justice.md/document_rom.php?id=041D82D8:3A07C731).

content, the manner of transmission, protection of editorial independence and prohibitions of censorship.<sup>199</sup>

The Broadcasting Code includes a number of provisions relating to equality and non-discrimination. Article 19(6)(c) provides that “[a]dvertising, including self-promotional advertising and teleshopping must not include any form of discrimination on grounds of race, religion, nationality, [or] sex”. Article 6(1) prohibits the broadcast of programs which incite hatred on grounds of “race, religion, sex [or] nationality”.<sup>200</sup> Banning the incitement of hatred is in line with international best practice. However, Article 19(6)(c) provisions on advertising is very broad and measures taken to eradicate discrimination must not overly impeded on the enjoyment of other human rights. Such a broad ban on advertising may be implemented in such a way as to restrict free speech to a disproportionate extent.

### ***Law on Freedom of Conscience, Thought and Religion***

The Law on Freedom of Conscience, Thought and Religion (Law No. 125 of 11 May 2007)<sup>201</sup> guarantees to “everyone the right to freedom of thought, conscience and religion”<sup>202</sup> in line with the Constitution and international human rights instruments.

Under Article 4(1) of the law, the right to manifest, change and practice one’s religion or belief is established. This provision may only be limited by a restriction pursuing a legitimate aim that is necessary in a democratic society for the protection of public order, morality or health.<sup>203</sup> Article 4(3) of the law ensures that the State cannot endorse a particular religion; whilst under Article 5(1) no one may be prosecuted for their religious belief (or lack of). Moreover, the possession of a particular set of beliefs or religion cannot justify the denial of civil and political rights.

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199 Broadcasting Code of Moldova (Code No. 260 of 27 July 2006), Article 8.

200 *Ibid.*, Article 6(1).

201 Law on Freedom of Conscience, Thought and Religion (Law No. 125 of 11 May 2007).

202 *Ibid.*, Article 4(1).

203 *Ibid.*, Article 4(2).

Under Article 15(1) of the law, religious denominations are independent from the state, with equal rights before the law and public authorities. Article 15(1) also provides that religious discrimination shall be punishable under law.

Despite affording an extensive set of guarantees establishing the right to practice one's own religion, Moldova has tended to favour the Russian Orthodox religious establishment.<sup>204</sup> Under Article 15(5) of the Law on Freedom of Conscience, Thought and Religion, "the state acknowledges the special and primordial role of the Christian Orthodox religion and, consequently, of the Moldovan Orthodox Church, in the lives, history and culture of the people of Republic of Moldova". Special procedures have noted that adherents to this religion have at times committed vandalism, intimidation and violence against religious minorities, including Jews, Muslims and members of different Evangelical groups, including Jehovah's Witnesses.<sup>205</sup>

### ***Law on Mental Health***

The Law on Mental Health (Law No. 1402 of 16 December 1997)<sup>206</sup> is the key statute governing the rights of persons with "mental disorders",<sup>207</sup> a broad term which encompasses both intellectual and psycho-social disabilities. The Law contains a broad range of provisions on diagnosis, treatment, patient confidentiality and funding of the mental health system.

The Law does not contain any detailed provisions on discrimination. Article 5(2) of the Law provides that psychiatric care must be provided without discrimination on grounds of sex,<sup>208</sup> and Article 3 provides that both Moldovan citizens<sup>209</sup> and foreign citizens and stateless persons<sup>210</sup> enjoy the same rights

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204 Promo-LEX Association, *Report on Human Rights in Moldova: 2014 Retrospective*, 2015, Chapter 7.1, available at: [http://www.promolex.md/upload/publications/ro/doc\\_1437047545.pdf](http://www.promolex.md/upload/publications/ro/doc_1437047545.pdf).

205 Human Rights Council, *Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, Addendum*, UN Doc. A/HRC/19/60/Add.2, 2012, p. 27.

206 Available at: <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=312970&lang=1>.

207 Law on Mental Health (Law No. 1402 of 16 December 1997), Article 1.

208 *Ibid.*, Article 5(2)(a).

209 *Ibid.*, Article 3(1).

210 *Ibid.*, Article 3(2).

under the Law. However, the nature and scope of this protection from discrimination are not elaborated on in the Law.

Contrary to providing important protections for people with mental disabilities, the Law in fact contains many discriminatory provisions. Of particular concern are the provisions regulating when treatment may be provided to persons with “mental disorders” without consent. Article 11(1) establishes that providing treatment under the Law is only possible with that person’s freely given written consent. However, the Law provides that consent is not required when applying coercive medical measures in accordance with the Criminal Code<sup>211</sup> and in the case of admission to hospital in accordance with Article 28.<sup>212</sup>

Article 28 establishes the conditions under which a person may be hospitalised without consent and in the absence of a court judgment. It provides that the person’s condition must be severe, and there must be either a “direct social threat”<sup>213</sup> or a “serious risk” to the individual’s health.<sup>214</sup> Article 28 potentially allows for the arbitrary deprivation of liberty in contravention of Article 14(1)(b) of the CRPD and Article 5, of the ECHR. It may also constitute inhuman treatment in contravention of Article 15 of CRPD and Article 16 of CAT. There is a risk that forced treatment and hospitalisation of those with intellectual and psycho-social disabilities can be abused and used in a discriminatory fashion, particularly given the link between disability and forced hospitalisation in the Law and the lack of safeguards. There is also a risk that the problematic regulation of deprivations of legal capacity, discussed above, will interact with the regulation of forced treatment to place persons with disabilities in a doubly vulnerable position, where their preferences are ignored.

The Law has been criticised by the Ministry of Justice for failing to comply with the obligations under the CRPD and basic principles of human

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211 Criminal Code of The Republic of Moldova (Code No. 985 of 18 April 2002), Articles 99, 100, 101, 102 and 103.

212 For further discussion of forced medical treatment, please see section 2.1 of this report.

213 See above, note 207, Article 28(a).

214 *Ibid.*, Article 28(c).

rights.<sup>215</sup> Of particular concern, the Law contains serious issues regarding the admission of forced treatment, hospitalisation without consent, and ensuring a complaint mechanism for persons that stay in medical or residential facilities.

### ***Law on Citizenship of the Republic of Moldova***

The Law on Citizenship of the Republic of Moldova (Law No. 1024 of 2 June 2000)<sup>216</sup> establishes the legal framework for citizenship of Moldova, including how and on whom citizenship is conferred, and outlines the rights and responsibilities which attach to citizenship.

Article 6 differentiates between citizens and non-citizens with Article 6(1) stating that Moldovan citizens are equal before the law and Article 6(3) stating that foreign citizens and stateless persons have their legal status established by law and by international agreements to which Moldova is a party. As identified above, many rights found in Moldovan law are held only by citizens. Article 6(2) provides that only citizens of Moldova have the right to elect and to be elected, to hold positions involving the exercise of public authority and to participate in referendums.

Article 7 guarantees non-discrimination amongst citizens of Moldova, irrespective of the means by which citizenship was acquired. This would, for example, prohibit discrimination against a person who acquired their citizenship by virtue of being a refugee. The Law is silent on causes of actions and remedies stemming from this right to non-discrimination, though the general remedies in the Civil Code will apply.

### ***Law on the Regime for Foreigners in the Republic of Moldova***

The Law on the Regime for Foreigners in the Republic of Moldova (Law No. 200 of 16 July 2010) regulates the entry, stay and exit of “aliens” in respect of

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215 Ministry of Justice of the Republic of Moldova, *Report on the Monitoring of the Law on Mental Health*, 2015, available at: <http://www.justice.gov.md/pageview.php?l=ro&idc=103&>.

216 Available at: <http://lex.justice.md/md/311522>.

Moldova's territory.<sup>217</sup> An alien is defined in the Law as "a person who does not hold Moldovan citizenship or stateless persons". A stateless person is in turn defined as "a person who is not considered a national by any state under their legislation."<sup>218</sup>

The Law does not apply to members of diplomatic missions and consular offices, international organisations and their family members whose status is regulated under international treaties, representatives of other states and members of official delegations.<sup>219</sup> It also does not extend to foreigners whose regime is regulated under the Law on Asylum in Moldova (Law No. 270-XVI of 18 December 2008).<sup>220</sup>

Pursuant to Article 4(1), aliens legally resident in Moldova enjoy the same rights and freedoms as citizens, guaranteed by the Constitution and international treaties to which Moldova is a party. This does not mean that rights conferred to citizens in the Constitution are, by virtue of the Law, extended to aliens. Rather, where a right is not expressly confined to citizens in the Constitution, then by virtue of Article 4 of the Law,<sup>221</sup> it applies to aliens too.

Aliens illegally present in Moldova may be detained in a Temporary Placement Centre for Foreigners (TPCs).<sup>222</sup> Under Article 66(5), aliens accommodated in TPCs will be treated without discrimination on grounds of race, sex, age, culture, nationality, religion or membership of a particular social group. The term "discrimination" is left undefined and it is therefore unclear whether it includes, for example, indirect discrimination or discrimination by association.

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217 Law on the Regime for Foreigners in the Republic of Moldova (Law No. 200 of 16 July 2010), Article 1.

218 *Ibid.*, Article 3.

219 *Ibid.*, Article 2(1).

220 *Ibid.*, Article 2(b).

221 Additionally, Article 19 of the Constitution of the Republic of Moldova provides that except as provided by domestic law and elsewhere in the Constitution, foreign citizens and stateless persons enjoy similar rights to citizens.

222 See above, note 220, Articles 52(4) and 64. "Detention" is defined in Article 64(1) as "a measure restricting freedom of movement, ordered by the court against the alien who fails to perform" an order to leave the territory."

The Law is not an adequate means of ensuring that persons in immigration detention are not subject to discrimination, primarily because it contains no enforcement procedure or remedy and because discrimination is left undefined. Nevertheless, this issue has been somewhat addressed since the enactment of the Law on Ensuring Equality, which provides a means of pursuing discrimination claims, in this context on grounds of nationality or ethnic origin.

### **3.3 National Policies Impacting on Discrimination and Inequality**

The previous section of this report showed that Moldovan legislation provides a degree of protection from discrimination on certain grounds. However, formal protection from discrimination in the form of legislation has done little to ensure equality. The Moldovan government has promulgated a number of public policies that seek to translate legislative protections into substantive outcomes, for example by providing guidance to public servants as to how to fulfil their functions in a non-discriminatory manner. This section of the report summarises the most important of these policies.

Public policies are not legally binding. Rather, they are aspirational, identifying areas of inequality and suggesting means of redressing them. Most public policies are developed for specified periods (up to five years), after which they expire. Some policies are renewed for further terms.<sup>223</sup> The structure of public policy documents in Moldova is dictated by legislation: policies must identify an issue, outline the policy's objectives, set out the means of achieving these objectives and summarise the expected social impact of implementing the policy.<sup>224</sup>

There is no public policy in Moldova with respect to equality and non-discrimination generally. Rather, policies tend to focus on a particular sphere of discrimination (for example employment) or a specific group of people.

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223 See, for example, Bureau of Interethnic Relations of the Republic of Moldova, "Press Release on the Development of the 2016–2020 Roma Action Plan to Replace the 2011–2015 Roma Action Plan", 21 December 2015, available at: <http://www.bri.gov.md/?pag=comunicate&opa=view&id=758&l=>.

224 Decision approving Drafting Rules and Single Requirements for Policy Documents (Government Decision No. 33 of 11 January 2007), available at: <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=319904&lang=1>.

While many marginalised groups are covered in public policies, there are notable exceptions. For example, there is no public policy regarding persons with mental disabilities – a deficiency that has been noted by the UN.<sup>225</sup>

The weight given to national policies and the extent to which the government implements their recommendations varies. In some cases, the government appears to support their implementation in principle but without allocating the funds or personnel necessary to do so. In others, policies and plans are so broadly stated and vague that it is difficult to know whether an obligation has been met. Even where policies are ignored, however, they can be effective advocacy tools. Civil society organisations are able to push for their implementation and have even partnered with public authorities to assist in meeting outcomes.

### 3.3.1 National Human Rights Action Plan 2011–2014

The National Human Rights Action Plan 2011–2014 (2011 NHRAP)<sup>226</sup> was approved on 12 May 2011, superseding the 2004–2008 National Human Rights Action Plan. It was a catch-all public policy regarding human rights in Moldova and included equality and non-discrimination targets and indicators. The 2011 NHRAP proposed a variety of reforms aimed at strengthening institutional mechanisms to prevent and combat discrimination, including:

- the establishment of the Council on the Prevention and Elimination of Discrimination and Ensuring Equality (CPEDEE) and the implementation of the Law on Ensuring Equality;
- improving the capacity of gender officers to monitor gender equality in public authorities;<sup>227</sup>
- the amendment of legislation, including the Electoral Code of the Republic of Moldova (Code No. 1381-XIII of 21 November 1997)

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225 See above, note 119, p. 82.

226 Decision approving the 2011–2014 National Human Rights Action Plan (Parliament Decision No. 90 of 12 May 2011), available at: <http://lex.justice.md/md/339395>.

227 Under an initiative of the Law on Ensuring Equal Opportunities between Women and Men (Law No. 5 of 9 February 2006), certain employees within an organisation are designated “gender officers” and are given responsibility to monitor and promote gender equality at work. Gender officers are usually in the human resources department of larger organisations.



(Electoral Code) to increase the rate of women's representation in Parliament;

- the exchange of information and expertise between the National Mechanism of Prevention and Combating Discrimination (NMPCD) and similar Moldovan institutions; and
- the conducting of a study of national case law regarding discrimination and the promulgation of national campaigns to promote non-discrimination, including on television and radio programmes (the body charged with executing these campaigns is not specified).

The measures proposed in the 2011 NHRAP were partially implemented. The Law on Ensuring Equality was enacted and the CPEDEE was constituted. The amendment to the Electoral Code is contained in legislation which is, at the time of writing, awaiting promulgation by the President.<sup>228</sup> On the other hand, the NMPCD was never established and according to a 2015 Ministry of Justice Report, several indicators included in the 2011 NHRAP were either reported as unimplemented or not reported at all.<sup>229</sup> Among the gaps in implementation, the Ministry of Justice noted that:

- reforms were often implemented in a perfunctory manner;
- reforms were sometimes reported as implemented on the basis of the completion of activities that were unrelated to the reform in question;
- no clear criteria existed to assess objectively whether reforms were satisfactorily implemented; and
- no mechanism existed through which the Central Public Authorities or Local Public Authorities could monitor the implementation of the 2011 NHRAP.

The deadlines for the implementation of all actions contained in the 2011 NHRAP have now passed. While the Ministry of Justice expressed an intention

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228 The Law on Amendments and Addenda to Certain Legislative Instruments (Draft Law No. 180 of 15 May 2014), discussed in section 3.2, makes such an amendment to the Electoral Code, however it has not yet been promulgated by the president.

229 Ministry of Justice of the Republic of Moldova, *Report on the Implementation Status of the 2011–2014 National Human Rights Action Plan for the Year 2014 in the Central Public Authorities*, 2015, available at: [http://justice.gov.md/public/files/drepturile\\_omului/Raport\\_privind\\_gradul\\_de\\_implementare\\_PNADO\\_pentru\\_anul\\_2014\\_in\\_cadrul\\_APC.pdf](http://justice.gov.md/public/files/drepturile_omului/Raport_privind_gradul_de_implementare_PNADO_pentru_anul_2014_in_cadrul_APC.pdf).

to develop a new human rights action plan in the fourth quarter of 2015, no such action plan has yet been released.<sup>230</sup>

### 3.3.2 2010–2015 National Gender Equality Programme (2010 NGEP)

The 2010–2015 National Gender Equality Programme (2010 NGEP)<sup>231</sup> was approved on 31 December 2009 and aims to combat discrimination on grounds of gender. The Ministry of Labour, Social Protection and Family is responsible for monitoring and coordinating the implementation of the actions contained in the 2010 NGEP. Its goals include:

- increasing employment among women and a decrease in the gender pay gap;
- eliminating all forms of gender-based discrimination in the labour market; and
- economic empowerment of women in rural areas.<sup>232</sup>

The 2010 NGEP focuses to a large extent on increasing the participation of women in public life. It pushes for compulsory consideration of gender equality in all policy documents and at all implementation levels. It also highlights the dearth of women in the public electoral process, suggesting that women continue to face discrimination in political and public activities, due largely to existing gender stereotypes and sexism.<sup>233</sup>

The issue of violence against women is explored in the 2010 NGEP. It notes the particular vulnerability of female migrants, for whom discrimination on grounds of both migrant status and gender can lead to “abuse or trafficking both in the labour market and during migration to the countries of

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230 Ministry of Justice of the Republic of Moldova, “Press Release: 2011-2014 National Human Rights Action was almost Entirely Implemented”, 31 March 2014, available at: <http://www.justice.gov.md/libview.php?l=ro&idc=4&id=1832>.

231 Decision approving the 2010-2015 National Gender Equality Programme (Government Decision No. 933 of 31 December 2009), available at: <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=333441&lang=1>.

232 *Ibid.*, Chapter 2.

233 *Ibid.*, Para 21.

destination.”<sup>234</sup> The 2010 NGEF observes that “there is insufficient awareness in society about domestic violence as a human rights violation” and “poor training of experts from different fields in relation to the identification, registration and reporting of domestic violence cases.”<sup>235</sup>

Among the strategies proposed in the 2010 NGEF to combat violence against women are the development of educational programmes and training modules, investment in rehabilitation and resocialisation programmes for victims and perpetrators of gender-based violence and human trafficking, and the increased collection, analysis and distribution of gender-disaggregated statistics on gender-based violence and trafficking. According to the Ministry of Labour, Social Protection and Family, these strategies have only been partially implemented, with insufficient resourcing cited as a key cause.<sup>236</sup> During the process of NGEF implementation, the CEDAW Committee criticised “limited cooperation between existing gender equality bodies and relevant ministries (...) frequent staff turnover (...) [and] insufficient gender mainstreaming within ministries at all levels”.<sup>237</sup> Moldovan NGOs raised concern over the sporadic/insufficient activity of the Governmental Commission for Equality between Women and Men and the lack of full time personnel responsible for ensuring gender equality in other ministerial departments.<sup>238</sup>

At the time of writing, the Ministry is developing a National Gender Equality Programme for 2016–2020.<sup>239</sup>

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234 *Ibid.*, Para 13.

235 *Ibid.*, Para 40.

236 Ministry of Labour, Social Protection and Family of the Republic of Moldova, *Evaluation Report on the Degree of Implementation of the National Gender Equality Programme for 2010–2015*, 2015, available at: [http://www.mmprsf.gov.md/sites/default/files/document/attachments/raport\\_evaluare\\_pnaeg\\_2010-2015.pdf](http://www.mmprsf.gov.md/sites/default/files/document/attachments/raport_evaluare_pnaeg_2010-2015.pdf).

237 Committee on the Elimination of Discrimination against Women, *Concluding Observations: Moldova*, UN Doc. CEDAW/C/MDA/CO/4-5, 29 October 2013, Para 13.

238 Gender Equality Platform and Others, *Joint Submission to the Universal Periodic Review for the Republic of Moldova*, 2016, Para 5.1, available at: <http://cdf.md/files/resources/98/UPR-submission-gender-equality-platform-Moldova.pdf>.

239 Government of the Republic of Moldova, *Project of the New National Gender Equality Programme for 2016–2020*, 2016, available at: <http://particip.gov.md/proiectview.php?l=ro&idd=3140>.

### 3.3.3 2007–2015 National Strategy for Employment Policies

The 2007–2015 National Strategy for Employment Policies (2007 NSEP), approved by the Moldovan government on 31 May 2007,<sup>240</sup> concerned discrimination in the labour market.

The 2007 NSEP called for the reduction of gender gaps in terms of both representation and wages.<sup>241</sup> It also called for the development of additional public policies to improve compliance with provisions of the Labour Code of the Republic of Moldova (Law No. 154 of 28 March 2003) relating to older employees. Finally, the 2007 NSEP recognised the labour market as a site in which social change can occur, noting that employment can integrate marginalised people who are otherwise at risk of exclusion.<sup>242</sup> However, the Strategy lacked sufficient provisions on the employment of persons with disabilities, a fact which may have contributed to poor results in this area.<sup>243</sup> The final report on strategy implementation is not yet available.

### 3.3.4 2011–2015 Action Plan for the Support of Roma People from the Republic of Moldova

The 2011–2015 Action Plan for the Support of Roma People from the Republic of Moldova (2011 APSRP) was approved on 8 August 2011.<sup>244</sup> The plan called for interventions to improve the outcomes of Roma people in the areas of education, employment, health insurance, living conditions, participation in decision-making and documentation. Particular focus was given to the welfare of Roma women.<sup>245</sup>

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240 Decision approving the 2007–2015 National Strategy for Employment Policies (Government Decision No. 605 of 31 May 2007).

241 *Ibid.*, Chapter 3.

242 *Ibid.*

243 Legal Assistance Centre for Persons with Disabilities, *Submission to the Committee on the Rights of Persons with Disabilities for Moldova*, 2015. p. 34, available at: [http://www.advocacy.md/sites/newadvocacy/files/Raport%20de%20alternativa%20CRPD\\_ROM.pdf](http://www.advocacy.md/sites/newadvocacy/files/Raport%20de%20alternativa%20CRPD_ROM.pdf).

244 Decision approving the 2011-2015 Action Plan for the Support of Roma People from the Republic of Moldova (Government Decision No. 494 of 8 August 2011), available at: <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=339319>.

245 *Ibid.*, Chapter 1.2.

One of the more ambitious objectives of the 2011 APSRP was to introduce “community mediators” to facilitate Roma access to public services and to communicate with public authorities on behalf of Roma people.<sup>246</sup> It called for the employment of 48 such community mediators in 44 settlements inhabited predominantly by Roma people, amounting to an average of one mediator per 150 Roma people.<sup>247</sup>

Throughout its implementation period, public authorities failed to publish interim reports on the status of the 2011 APSRP. In February 2016, the Bureau for Interethnic Relations published a final report on the 2011 APSRP,<sup>248</sup> according to which progress was made in certain respects. In particular, community mediators were set up in up to 12 localities, leading to an increase in Roma persons obtaining administrative and bureaucratic documents, increased school attendance, increased access to social welfare and more efficient communication between the Roma population and other groups at the community level. However, the report lacks statistical data and may not accurately assess the success of the policy’s implementation. For example, the figure of 12 mediators employed contradicts the figure of seven which is given by representatives of local public authorities.<sup>249</sup> Ultimately, the 2011 APSRP suffered from a lack of funds being allocated to its implementation. The 2016–2020 Action Plan in support of the Roma population in Moldova was approved by the government on 20 April 2016. However as with the previous iterations, insufficient resources have been allocated for its effective implementation.

### **3.3.5 2007–2014 National Strategy on Community-Based Actions to Support Children in Difficulty**

The 2007–2014 National Strategy on Community-Based Actions to Support Children in Difficulty (2007 NSCASC)<sup>250</sup> was approved on 20 August 2007. The goal, set out in Chapter 2 of the Strategy, was to create opportunities

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246 *Ibid.*, Annex.

247 *Ibid.*

248 Government of the Republic of Moldova, *Evaluation Report on the Implementation of the 2011–2015 Action Plan for the Support of Roma People from the Republic of Moldova*, 2016, available at: [http://www.bri.gov.md/files/3849\\_Studiu-HG-56\\_18.01.16.pdf](http://www.bri.gov.md/files/3849_Studiu-HG-56_18.01.16.pdf).

249 *Ibid.*, p. 14.

250 Decision approving the 2007–2014 National Strategy on Community-Based Actions to Support Children in Difficulty (Government Decision No. 954 of 20 August 2007).

for the social integration of disadvantaged children through relevant Community actions. The 2007 NSCASC set out the objectives that Moldova had to meet in order to comply with the 2009–2013 European Integration: Freedom, Democracy, Welfare Programme<sup>251</sup> and the UN Convention on the Rights of the Child.<sup>252</sup>

The 2007 NSCASC aimed to ensure equality and non-discrimination of children in several vulnerable groups. It also makes reference to the importance of self-realisation of the identity and personality of children and young people. No report assessing the extent to which this strategy was realised has been published.

### 3.3.6 2010–2013 Strategy on Social Inclusion of People with Disabilities

The 2010–2013 Strategy on Social Inclusion of People with Disabilities (2010 SSIPD)<sup>253</sup> was approved on 9 July 2010 and, among other reforms, called for the development of an efficient mechanism for the provision of vocational guidance, training and rehabilitation services to persons with disabilities.<sup>254</sup> As well as this policy prescription, the 2010 SSIPD noted that the lack of a single legal definition of disability in Moldova was an impediment to effective legislative reform. The Constitution refers to disabled people as “handicapped”<sup>255</sup> and the Law on the State Protection and Guard Service (Law No. 134 of 13 June 2008) uses the term “invalids”.<sup>256</sup> The Equal Opportunities Law uses appropriate terminology.<sup>257</sup>

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251 Government of the Republic of Moldova, *2013–2014 Activity Program: European Integration: Freedom, Democracy, Welfare*, 2013, available at: [http://www.gov.md/sites/default/files/document/attachments/program\\_guvern-ro.pdf](http://www.gov.md/sites/default/files/document/attachments/program_guvern-ro.pdf).

252 Convention on the Rights of the Child, 1577 U.N.T.S. 3, 1989.

253 Law approving the 2010–2013 Strategy on Social Inclusion of People with Disabilities 2010–2013 (Law No. 169 of 9 July 2010).

254 *Ibid.*, Chapter 1.

255 See above, note 105, Articles 50 and 51.

256 Articles 40(9) and 46(5), available at: <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=362560>.

257 See, for example, Law on Social Inclusion of Persons with Disabilities (Law No. 60 of 30 March 2012), Article 2, available at: <http://lex.justice.md/md/344149>.

The 2010 SSIPD lapsed in 2013 and no corresponding public policy has been introduced. Problems in terminology persist. For example, the Constitution has not been amended so as to remove references to handicapped persons. On the other hand, the Law on Ensuring Equality was enacted during the term of the policy and refers to “persons with disabilities.”

The Equal Opportunities Law was promulgated during the implementation period of the 2010 SSIPD so, at least in terms of establishing a legislative framework for disability discrimination, the policy was successful. However, the success of the Law has been hampered by the failure of Parliament to bring other statutes into line with it. For example, while the Equal Opportunities Law provides that buildings must be accessible to disabled persons, planning and construction laws do not require this and the obligation is often ignored. There has been no government report monitoring the extent to which the 2010 SSIPD was implemented.<sup>258</sup>

### 3.3.7 2014–2016 Programme for Mainstreaming Ageing in Policies

The Programme for Mainstreaming Ageing in Policies (PMAP)<sup>259</sup> was approved on 2 June 2014 and explores ways to facilitate the increased participation of older people, especially women, in socioeconomic life.

Among other objectives, the PMAP seeks to:

- challenge the view that age is associated with a decrease in workplace productivity;<sup>260</sup>
- combat the tendency for older women to be poorer than older men due to having worked for fewer years and at lower wages;<sup>261</sup> and

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258 For a government report on Moldova’s implementation of the CRPD, see above, note 236. For the views of NGOs on Moldova’s implementation of the 2010 SSIPD, see, for example: Institute for Development and Social Initiatives, *Equal Opportunities, Inclusion and Social Protection of Disabled People*, 2010, available at: [http://aopd.md/attachments/article/62/MONITORUL\\_SOCIAL%20dizabilitati.pdf](http://aopd.md/attachments/article/62/MONITORUL_SOCIAL%20dizabilitati.pdf). Also, see above, note 243.

259 Decision approving the Programme for Mainstreaming Ageing in Policies (Government Decision No. 406 of 2 June 2014), available at: <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=353338>.

260 *Ibid.*, Para 13(a).

261 *Ibid.*, Para 41.

- increase the monitoring of health service delivery to ensure that older people are not discriminated against within the health system.<sup>262</sup>

The PMAP suffers from a lack of specificity. Indeed, what is meant by the term “older persons” is undefined. As its provisions are broad and aspirational, it is difficult to assess the degree to which it has been implemented.

### 3.3.8 2014–2020 National Youth Strategy and Action Plan

The 2014–2020 National Youth Strategy and Action Plan (2014 NYS)<sup>263</sup> provides that non-discrimination and equality of opportunity should be guiding principles in the formation of policies affecting young people in Moldova.<sup>264</sup> It also notes that victims of discrimination on grounds of age are less likely to access social services and are more likely to be poor and have health problems.<sup>265</sup> The 2014 NYS identifies age discrimination as amongst the most pressing issues affecting young people in Moldova. It notes that around 30.3% of young people, defined in the Law on Youth (Law No. 279 of 11 February 1999)<sup>266</sup> as persons between the ages of 16 and 30, believe that they are discriminated against, particularly in the spheres of employment, education and civil participation (i.e. decision-making at the community level).<sup>267</sup>

The *Ministry of Youth and Sports of Moldova* is responsible for strategy implementation. In 2016, the *Ministry of Youth and Sports of Moldova* issued the first progress report on strategy implementation during 2015.<sup>268</sup> Overall, the report shows an average level of implementation. Overall implementation score is 0.6 (where (0) action not implemented – (1) action

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<sup>262</sup> *Ibid.*, Para 43.

<sup>263</sup> Decision on adoption of the National Youth Strategy 2020 and Action Plan (Government Decision No. 1006 of 10 December 2014), available at: <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=356215>. This policy superseded the 2009–2013 Youth Development Strategy.

<sup>264</sup> *Ibid.*, Annex 1, available at: [http://lex.justice.md/UserFiles/File/2014/mo400-403md/anexa%201\\_1006.docx](http://lex.justice.md/UserFiles/File/2014/mo400-403md/anexa%201_1006.docx).

<sup>265</sup> *Ibid.*, pp. 11, 13, and Annex 1.

<sup>266</sup> Article 2, available at: <http://lex.justice.md/md/311644>.

<sup>267</sup> See above, note 259, pp. 11, 13 and Annex 1.

<sup>268</sup> At the time of writing, the report is not available online.



fully implemented) while the score on reaching Strategy Objectives is 0.59. The main deficiencies in implementation that are identified in the report concern core actions related to elaboration and adoption of guidelines and methodologies, public policies, research and studies on youth. The highest scores were achieved in relation to organising various public events, capacity building trainings, seminars, etc., many of which were implemented with support and collaboration from civil society organisations (such as the National Youth Council in Moldova).

### 3.3.9 2011–2020 National Strategy on Migration and Asylum

The 2011–2020 National Strategy on Migration and Asylum (2011 NSMA)<sup>269</sup> harmonises Moldova’s pre-existing policies regarding the processing of migrants and asylum seekers. While the 2011 NSMA is not solely concerned with equality and non-discrimination, it includes measures designed to protect migrants and aliens from discrimination on grounds including race. For example, the 2011 NSMA states that legal aliens and stateless persons should have freedom of movement within Moldova:

*Ensuring that the freedom of movement of legally staying aliens or stateless persons in the Republic of Moldova is not subject to unjustified restrictions, including discriminatory measures, based on any ground such as sex, race, colour, ethnic or social origin, genetic features, health status (including HIV/AIDS), language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability or age.*<sup>270</sup>

Unusually, the 2011 NSMA seeks to prevent discrimination against aliens and stateless persons on grounds of their “genetic features”. Discrimination on this ground is not prohibited in other Moldovan legislation or policies and it is unclear what the intention behind the inclusion of this protected characteristic was in this context, and what its application would entail.

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269 Decision approving the 2011-2020 National Strategy on Migration and Asylum (Government Decision No 655 of 8 September 2011), available at: <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=340066>.

270 *Ibid.*, Chapter 5, Para 21.

### 3.4 Enforcement and Implementation

While there is a relatively comprehensive legal framework protecting the rights to equality and non-discrimination in Moldova, the extent to which the Constitution and legislative provisions are effective depends on how they are enforced and implemented in practice. As this section identifies, there are many areas in which their enforcement and implementation needs to be strengthened.

The focus of this section is on the institutional mechanisms to protect against discrimination established in the Law on Ensuring Equality. In particular, the mandate of the Council on the Prevention and Elimination of Discrimination and Ensuring Equality (CPEDEE) in relation to the investigation and conciliation of complaints will be examined. The treatment of discrimination actions in court is also outlined.

#### 3.4.1 Moldovan Legal System

The structure of Moldova's legal system is set out in the Constitution, Chapter 9 of which concerns the judiciary. The Constitutional Court is established under Article 134 as the "sole body of constitutional jurisdiction" in Moldova, charged with reviewing the constitutionality of legislation, decisions of Parliament, Presidential decrees and other instruments including international treaties.<sup>271</sup> Article 140 provides that laws become null and void from the time at which the Constitutional Court orders a statute invalid, and decisions of the Court cannot be appealed.<sup>272</sup>

Existing in parallel to the Constitutional Court is a hierarchy of other judicial organs: the Supreme Court of Justice, the Court of Appeal and the courts of law. These courts are established under Article 115 of the Constitution, however their structures and areas of competence are set out in legislation,<sup>273</sup> in particular the Law on the Supreme Court of Justice (Law No. 789 of 26 March 1996) and the Law on the Organisation of Judiciary (No. 514-XIII of 16 July 1995) (Law on the Judiciary). The establishment of extraordinary courts is forbidden under Article 115(3) of the Constitution.

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<sup>271</sup> See above, note 105, Article 135(1).

<sup>272</sup> *Ibid.*, Article 140(2).

<sup>273</sup> *Ibid.* Article 115(4).

The Supreme Court of Justice is the highest non-constitutional court, tasked with “ensuring correct and unitary implementation of laws by all courts.”<sup>274</sup> It has jurisdiction to hear appeals in civil, administrative, criminal and certain procedural matters<sup>275</sup> and can hear certain types of case at first instance.<sup>276</sup> The Court of Appeal sits beneath the Supreme Court of Justice and hears appeals of the decisions of the courts of law and specialised courts, as well as cases at first instance falling within its areas of competence.<sup>277</sup> It hears both criminal and civil matters.<sup>278</sup> There are four appellate courts and each exercises jurisdiction over its own geographic area.

Specialised courts have jurisdiction over cases involving certain subject matters.<sup>279</sup> Examples include the Commercial District Court and the Military Court.<sup>280</sup> Finally, the courts of law function at the district and municipal level, and sit within the jurisdiction of one of the four appellate courts.

The CPEDEE does not have judicial power. Established under the Law on Ensuring Equality, it is tasked with examining the complaints of persons who consider themselves to have been discriminated against.<sup>281</sup> The CPEDEE is unable to impose sanctions when it finds that unlawful discrimination has occurred; rather, it can refer such a case to the relevant public body along with proposed disciplinary steps.<sup>282</sup> The CPEDEE can also establish that a person

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274 Law on the Organisation of Judiciary (Law No. 514 of 16 July 1995), Article 43.

275 Law on the Supreme Court of Justice (Law No. 789 of 26 March 1996), Article 2(a).

276 Administrative and civil cases that the Supreme Court of Justice can hear at first instance are contained in Article 10 of the Law on Administrative Litigation (Law No. 793 of 10 February 2000); the criminal cases that the Supreme Court of Justice can hear at first instance include hearings for crimes committed by the President of Moldova and are listed in Article 39 of the Criminal Procedure Code of the Republic of Moldova (Code No. 122 of 14 March 2003).

277 Under Article 33(3) of the Civil Procedure Code (Code No. 225 of 30 May 2003), the Court of Appeal may hear in the first instance disputes relating to the decisions and other acts of the Central Public Authorities and the decisions of the Central Electoral Commission. It may also hear insolvency cases under the Law on Insolvency (Law No. 149 of 29 June 2012).

278 Civil Procedure Code (Code No. 225 of 30 May 2003), Title 1; Criminal Procedure Code (Code No. 122 of 14 March 2003), Article 38.

279 See above, note 274, Article 15(2).

280 *Ibid.*, Article 25(2).

281 See above, note 33, Article 12(1)(i).

282 *Ibid.*, Article 12(1)(j).

has committed certain administrative offences relating to discrimination, as set out in the Contravention Code of the Republic of Moldova (No. 218-XVI of 24 October 2008) (Contravention Code). However, pecuniary penalties can only be imposed by a court.<sup>283</sup> Decisions of the CPEDEE, comprising either recommendations or findings of administrative offences, can be judicially reviewed in courts. Further, as noted in the discussion of the Contravention Code, it is an administrative offence to prevent the CPEDEE from carrying out its functions, including by failing to submit documents relating to a complaint with the prescribed timeframe.<sup>284</sup>

### 3.4.2 Enforcement

States do not meet their obligation to protect people from discrimination by simply prohibiting discrimination in the law. They must also ensure that the rights to equality and non-discrimination are effectively enforced in practice. This means that, in addition to improving legal protection from discrimination, Moldova must also put in place mechanisms which guarantee victims of discrimination effective access to justice and appropriate remedies. According to Principle 18 of the Declaration of Principles on Equality:

*Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.*<sup>285</sup>

This means that, besides improving the national regulatory framework in the field of non-discrimination and equality, Moldova is obliged to increase the institutional capacity of the CPEDEE, the courts and other authorities so as to provide effective remedies for violation of the rights to equality and non-

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283 See above, note 33, Article 12(1)(k).

284 See above, note 162, Articles 71-2.

285 See above, note 45, p. 8.

discrimination. As a party to the ECHR, Moldova must ensure that the rights it guarantees are substantive and realisable; not theoretical and illusive.<sup>286</sup>

### ***Access to Justice***

Access to justice is a tenet of international human rights law<sup>287</sup> and will only be realised where victims of discrimination are able to seek redress unhindered by undue procedural burdens or costs. Remedies must be “accessible and effective”<sup>288</sup> and legal aid must be provided where necessary. Rules on standing which allow organisations to act on behalf, or in support, of victims of discrimination are particularly important in overcoming the disadvantages faced by individuals in the justice system. It is also important to allow groups of victims who have experienced similar discriminatory treatment to bring claims on behalf of a group, if the systemic nature of discrimination is to be effectively addressed.

The means by which individuals in Moldova are able to enforce equality and non-discrimination provisions depend on whether the provision is found in the Constitution or in legislation.

### ***Access to Justice under the Constitution***

The Constitution primarily creates institutions and espouses broad principles and rights. The operation of the institutions it creates and the justiciable rights they uphold are then predominantly a matter for legislation. Nevertheless, the Constitution contains several provisions relevant to access to justice.

The right to obtain effective redress for infringement of rights, freedoms and legitimate interests is preserved in Article 20 of the Constitution:

*(1) Any individual person shall be entitled to obtain effective reparation from the part of competent courts*

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286 *Bartenbach v Austria*, European Court of Human Rights, Application No. 3912/03, 20 March 2008; *Tudorache v Romania*, European Court of Human Rights, Application No. 78048/01, 29 September 2005.

287 European Convention on Human Rights, Article 6; International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 1966.

288 See above, note 31, para 15.

*of law against actions infringing upon his/her legitimate rights, freedoms and interests.*

*(2) No law may restrict the access to justice.*

The Constitution also includes provisions relating to the manner in which judicial remedies are to be obtained. Article 117 provides that legal hearings in all courts are to be held in public, except in certain cases as provided for in legislation. Article 118 provides that persons that do not speak the “Moldovan language” are entitled to speak at trial through an interpreter. The right to appeal against sentences delivered by courts of law is preserved in Article 119 of the Constitution, and the right to challenge the constitutional validity of legislation is contained in Article 135.

The Constitutional Court is the sole and authoritative court dealing with questions of Constitutional interpretation.<sup>289</sup> It has the power to review legislation, parliamentary decisions, presidential decrees, government orders, and international treaties.<sup>290</sup> There is no right of direct petition to the Constitutional Court. Instead, the Court has power to hear “pleas of unconstitutionality of the normative acts, upon appeal of the courts of law”.<sup>291</sup> Under this system, other courts, upon finding that a normative act violates the Constitution, may refer this normative act to the Constitutional Court to be reviewed. Article 25 of the Law on the Constitutional Court provides that referrals to the Constitutional Court can be made by, *inter alia*, the President, the Government, the Minister for Justice, the Supreme Court, the Prosecutor General, and MPs. In addition, it seems that, in practice, a plea of unconstitutionality can be raised by courts other than the Supreme Court, or by any of the parties to a case which is before the courts.<sup>292</sup> Therefore, individuals, NGOs, and other bodies have only an indirect route to the Constitutional Court. Access to constitutional review therefore is entirely contingent on an individual or group’s ability to access the normal judicial process, as discussed below.

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289 See above, note 105, Article 134(1).

290 *Ibid.*, Article 135(1)(a).

291 Venice Commission *3<sup>rd</sup> Congress of the World Conference on Constitutional Justice: Questionnaire: Reply by the Constitutional Court of Moldova*, 2014.

292 *Ibid.*, p. 9.

Where the Constitutional Court finds that a normative act violates the Constitution, that act becomes null and void upon the adoption of the decision.<sup>293</sup> Following the publication of a decision of the Constitutional Court, the government is required to put forward legislation in Parliament which amends the relevant normative act within three months.<sup>294</sup> These proposals take priority in the parliamentary process.<sup>295</sup> However, delays are common resulting in considerable uncertainty.<sup>296</sup> In order to remedy this uncertainty, the Constitutional Court has held<sup>297</sup> that when a normative act is rendered null and void by a decision of the Court and where that act repealed or amended the law, then the law amended or repealed will come back into effect pending the outcome of the legislative process. While this to some extent remedies the uncertainty caused by legislative delays, it does not necessarily ensure that constitutional rights are protected in the interim. In addition to the power to nullify normative acts, the Constitutional Court has the power to suspend the application of the normative act at issue until the case is decided on the merits by other courts.<sup>298</sup>

### *Access to Justice under Legislation*

The administration of justice by courts is largely regulated by the Civil Procedure Code (No. 225 of 30 May 2003). Article 33 of the Code establishes the competence of courts to hear all civil cases involving individuals, businesses and public authorities concerning the violation of rights, freedoms and legitimate interests, including complaints in which discrimination is alleged.

Ordinary courts may adjudicate discrimination actions in civil, administrative and criminal jurisdictions. In civil actions, complaints of discrimination are filed directly to the court, for example pursuant to Article 18 of the Law on Ensuring Equality. Applicants are not obliged to lodge a complaint with the CPEDEE before bringing a discrimination action to court. Similarly, applicants can apply to court after having lodged a complaint with the CPEDEE, so long

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293 See above, note 105, Article 140.

294 Law on the Constitutional Court (Law No. 317 of 13 December 1994), Article 281.

295 See above, note 291, p. 11.

296 *Ibid.*, pp. 11–12.

297 Constitutional Court, Decision No. 33 of 10 October 2013.

298 See above, note 294, Article 25<sup>1</sup>.

as less than a year has passed since the alleged act was committed and the CPEDEE complaint has concluded.<sup>299</sup>

Article 21 of the Law on Ensuring Equality and Article 85(1)(a) of the Civil Procedure Code provide that persons bringing an action to court on matters of discrimination are exempt from paying filing fees. Pursuant to Article 18(2) of the Law on Ensuring Equality, trade unions or NGOs operating in the field of human rights can initiate civil actions on behalf of persons whom they believe were discriminated against. To be eligible to file this type of representative action, NGOs must show that they are registered at the State Registry of NGOs and have the consent of the victim (or victims).<sup>300</sup>

There are two avenues through which courts may hear discrimination cases in an administrative, as opposed to civil, capacity. Firstly, decisions of the CPEDEE and other public authorities may be challenged in procedures akin to judicial review. Article 277 of the Civil Procedure Code establishes the right of parties aggrieved by an administrative act or failure to petition the courts for cancellation of the act, reinstatement of the right or compensation. Secondly, where the CPEDEE finds that one of the administrative offences in the Contravention Code relating to discrimination has been infringed, it may submit its findings to court, which will decide whether or not to impose sanctions.

Courts may hear prosecutions for criminal offences involving discrimination as set out in the Criminal Code of the Republic of Moldova (No. 985 of 18 April 2002) (Criminal Code). As discussed in part 3.2.2 above, examples of such offences include:

- torture, inhuman or degrading treatment based on discrimination (Article 166(3));
- sexual harassment for discriminatory purpose (Article 173); and
- the violation of the equality of citizens (Article 176(1)).

Under Moldovan law, proceedings involving certain criminal offences, including those discussed above, are initiated by the victim, who must make

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<sup>299</sup> Law on Ensuring Equality (Law No. 121 of 25 May 2012), Article 20.

<sup>300</sup> *Ibid.*



a “preliminary complaint” to the police.<sup>301</sup> The victim can withdraw complaints.<sup>302</sup> Unusually, complaints of sexual harassment and other sexual crimes<sup>303</sup> cannot be withdrawn as they are not listed in the exhaustive list of cases initiated by a complaint in Article 276(1) of the Criminal Procedure Code. Legal proceedings are initiated by the General Prosecutor’s Office, which is established in Article 125 of the Constitution, or one of its subordinate territorial or subordinate units. Trials are conducted in accordance with the Criminal Procedure Code of the Republic of Moldova (No. 122 of 14 March 2003). Victims play an active role in prosecutions, as they are required to be party to the case.<sup>304</sup> While it is possible for a victim to refuse to be party to a case, this will result in the termination of the case by the prosecutor.

Both criminal and civil proceedings concerning the same facts can be ongoing at the same time.<sup>305</sup> Civil proceedings can be initiated at any time from the start of criminal proceedings until the “end of the judicial investigation”.<sup>306</sup> If a civil claim is not filed before the conclusion of criminal proceedings, a claim can still be brought.<sup>307</sup> However, if a civil claim fails before criminal proceedings begin, a person is not entitled to commence criminal proceedings.<sup>308</sup> Conversely, if the criminal case is unsuccessful, a person cannot then bring a civil claim on the same facts.<sup>309</sup>

The manner of bringing complaints to the CPEDEE is set out in Articles 13 to 15 of the Law on Ensuring Equality. Complaints must contain a description of the violation of the complainant’s rights and the facts and evidence supporting this contention. The CPEDEE will then examine the complaint in accordance with Article 15 of the Law, requesting relevant data or explanations

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301 See Criminal Procedure Code above, note 278, Article 276(1).

302 *Ibid.*, Article 58(3)(7).

303 See above, note 211, Articles 171–175.

304 See above, note 278, Article 58.

305 *Ibid.*, Article 219.

306 *Ibid.*, Article 221(1).

307 *Ibid.*, Article 221(5).

308 *Ibid.*

309 *Ibid.*

about facts forming the subject of complaints. If the CPEDEE, in the course of investigations, thinks that a crime has occurred, it must refer the matter to the prosecutor, as the CPEDEE cannot consider a matter parallel to criminal proceedings. In practice, however, no referrals to prosecutors by the CPEDEE have yet been made.

### ***Legal Aid System***

Article 11(1) of the Law on the Judiciary provides that in all trials, parties are entitled to representation or, in the case of criminal trials, a defence attorney. However, there is no entitlement to specialist discrimination lawyers in cases involving discrimination.

Legal aid in Moldova is established under the Law on State-Guaranteed Legal Aid (Law No. 198 of 26 July 2007) (Law on Legal Aid). Article 8 of the Law provides that the system of legal aid is to be managed by three bodies, namely the Ministry of Justice, the Bar Association and the National Council for State-guaranteed Legal Aid (NCLA). The operation of the NCLA is also regulated by the Order of the Minister of Justice (No. 18 of 24 January 2008).

Pursuant to Article 6, legal aid is afforded (a) to Moldovan citizens and (b) to foreign citizens or stateless persons without legal assistance in cases related to public authorities or courts. There are two types of legal aid provided for under the Law: primary and qualified. “Primary” legal aid is provided to persons regardless of their level of income<sup>310</sup> and includes the provision of:<sup>311</sup>

- information about the legal system, legislation in force, the rights and duties of persons under particular laws and how to exploit rights through judicial and extrajudicial means;
- advice on particular legal matters; and
- assistance in the drafting of legal documents.

“Qualified” legal aid may be granted in both civil and criminal matters and is only available to persons regardless of their level of income in certain,

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310 Law on State-Guaranteed Legal Aid (Law No. 198 of 26 July 2007), Article 15.

311 *Ibid.*, Article 2.

pressing circumstances. According to Article 19 of the Law on Legal Aid, persons eligible for qualified legal aid include those who:

- lack the means to pay for legal assistance in criminal cases, where assistance is appropriate in the interests of justice;
- require emergency legal assistance on the issue of detention in a criminal trial;
- require legal assistance in cases of civil and administrative jurisdiction, but lack the means to pay for these services, and the legal or procedural issues involved are complex; or
- are children and victims of crime.

Article 20 provides that persons falling into several of the above classes are eligible for qualified legal aid regardless of income, for example those requiring emergency legal assistance in the case of detention at criminal trials, child victims of crime and persons committing an offence for which the penalty is administrative arrest.

The lawyers who provide state-guaranteed legal aid are trained at the NCLA. There are currently no legal aid lawyers specialising in cases of discrimination, although the NCLA has stated that it intends to provide this type of lawyer in the future.<sup>312</sup> As of the publication of this report, there are no signs that intention has led to the creation of a division of specialised discrimination lawyers. However, training has been provided to Moldovan lawyers, including those working in legal aid, on anti-discrimination law by organisations including the Council of Europe,<sup>313</sup> the Soros Foundation,<sup>314</sup> as well as Equal Rights Trust and Promo-LEX.<sup>315</sup>

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312 National Council for State Guaranteed Legal Aid, *Instruction and Methodological Assistance for Lawyers who Provide Free Legal Aid in 2014 and Prospects for 2015*, 2014, available at: <http://www.cnajgs.md/ro/news/activitatile-de-instruire-si-asistenta-metodica-continua-a-avocator-care-acorda-asistenta-juridica-garantata-de-stat-realizate-de-catre-cnajgs-in-anul-2014-si-perspective-pentru-anul-2015>.

313 Council of Europe Office in Moldova, *Training for Lawyers and Human Rights Activists on "Discrimination on the Grounds of Mental Health"*, 2014.

314 Promo-LEX Association, "Training Programme for Lawyers in Anti-Discrimination", 7 November 2010, available at: <https://promolex.md/index.php?module=announcements&cat=0&item=1363>.

315 Promo-LEX Association and Equal Rights Trust, "Competition for the Selection of Participants in Training", 14 June 2010, available at: <https://promolex.md/index.php?module=announcements&cat=0&item=269>.

A report from the UN Development Programme in conjunction with the Moldovan government found in 2014 that the quality of legal aid had improved over the previous five years, however a lack of continued training for legal aid lawyers and limited remuneration had contributed to cases in which advice of an insufficient quality was provided to clients.<sup>316</sup>

Furthermore, legal aid lawyers have themselves been found to have engaged in discrimination. In 2014, the CPEDEE investigated cases concerning the substandard provision of legal advice and representation in the Balti Municipality and Chisinau Municipality in respect of persons with mental disabilities. The CPEDEE found that discrimination occurred and recommended that measures be taken to remove the restrictions. Although the decision was annulled at both the initial review<sup>317</sup> and appellate level,<sup>318</sup> the basis for the annulment at both stages was a finding that the CPEDEE had not fulfilled its obligations under statute in relation to the case rather than a dispute as to whether unlawful discrimination had in fact occurred.<sup>319</sup>

### ***Evidence and Proof***

International law recognises that it can be difficult for a person to prove that discrimination has occurred, and thus requires that legal rules on evidence and proof are adapted to ensure that victims can obtain redress. Principle 21 of the Declaration of Principles on Equality states that:

*Legal rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that*

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316 Government of the Republic of Moldova and UN Development Programme, *Quality of Legal Aid Services: A Capacity Needs Assessment for the National Council for State-guaranteed Legal Aid from the Republic of Moldova*, 2014, p. 16.

317 Council on the Prevention and Elimination of Discrimination and Ensuring Equality, Decision No. 052/14 of 29 April 2014.

318 Chisinau Court of Appeal, Decision No. 3-282/2014 of 17 July 2014; Supreme Court of Justice, Decision No. 3ra-1486/14 of 26 November 2014.

319 Buiucani Court, Decision No. 3-282/2014 of 19 March 2014.

*they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (prima facie case), it shall be for the respondent to prove that there has been no breach of the right to equality.*

As this principle indicates, the “burden of proof” in cases of discrimination should be transferred to the respondent, once facts from which it may be presumed discrimination has occurred have been established. The CESCR has stated in its General Comment No. 20 that:

*Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.*<sup>320</sup>

In line with these principles, Article 19 of the Law on Ensuring Equality provides that, in discrimination court cases, the claimant must adduce evidence of facts from which it may be presumed that discrimination occurred. The burden of proof is not shared by the claimant and the respondent. Unless the facts attract criminal liability, the burden then shifts to the respondent to rebut the presumption, either by proving that the claimant is in a dissimilar position to the comparator; that differential treatment is not referable to a protected ground, or that such treatment is otherwise justified.<sup>321</sup>

The approach to the burden of proof is different in respect of complaints made to the CPEDEE. In accordance with Article 13(2) of the Law on Ensuring Equality, the CPEDEE will strike out complaints unless, among other things, they include the facts and any evidence supporting the complaint of a rights violation. The Law does not set out whether these facts and evidence must be sufficient to show a *prima facie* case of discrimination. Article 15(1) of the Law then provides that the burden of showing that an impugned act does

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320 See above, note 32, Para 13.

321 For further discussion of the criminalisation of some forms of discrimination under Moldovan law, see the discussion of the Criminal Code in section 3.2.3 above.

not constitute discrimination lies with the alleged perpetrator. Accordingly, it remains unclear whether the complainant must first make out a *prima facie* case before the onus shifts to the respondent.

The CPEDEE also takes a more expansive approach to what constitutes admissible evidence than do the courts. For example, the CPEDEE conducts on-site verification of circumstances;<sup>322</sup> a procedure in which courts have historically been reluctant to engage. Recent jurisprudence suggests that courts are reluctant to consider evidence procured by way of situational testing, a method of establishing discrimination by having two individuals who differ only in respect of one protected characteristic, interact with an alleged discriminator (e.g. a recruiter, a restaurant choosing who to serve etc) in order to see if they are treated differently.<sup>323</sup> In *Zapescu v Trabo Plus (Andy's Pizza Restaurants)*,<sup>324</sup> two candidates for a job (who knew one another) “tested” an employer’s attitude towards them. Both the Chisinau Centru Court and Chisinau Court of Appeal held that evidence of the employer’s refusal to hire one of the applicants was inadmissible. However the CPEDEE has accepted evidence from situational testing in the past.<sup>325</sup>

### ***Remedies and Sanctions***

It is essential that remedies are designed not only to address the needs of the individual bringing a claim, but to address structural causes of the discrimination experienced by the individual in the case, which are likely to affect others. In this respect, the CEDAW Committee has said:

*This obligation requires that States parties provide reparation to women whose rights under the Convention*

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322 Council on the Prevention and Elimination of Discrimination and Ensuring Equality, Decision No. 155/14 of 11 December 2014.

323 Much has been written on situation testing as a method of proving discrimination. See, for example Centre for Equal Rights, *Proving Discrimination Cases: the Role of Situation Testing*, 2009, available at: [http://www.eccar.info/sites/default/files/provingdiscriminationcases\\_theroleofsituationtesting\\_en\\_03.09.pdf](http://www.eccar.info/sites/default/files/provingdiscriminationcases_theroleofsituationtesting_en_03.09.pdf).

324 Chisinau Centru Court, Decision No. 2-472/14 of 27 June 2014; and Chisinau Court of Appeal, Decision No. 2a-3692/14 of 22 January 2015. This is the only litigation to have considered the admissibility of situational testing evidence in Moldovan courts; as such, it cannot be said with certainty that such evidence is per se inadmissible.

325 See, for example, Council on the Prevention and Elimination of Discrimination and Ensuring Equality, Decision No. 156/14 of 17 October 2014.

*have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.*<sup>326</sup>

The CESCR has also said that “effective” remedies include compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies.<sup>327</sup> Sanctions imposed on discriminators must be effective, proportionate and dissuasive.<sup>328</sup>

Article 18 of the Law on Ensuring Equality provides that where cases of discrimination are brought to court in a civil capacity, a court may:

- declare that the claimant’s rights were violated;
- prohibit the continuation of the discriminatory conduct;
- order the reinstatement of the situation prior to the violation of rights;
- order compensation for material and moral damage and recovery of court costs; or
- declare that a discriminatory document is null and void.

The remedies and sanctions available for administrative offences, as well as the measures that the CPEDEE is itself empowered to undertake, are discussed below.

### ***Administrative Mechanisms***

Aside from bringing a case to court, persons who believe themselves to have been the subject of discrimination can file an administrative complaint with the CPEDEE.

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<sup>326</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: On the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 2010, Para 32.

<sup>327</sup> Para See above, note 32, Para 40.

<sup>328</sup> See above, note 45, Principle 22.

The mechanisms available to the CPEDEE depend on its conclusions as to whether and what type of discrimination has occurred. Where no administrative or criminal offences are considered to have been committed, the CPEDEE can make recommendations under Article 15(4) to ensure the restoration of the victim's rights and to prevent the occurrence of similar acts. Such recommendations are communicated to the perpetrator and if after 10 days the recommendations are not adhered to, paragraph (6) provides that the CPEDEE may inform a superior body to take appropriate measures, or inform the public about the recalcitrant respondent. For example, in response to the CPEDEE's recommendations,<sup>329</sup> the Ministry of Education announced changes to the way that reasonable accommodation of children with disabilities were made when taking exams.<sup>330</sup>

The CPEDEE may also act in a conciliatory role: one of its functions under Article 12(1)(m) is to "contribute to the amicable resolution of conflicts arising from the commission of discriminatory acts".

With respect to administrative offences, the CPEDEE is empowered under Article 423 of the Contravention Code to establish that certain provisions of the Code have been contravened. If it determines that such contraventions have occurred, it may under Article 15(8) refer its findings to a competent court, which can then choose whether or not to impose sanctions. The administrative offences for which the CPEDEE has jurisdiction are outlined in part 3.2.3 of this report.

Finally, pursuant to Article 15(9), if the CPEDEE concludes that facts contain the elements of a criminal offence, it must send its case materials to the prosecutorial authorities. It should also be noted that while the CPEDEE cannot impose sanctions or award damages to victims of discrimination, certain actions which flout or obstruct the CPEDEE's operations are administrative offences.<sup>331</sup>

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329 Council on the Prevention and Elimination of Discrimination and Ensuring Equality, Decision No. 122/2014 of 9 September 2014.

330 Ministry of Education of the Republic of Moldova, "Changing Education Examination Ppupils with SEN", 9 March 2013, available at: <http://www.aee.edu.md/content/modificarea-instruc%C5%A3iunii-de-examinare-elevilor-cu-ces>.

331 See the analysis of the Contravention Code in section 3.2.3 of this report for a discussion of these administrative offences.



However, the efficacy and impact of the system through which administrative offenses are determined and punished is questionable. According to the latest information provided by the CPEDEE, reports sent from the CPEDEE to courts in relation to administrative offences have been routinely invalidated.<sup>332</sup> This blanket rejection of CPEDEE findings has led it to suspend the procedure of issuing these reports to court. Generally, findings are struck out on the basis that the CPEDEE has failed to comply with the formal requirements of such findings, which are outlined in Article 443 of the Contravention Code.<sup>333</sup> It is clear that a system in which the commission of administrative offences is determined by the CPEDEE while jurisdiction for the imposition of sanctions and confirmation of the offence resides with courts is not working.

Besides CPEDEE and courts, the Ombudsperson's Institution, governed by the Law on the Ombudsperson (Law No. 52 of 3 April 2014), has an important role in preventing and combating discrimination. Among the Ombudsperson's core competencies are:

- the examination of individual complaints on the violation of rights and freedoms;
- the initiation of lawsuits against perpetrators of discrimination; and
- the power to notify and bring actions to the Constitutional Court.<sup>334</sup>

The Ombudsperson represents one of the few means of individual access to the Constitutional Court, albeit in an indirect manner. The Ombudsperson refers only a few cases each year to the Court, however. From 2013–2016 there have been a total of 12 referrals, nine of which occurred in 2013.<sup>335</sup> Nevertheless it can be effective. For example, the Constitutional Court found unconstitutional a provision which limited admission to PhD study to those aged under 35.<sup>336</sup>

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332 Council on the Prevention and Elimination of Discrimination and Ensuring Equality, *Activity Report*, 2015, available at: <http://www.egalitate.md/media/files/Raport%20general%202015.pdf>.

333 Council on the Prevention and Elimination of Discrimination and Ensuring Equality, Decision No. 004/13 of 22 November 2013.

334 Law on the Ombudsperson (Law No. 52 of 3 April 2014), Article 16.

335 Ombudsman, *Complaints to the Constitutional Court*, 2016, available at: <http://www.ombudsman.md/ro/advanced-page-type/sesizari-la-cc>.

336 Constitutional Court, Decision No. 26 of 19 September 2013, available at: <http://lex.justice.md/md/350753>.

### 3.4.3 Jurisprudence on Equality and Non Discrimination

Moldova's equality laws are still young. It is perhaps, therefore, unsurprising that there is very limited jurisprudence to provide guidance on their interpretation. This section is not intended as a review of all equality and non-discrimination related decisions. Some discussion of numerous recent Moldovan cases in the area of equality and non-discrimination can be found in the Legal Resources Centre from Moldova's 2015 report entitled *Compatibility analysis of Moldovan legislation with the European standards on equality and non-discrimination*.<sup>337</sup> Instead, this section focuses on analysing a couple of key issues which are emerging in the case law. In addition, there have been four cases in the ECtHR in which Moldova was found to have breached the right to freedom from discrimination under Article 14 of the ECHR and each of these will also be discussed.

#### ***Sexual Orientation as a Prohibited Ground***

It has already been noted that, while sexual orientation is not included as a prohibited ground in Article 1(1) of the Law on Ensuring Equality, there have been instances in which the CPEDEE has found discrimination on this ground through the direct application of the European Court of Human Rights (ECtHR) jurisprudence. In Decision No. 028/13 of 21 January 2014, the complainant's ex-husband was awarded custody of their child after their separation. Following an application made by the husband, the relevant child protection authority<sup>338</sup> reduced the length of time the complainant could spend visiting her child. The application cited her alleged homosexuality as a reason for a reduction in visitation rights. The complainant lodged a complaint to the CPEDEE accusing the authority of discrimination on grounds of sexual orientation. The CPEDEE found that as sexual orientation is a ground protected under Article 14 of the ECHR, it is also a ground on which the CPEDEE may uphold unlawful discrimination complaints.

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337 Legal Resource Centre of Moldova, *Compatibility Analysis of Moldovan Legislation with European Standards on Equality and Non-Discrimination*, 2015, available at: <http://crjm.org/wp-content/uploads/2015/07/LRCM-Compatib-MD-EU-nondiscrim-legisl-2015-07.pdf>.

338 The Direction on the Protection of the Rights of Children within the Botanica District of Chisinau City.

The authors of this Report think that CPEDEE was correct to observe that Article 14 of the ECHR protects sexual orientation. While the ground is not expressly included in Article 14, the ECtHR found in *Kozak v Poland*<sup>339</sup> and *Gederdoc-M v Moldova*<sup>340</sup> that discrimination on this basis is prohibited. The CPEDEE was also right to conclude that it is subject to the ECHR and its case law: the Constitutional Court has recognised that, in accordance with Article 4(2) of the Constitution, provisions of the ECHR and ECtHR jurisprudence must be enforced in the same manner as national legislation and prevail to the extent of any inconsistency.<sup>341</sup>

However, in relying on the direct interposition of the ECHR to uphold the mother's claim, the Council forwent the opportunity to conclude that sexual orientation is included in Article 1(1) of the Law on Ensuring Equality by virtue of the phrase "or other similar criteria". Indeed, neither the CPEDEE nor any Moldovan court has been willing to recognise sexual orientation as a protected characteristic under Article 1(1).<sup>342</sup> A constitutional court judgment handed down two months prior to the CPEDEE's decision<sup>343</sup> declined to confirm that sexual orientation is a prohibited under the Law on Ensuring Equality (except to the extent that discrimination occurs in the field of employment, in which case it is specifically protected under Article 7).<sup>344</sup> There is no reason in principle to confine Article 1(1) in this way: the plain language of the Article includes analogous criteria and nothing about sexual orientation that renders it substantively different to, for example, race, sex or language. The Constitutional Court should have found that the Law on Ensuring Equality itself provides protection against discrimination on grounds of sexual orientation.

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339 *Kozak v Poland*, European Court of Human Rights, Application No. 13102/02, 2 March 2010.

340 *GENDERDOC-M v Moldova*, European Court of Human Rights, Application No. 9106/06, 12 June 2012.

341 See above, note 19.

342 While the ex-husband twice appealed the CPEDEE's Decision No. 028/13 of 13 December 2013, neither court dismissed his claim on the ground that Article 1(1) includes sexual orientation. See Buiucani Court, Decision No. 3-416/14 of 20 November 2014, and Chisinau Court of Appeal, Decision No. 3a-22/15 of 5 March 2015.

343 Constitutional Court, Decision No. 14 of 8 October 2013.

344 This decision did not affect the later CPEDEE decision because the Court merely declined to answer whether sexual orientation falls within the phrase "or other similar criteria". It did not rule that Article 1(1) does not extend to this characteristic.

## ***Religion and Discrimination***

The Law on Ensuring Equality provides a number of specific exceptions to the right to non-discrimination in relation to the activities of religious institutions. The Law is expressed in Article 1(2)(c) not to extend to religious authorities to the extent that the impugned conduct is related to religious belief.<sup>345</sup> In employment, differential treatment in the course of the professional activities of religious authorities on grounds of religion does not constitute discrimination, so long as a person's religion is an essential requirement of the role and the requirement itself is legitimate and justified.<sup>346</sup> A similar concession is included in Article 9(4) in relation to enrolment to study at religious educational institutions.

The Constitutional Court recently upheld the constitutionality of the exception contained in Article 1(2)(c) of the Law on Ensuring Equality.<sup>347</sup> In a decision handed down on 16 May 2016, the Court found that the impugned Article did not infringe the right to equality contained in Article 16 of the Constitution. The Court stated that this right, along with the guarantee of religious autonomy in Article 31 of the Constitution, encompasses the freedom of religious institutions to manifest their beliefs. However, the Court noted that this freedom is not unlimited: it must be consistent with public order, public health, public morals, and the rights and freedoms of others. Thus, Article 1(2)(c) of the Constitution must be interpreted narrowly, so as to cover the teachings, canons and traditions of religions, but not to extend to acts conducted in the name of religion that are aimed at injuring others. Interpreted this way, Article 1(2)(c) was held to be consistent with the right of equality in Article 16.

To the extent that it recognises that the freedom to manifest religious belief is subject to the rights and freedoms of others, this decision is to be commended. Indeed, this qualification is no more than is required under international law: Article 9(2) of the ECHR preserves the freedom to manifest one's religion or beliefs but provides that this freedom can be limited insofar as it is necessary in a democratic society for the protection of the rights and freedoms of others.

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345 See above, note 33, Article 1(2)(c).

346 *Ibid.*, Article 7(6).

347 Constitutional Court, Decision No. 28g/2016 of 16 May 2016.

However, balancing the right to freedom of religion and the rights and freedoms of others has been approached differently by the courts on the matter of hate speech. In the Supreme Court of Justice case of *Genderdoc-M Information Center v Marchel, Balti and Falesti Bishop*,<sup>348</sup> the Court considered whether the conduct of the Bishop of the Balti and Falesti Diocese of the Orthodox Church had engaged in hate speech and incitement to discriminate against homosexuals. The Bishop stated that:

*The [Law on Ensuring Equality] has opened the gate and created a heaven for homosexuals. We demand (...) that they not be allowed to find employment in educational institutions healthcare institutions. 92% of homosexuals are carriers of HIV and AIDS.*

The Balti Court found at first instance that the Bishop was liable and ordered that he publically apologise, repudiate the offending information and pay to the victims non-pecuniary damages and legal fees. The Supreme Court of Justice, however, quashed the Balti Court decision, holding that the impugned speech was in fact consistent with the teachings of the Orthodox Church and thus not unlawful.

The Supreme Court of Justice has been willing enough to find discrimination against homosexuals in a non-religious context. In *Genderdoc-M and Angela Frolov v Vitalie Marian*,<sup>349</sup> it found that the publication of an online “blacklist” containing the names of individuals who, in the defendant’s opinion, supported homosexuality, was discriminatory. The statements of the Bishop in *Genderdoc-M Information Center v Marchel, Balti and Falesti Bishop* were similar in nature to those contained on the defendant’s website, however the former escaped liability because he belonged to a religious institution.

The different approaches of the courts in these cases highlight the need for clearer analysis to be given to the complex issues of hate speech, religious freedom and the rights and freedoms of others. Religion cannot

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348 Supreme Court of Justice, Decision No. 2ra-1448/15 of 16 September 2015.

349 Supreme Court of Justice, Decision No. 2ra-731/14 of 19 March 2014, available at: [http://jurisprudenta.csj.md/search\\_col\\_civil.php?id=8408](http://jurisprudenta.csj.md/search_col_civil.php?id=8408).

be a means through which hate speech is legitimised. The Supreme Court should only allow discrimination perpetrated by religious authorities to escape liability where such conduct is not inconsistent in a pluralist democratic society. The right to freedom of speech enables people to speak freely, even where their speech may offend, subject to certain limitations. It does not extend to permitting hate speech. The court in *Genderdoc-M Information Center v Marchel, Balti and Falesti Bishop* was too willing to accept that the statements of the Bishop were consistent with the teachings of the Orthodox church and thus did not give sufficient attention to the issue from the perspective of the prohibition on hate speech. It is arguable that, were the case to be heard again, the more recent constitutional court decision, detailed above, would be applied such that a different conclusion were reached.

### ***European Court of Human Rights***

The ECtHR has so far handed down four judgments against Moldova in which Article 14 of the ECHR, the right to be free from discrimination in the enjoyment of convention rights, was found to have been contravened. Three of these cases involved gender discrimination, and in particular the lack of effective measures in response to domestic violence, while one case concerned gender discrimination in respect of the right to freedom of assembly.

#### *Case of Genderdoc-M v Moldova*

The applicant in the *Case of Genderdoc-M v Moldova*<sup>350</sup> was a Moldovan NGO, whose object is to promote the rights of the Moldovan lesbian gay bisexual and transgender (LGBT) community. At issue was the decision of the Chisinau Municipal Council to refuse to permit the applicant to organise a public demonstration in May 2005, in support of a proposed law prohibiting the discrimination of sexual minorities. Permission was withheld on the basis that a law protecting minorities in Moldova already existed; an application to the Chisinau Mayor's Office was rejected for a similar reason.

Genderdoc-M challenged the decision of the Chisinau Mayor's Office on grounds that it was not made in accordance with legislation and was discriminatory. On

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350 See above, note 314.

2 June 2005 the Chisinau Court of Appeal found for the applicant on the basis that the relevant statute, the Law on the Organisation and Conduct of Assemblies (Law No. 560-XIII of 21 July 1995), did not allow for refusal of permission based on the content of the protest. The Chisinau Mayor's Office appealed to the Supreme Court of Justice, citing the number of individuals and associations that had contacted it to express their vehement disagreement with both the protest and any law legalising homosexual partnerships. The Supreme Court of Justice allowed the appeal and referred the case back to the Chisinau Court of Appeal. The Court of Appeal, after hearing argument from the Chisinau Mayor's Office to the effect that staging of a protest in support of homosexuality would "endanger public order and social morality", found against the NGO. When the applicant challenged this decision, the Supreme Court of Justice rejected it on the basis that the applicant had not complied with various procedural requirements in relation to the protest.

Genderdoc-M filed a complaint against Moldova at the ECtHR alleging a violation of Articles 11 and 14 of the ECHR. Article 11 grants to everyone "the right to freedom of peaceful assembly" and prohibits restrictions on the exercise of this right other than such as are "necessary in a democratic society" in the interests of, among other things, public safety or the protection of morals. Moldova conceded that this Article had been violated. The question then became whether Genderdoc-M was discriminated against in the enjoyment of this right, in contravention of Article 14.

The ECtHR found for the applicant, reiterating that difference in treatment is discriminatory if:

*[I]t has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a certain margin of appreciation in addressing whether and to what extent differences in otherwise similar situations justify different treatment in law; the scope of this margin will vary according to the circumstances, the subject matter and its background.<sup>351</sup>*

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351 *Ibid.*, Para 50.

The Court stated that, while Article 14 does not expressly protect people from discrimination on grounds of sexual orientation, sexual orientation was an “other status” protected under the Article. It also observed that where an impugned distinction relates to a personal or vulnerable sphere of one’s life, “particularly weighty reasons need to be advanced before the Court to justify the measure complained of”.<sup>352</sup> Similarly:

*Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for achievement of the aim sought; it must also be shown that it was necessary in the circumstances.*<sup>353</sup>

The Court concluded that the government of Moldova had failed to show that the distinction was not due to sexual orientation, given that the Chisinau Mayor’s Office had stated before the Court of Appeal that the assembly should be banned not for procedural reasons but because of the opposition of many Moldovan citizens to homosexuality. There was no legitimate aim in pursuance of which the distinction was made and so the difference in treatment could not be justified.<sup>354</sup>

### *Case of Eremia v Republic of Moldova*

The *Case of Eremia v Republic of Moldova*<sup>355</sup> considered whether state authorities’ failure to adequately protect women from domestic violence can amount to gender-based discrimination. The first, second and third applicants in the case were the wife and two children of a Moldovan police of-

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352 *Ibid.*, Para 51.

353 *Ibid.*, Para 51.

354 The Court also found that the right under Article 13 to an effective remedy for violations of ECHR rights was breached, given that it was more than a year and a half before the applicant’s request for permission to stage the protest was answered. The breached right in respect of which an effective remedy was withheld was freedom of assembly under Article 11 and not the right to non-discriminatory enjoyment of rights under Article 14.

355 *Case of Eremia v Republic of Moldova*, European Court of Human Rights, Application No. 3564/11, 28 May 2013, Para 85.



ficer, who had for an extended period of time engaged in violence towards the applicants.

On multiple occasions, the first applicant had entreated Moldovan authorities to protect her and her children from her husband's conduct:

- she requested a divorce and asked for the statutory six month "cooling off period" to be waived, however a judge of the Calarasi District Court had refused to expedite the procedure in spite of her husband's violence and the President of the Court ignored a formal complaint about the judge's decision;<sup>356</sup>
- a protection order was taken out on 9 December 2010, however the Calarasi Social Assistance and Family Protection Department failed to enforce the order until 15 March 2011;<sup>357</sup>
- after lodging a police complaint as to the husband's violence and his non-compliance with the protection order, the first applicant was called to a police station and pressured to withdraw her complaint because if her husband lost his job, "this would have a negative impact on their daughter's educational and career prospects.";<sup>358</sup> and
- on 1 April 2011 the husband admitted to the Calarasi Prosecutor's Office that he had physically and psychologically abused the three applicants. However, he then concluded a plea-bargain with the prosecutor, such that he was conditionally released from criminal liability and the investigation was suspended for one year.<sup>359</sup>

The ECtHR first considered whether the right to freedom from torture, inhuman or degrading treatment or punishment contained in Article 3 of the ECHR had been breached. It noted that Article 1 imposes a positive obligation on state parties to ensure that persons within their jurisdiction can access the rights conferred in the Convention. While legislation exists in Moldova to combat and prevent domestic violence, such legislation was not implemented in practice: Moldova knew (or ought to have known) about the violence and failed to take reasonable steps to prevent it. It was thus in breach of Article 3.

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356 *Ibid.*, Para 12.

357 *Ibid.*, Para 21.

358 *Ibid.*, Para 17.

359 *Ibid.*, Para 27.

Having established that Moldova had breached the applicants' Article 3 rights, the Court considered whether this breach also amounted to discrimination prohibited under Article 14. The Court referred to its decision in *Opuz v Turkey*<sup>360</sup> to the effect that the failure to protect women from domestic violence "breaches their right to equal protection of the law and that this failure does not need to be intentional."<sup>361</sup> It described the actions of the Moldovan authorities as:

*[M]ore than a simple failure or delay in dealing with violence against the first applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman.*<sup>362</sup>

The Court also cited a report of the UN Special Rapporteur on violence against women, its causes and consequences, which had concluded that Moldovan authorities do not fully appreciate the seriousness and extent of the problem of domestic violence in Moldova "and its discriminatory effect on women".<sup>363</sup> Taken together, the conduct of Moldovan authorities indicated that the state was unwilling to extend protection to the applicants in part because they were women. The state had breached Article 14 in conjunction with Article 3.

#### *Case of Mudric v Republic of Moldova*

At issue in the *Case of Mudric v Republic of Moldova*<sup>364</sup> was also whether the response of Moldovan authorities to a pattern of domestic violence against the applicant amounted to discrimination on grounds of gender.

The applicant, a 72-year-old woman, lived next door to her ex-husband, whom she had divorced 22 years before the commencement of proceedings. Her ex-husband suffered from paranoid schizophrenia and from 1981 had begun to

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360 *Opuz v Turkey*, European Court of Human Rights, Application No. 33401/02, 9 June 2009.

361 See above, note 355, Para 85.

362 *Ibid.*, Para 89.

363 Human Rights Council, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin Ertürk, Addendum*, UN Doc. A/RC/11/6/Add.4, 2009.

364 *Mudric v Republic of Moldova*, European Court of Human Rights, Application No. 74839/10, 16 July 2013.

believe that the applicant was trying to poison him. Documents were adduced during the hearing showing that Moldovan authorities were aware of the ex-husband's mental health problems and the fact that he harboured significant antipathy towards the applicant.

On 19 February 2010 the applicant's ex-husband broke into her house and remained in it permanently thereafter.<sup>365</sup> This led to a criminal investigation by the Ocnita police, however her husband was absolved of responsibility as the crime had been committed "in a state of insanity."<sup>366</sup> The applicant's complaints in respect of violence led to the issuance of three protection orders, the last of which was issued on 16 December 2010, though none were enforced.

The ECtHR found first that Article 3 of the ECHR in combination with Article 1 was breached, in that Moldova failed to satisfy its positive obligations to ensure that individuals within its jurisdiction are protected from ill-treatment.<sup>367</sup> While Moldova had enacted legislation establishing a mechanism through which such ill-treatment could be prevented and punished, these laws were not satisfactorily applied in practice. The Court identified a date at which the authorities could properly have charged the applicant with three Criminal Code offences, namely:

- bodily harm and threat of such harm (Articles 152 and 155);
- break-in (Article 179); and
- failure to abide by a court decision (Article 320).

Instead, prosecutions commenced only six months after the applicant's complaint relating to the break-in, and eight months after the ex-husband's disobeyed a court decision by breaching the protection order.<sup>368</sup> These delays indicated a failure to extend the right to freedom from ill-treatment to the applicant and constituted a breach of Article 3.

As to whether Moldova had engaged in discrimination, in breach of Article 14 of the ECHR, the Court noted that despite complaints of violence, the ap-

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<sup>365</sup> *Ibid.*, Para 10.

<sup>366</sup> *Ibid.*, Para 17.

<sup>367</sup> *Ibid.*, Para 55.

<sup>368</sup> *Ibid.*, Para 51.

plicant's ex-husband was allowed to live in her house for more than a year. It also cited the failure of authorities to enforce the three protection orders. Combined, this conduct amounted to Moldova "repeatedly condoning such violence and reflected a discriminatory attitude towards [the applicant] as a woman."<sup>369</sup> Moldova was found to be in breach of Article 14 in conjunction with Article 3.

*Case of TM and CM v Republic of Moldova*

At issue in the *Case of TM and CM v Republic of Moldova*<sup>370</sup> was again Moldova's response to a prolonged period of domestic violence against the first and second applicant, a mother and daughter respectively.

After an assault on 21 March 2011, the first applicant complained to police about violence at the hands of her ex-husband and applied for a protection order. Despite legislation stipulating that such an application must be dealt with in 24 hours, it took a court 10 days to process it. The protection order was issued on 11 April 2011. The applicant also asked the prosecutor's office to initiate a criminal investigation against her ex-husband, however this complaint was rejected. Several medical reports were made after incidences of violence, recording injuries to both the first and second applicants.

The ECtHR found first that the ex-husband's conduct against the two applicants reached the threshold of severity required for classification as ill-treatment as per Article 3. The Court then considered whether the authorities had discharged their positive obligation (imposed in Article 1) to both establish a legislative framework aimed at preventing and punishing ill-treatment, and to implement those laws in practice. Citing the same statutory provisions as in *Eremia* and *Mudric*, the Court concluded that Moldova had sufficient legislation in place to combat domestic violence.<sup>371</sup> The Court then considered whether the government knew or ought to have known about the violence, and if so whether it took reasonable steps to prevent it. It cited the medical

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<sup>369</sup> *Ibid.*, Para 62.

<sup>370</sup> *T. M. and C. M. v The Republic Of Moldova*, European Court of Human Rights, Application No. 26608/11, 28 January 2014.

<sup>371</sup> *Ibid.*, Para 44.

reports, the protection order and the various fines imposed: the failure to address the violence properly constituted a breach of Article 3.<sup>372</sup>

The Court then considered whether the right to freedom from ill-treatment had been withheld from the applicants on grounds of gender, in breach of Article 14. The Court noted the prosecutor's failure to start a criminal investigation because it did not regard the first applicant's injuries as sufficiently severe,<sup>373</sup> and the failure of the authorities to enforce a protection order. The Court explained that in cases of domestic violence, the failure of authorities to take a proactive approach may illustrate a discriminatory attitude towards women:

*Considering the particular vulnerabilities of victims of domestic violence, who often fail to report incidents, it was for the authorities to verify whether the situation warranted a more robust reaction of the State and to at least inform the first applicant of the existing protective measures.*<sup>374</sup>

As in *Eremia* and *Mudric*, this inaction amounted to condoning violence and reflected a discriminatory attitude towards the applicants as women, in breach of Article 14.

### 3.5 Summary

There are currently no states in the world whose legal and policy framework adequately uphold the right to equality in line with international best practice. That said, while there is room to improve Moldova's legal framework to ensure full protection for the right to equality, the framework is one of the more comprehensive frameworks currently in existence. At the international level, Moldova has ratified the major UN anti-discrimination treaties including CEDAW, CERD and CRPD (although state party reports are often delivered late) and regionally it is party to the ECHR among other instruments. Pursuant to Article 4 of the Constitution, these conventions are to be applied in place of domestic legislation to the extent of inconsistency. There is a mixed success in applying

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372 *Ibid.*, Para 49.

373 *Ibid.*, Para 12.

374 *Ibid.*, Para 60.

this principle. While the CPEDEE has displayed a readiness to prioritise international law in this way, courts have been more reticent.

At the domestic level, the right to equality is protected through the Constitution, the Law on Ensuring Equality and a series of statutes dealing with particular characteristics or areas of activity. Article 16 of the Constitution enshrines the right to equality, the right is expressed to apply only to Moldovan citizens and the provision only references the equality of a fixed list of protected groups, meaning that constitutional protection falls short of what is required. However, the Law on Ensuring Equality prohibits discrimination on a wide range of grounds and, vitally, establishes a regulator charged among other things with examining and conciliating complaints of discrimination and is central to the conclusion that Moldova's legal framework on equality is more advanced than many states.

Despite this framework, there are serious impediments to access to justice for victims of discrimination in Moldova. The CPEDEE lacks the power to impose penalties and sanctions on those that it considers to have engaged in discrimination. Rather, it is confined to remedies such as making recommendations as to the restoration of rights, attempting to conciliate complaints and making referrals to prosecutorial bodies. And there have been relatively few occasions on which courts have heard and dealt with equality cases in a matter compliant with international standards.

Certain types of litigation remain inaccessible to aggrieved persons. For now, although the subject of ongoing litigation, there is no right of direct petition to the Constitutional Court, with individuals and NGOs having to rely on referrals from courts of law and other government bodies in order to impugn unconstitutional legislation. Nor can the CPEDEE bring cases directly to the Constitutional Court regarding legislation it considers unconstitutional (although the Ombudsman is able to do so). Further, while legal aid is generally available to victims of discrimination and such litigants are exempt from court fees, the government does not provide lawyers with expertise in discrimination law.

In summary, a significant increase in improving implementation of the present legal framework must be a priority if the framework is to provide the protection required and the means necessary to tackle the patterns of discrimination identified in Part 2 of the report.