



Treatment of LGBT persons deprived of liberty: risks of ill-treatment

Submission to the Subcommittee for the Prevention of Torture, 18 January 2015

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Introduction

This document provides a brief overview of the situation of lesbian, gay, bisexual and Trans (LGBT) persons deprived of liberty in Romania. After presenting the context of discrimination, violence and harassment in which LGBT persons live in Romania, it discusses the particular situations of LGB and Trans persons in detention. The challenges concern the lack of monitoring and data collection, the gaps in the legislative framework (particularly in relation to gender identity and expression), underreporting of abuses by victims and inadequate investigations into complaints, the lack of training of state actors, the inability of Trans persons to choose which prison population they will be accommodated with, and the failure to allow Trans persons access to hormonal treatment.

In general, it is not possible to provide very recent information on LGBT persons in detention in Romania, due to the failure of public authorities to invest in research and data collection on this topic, and the consequent lack of resources available to civil society organizations. A monitoring programme was implemented by civil society³ in 2007, and although a follow-up project has not been possible, ACCEPT believes that the situation has not significantly improved. This is because there has been no investment by the state to tackle the problems identified in the monitoring programme, or to change societal attitudes towards LGBT persons.

General overview of the situation of LGBT persons in Romanian society:

It is important to take into account how LGBT persons are perceived in Romanian society, as this sheds light on the attitudes of state actors and detainees towards LGBT persons deprived of liberty, and the consequent risks of torture and ill-treatment that they face.

Societal discrimination against LGBT persons remains a major problem in Romania.⁴ The nation ranks fifth, with Italy, among the countries where sexual minorities feel most

¹ ACCEPT is the first Romanian non-governmental organization that defends and promotes the rights of LGBT persons at the national level.

² ILGA is the world federation of LGBTI organisations, with a membership extending to more than 1200 member organisations in all continents.

³ Performed by ACCEPT and the Romanian Helsinki Committee (APADOR-CH), results presented in Iordache, R. E., and Ionescu, I. *Legal Study in Homophobia and Discrimination on Grounds of Sexual Orientation- Romania*. Issue brief. Bucharest: FRA, 2008.

⁴ In September 2015, an opinion poll commissioned by NCCD revealed that LGB persons rank fourth among the most discriminated groups in Romania, along with Roma persons. The NCCD Report is available in Romanian here: <http://cncd.org.ro/files/Sondaj%20TNS%20CNCD%202015.pdf>. The poll

discriminated against (54%),⁵ even though the law expressly prohibits discrimination based on sexual orientation.⁶ Gender identity and gender expression are not covered as a protected ground per se, but the list of protected grounds is non-exhaustive.

In addition, open hostility prevents the reporting of harassment and discrimination: a report⁷ of the national Equality Body (NCCD – The National Council for Combatting Discrimination) found that while LGB persons⁸ are one of the populations most discriminated against, the number of complaints of discrimination on account of sexual orientation is extremely low.⁹ This finding was borne out in an EU LGBT Survey in which only 10% of Romanian respondents had reported the most recent incident of assault or threats against them to the police.¹⁰ This was despite the fact that 78% stated that, due to the fear of being assaulted, threatened or harassed because of their sexual orientation or gender identity and expression (SOGIE), they avoid holding hands in public with a same-sex partner and 61% avoid certain locations.

In recent years some progress has been made in relation to anti-discrimination and tackling hate crime. Nevertheless, there is still a need for greater legal protection of victims, better understanding by Police of hate crimes, improved responses by state officials, and enhanced knowledge and resources available to the courts to reflect the seriousness of offences in sentencing. The Romanian Criminal Code which entered into force in February 2014 contains provisions that criminalise incitement to discrimination and that qualify motivation for a crime on the basis of sexual orientation as an aggravating circumstance (Art. 77). The current framework also makes reference to reporting, monitoring and data collection of hate crimes. The legislation, however, does not refer to crimes related to gender identity and expression.

Despite the existence of some legal protections, there are no specialized units within police or liaison officers tasked with investigating crimes and incidents linked to SOGIE. There is also a lack of provisions for victim support or an accessible system allowing anonymous or third party reporting. Moreover, state authorities have not published evidence showing effective implementation of the legal instruments; ACCEPT has only received information on situations in which the state failed to identify or sanction the authors of violent hate crimes against LGBT persons.

found that persons living with HIV/AIDS, persons with substance use disorders and persons with disabilities face even greater discrimination.

⁵ FRA – European Union Agency for Fundamental Rights report, 'EU LGBT survey – European Union lesbian, gay, bisexual and transgender survey', published October 2014, available at the following link: <http://fra.europa.eu/en/publication/2014/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-main>.

⁶ G.E.O. no. 137/2000.

⁷ NCCD Report – 'Perceptions and Attitudes with regard to discrimination' – latest public report, for 2013, is available in Romanian at the following link:

<http://www.cncd.org.ro/noutati/Evenimente/Rezultatele-sondajului-de-opinie-Perceptii-si-atitudini-privind-discriminarea-2013-189/>.

⁸ Almost all information available in Romania concerning sexual minorities relates solely to gay men. Public statistics, such as those of the NCCD, refer to "homosexuals", and not LGB persons more broadly. Extremely limited information is available concerning gender identity, gender expression and Trans persons.

⁹ The NCCD Report for 2013 indicated, for instance, that 13 complaints related to discrimination on the grounds of sexual orientation were lodged with the Equality body in 2013, but only 3 in 2012, 8 in 2011 and 4 in 2010. http://www.cncd.org.ro/files/file/Raport_activitate_CNCD_2013.pdf. Sexual orientation is one of the least invoked grounds in discrimination complaints.

¹⁰ EU LGBT Survey 2012 – available here: http://fra.europa.eu/sites/default/files/eu-lgbt-survey-technical-report_en.pdf. More data is available here: <http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-lgbt-survey-2012>

LGB persons deprived of liberty:

In 2007, the Romanian Helsinki Committee (APADOR-CH) and ACCEPT implemented a program monitoring detention facilities in Romania. Although positive steps had been taken to ensure protection of detainees,¹¹ some of the findings were alarming: there were sex abuses in prisons committed by inmates and ignored by the guards; the complaint procedures in cases of rape were not efficient; and gay men were discriminated against by their fellow inmates, and this treatment was tolerated by the management.¹² One case is provided as an example in the last section of this report.

ACCEPT has not received recent information about cases of abuse committed by State officials during arrest and interrogation or by fellow detainees. Updated information on LGBTI issues more generally is unfortunately also unavailable, mainly due to a lack of interest on the part of public authorities in investing in qualitative and quantitative research and data collection on this topic, and the limited resources available to civil society organisations. ACCEPT has frequently emphasised to the government the need to fund similar monitoring and documentation programmes, but the State has failed to provide necessary resources. However, ACCEPT believes that the situation has not changed significantly since 2007, due to the failure of the State both to take measures to respond to the findings of the monitoring project, and to shift societal attitudes to LGBT persons.

In terms of the legal framework in place, the Ethics Code¹³ of prison staff of the National Administration of Penitentiaries (NAP) forbids discrimination on any grounds – sexual orientation is explicitly covered, but gender identity and expression are not. The code furthermore stipulates that all workers in the prison system, have the obligation to refrain from committing and to prevent the commission of any action that involves discrimination on any ground against persons deprived of their liberty. This measure aims to minimise the risk of physical assault and to create procedures allowing inmates to report hate crimes, including to independent bodies or to human rights NGOs. Nevertheless, the efficiency of these reporting systems will remain limited as long as there is no system of monitoring or oversight in place.

Furthermore, while no quantitative data is available, according to information received by ACCEPT, fear of further ill-treatment or possible breaches of confidentiality generally leads LGBTI persons to refrain from complaining. This caution is reflective of attitudes of LGBT persons in Romania outside detention contexts, where the FRA found that 89% of LGBT persons who have been victims of violence or threats did not report the last incident of physical/sexual assault or threat of violence to the police. Out of these, 40% feared a homophobic/transphobic reaction from the Police, and 37% thought the Police would not take action.¹⁴

Law no. 254/2013 regarding the execution of sentences and custodial measures ordered by the court during criminal trials refers to the prohibition of torture, inhuman or degrading treatment, and other ill-treatment (Art. 5) as well as the prohibition of discrimination, including

¹¹ The steps were the legislative reforms mentioned below. These were introduced as part of attempts to bring legislation in line with requirements of the European Union during the accession process.

¹² *Op Cit*, Iordache, R. E., and Ionescu.

¹³ Ethics Code, published in the Official Gazette no. 1098/2004

¹⁴ EU LGBT Survey 2012 – available here: http://fra.europa.eu/sites/default/files/eu-lgbt-survey-technical-report_en.pdf. More data is available here: <http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-lgbt-survey-2012>

on grounds of sexual orientation (Art. 6).¹⁵ The NAP has two ways to minimise incidents of physical assault, sexual abuse and other forms of ill-treatment against detainees who might be vulnerable to such incidents, including LGBT persons. Firstly, the legislation creates delegate judges for the execution of custodial sentences,¹⁶ whose duties include handling complaints by prisoners regarding the exercise of their rights and any incidents of abuse, as well as resolving detainee complaints regarding disciplinary sanctions. Secondly, the law provides for “other specific measures” for protecting “vulnerable inmates” (Art. 28 of the same law). However, it is unclear what these specific measures are – they should have been defined in a Regulation for the application of Law 254, but to date no such Regulation has been approved – or who is categorised as a vulnerable inmate.

Regarding the existence of effective procedures for determining the disciplinary or criminal liability of those responsible for abuses, such breaches by the prison staff constitute disciplinary misconduct, and may also attract criminal liability depending on the gravity of the acts. The National Administration of Penitentiaries put in place a mechanism for receiving and investigating reports of abuses from other inmates or prison staff; first of all, the detainees have the right to ask, in writing, to be examined by a forensic doctor. If the doctor finds that the inmate shows signs of violence, he or she is required to notify the Director of the prison. In case the doctor establishes that the inmate was subjected to torture or other ill-treatment he or she will notify a prosecutor.

However, the effectiveness of all these systems of protection remains unclear in practice. For example, in *LZ v Romania*,¹⁷ the European Court of Human Rights found in 2009 that there had been a failure to investigate a man’s complaint of having been raped by other detainees. A similar finding was reached by the court four years later in *Ticu v Romania*,¹⁸ where an intersex and intellectually disabled detainee had complained repeatedly about having been sexually abused by other inmates. Failings in the system are perpetuated due to limited monitoring and quality assessment, as well as the fact that the system’s effectiveness depends on the willingness of victims to report such abuses, even though, as stated above, LGBT persons often refrain from doing so for fear of retribution.

Finally, an overarching area of concern is the lack of training on SOGIE issues for prison staff, police staff and magistrates (including delegate judges). While all personnel of public authorities are generally bound by the non-discrimination principle, and are required, as part of their training programmes, to be aware of the provisions of anti-discrimination legislation, there are no practical training sessions on sexual orientation or gender identity and gender expression specifically. There are no qualified personnel (trainers) on these topics at the level of public authorities and no focal points on SOGIE issues.

Trans persons deprived of liberty

Gender identity and gender expression are not covered in the national anti-discrimination law.¹⁹ Moreover, no reference is made to gender identity or gender expression anywhere in legislation relating to persons deprived of liberty.

¹⁵ In addition to these protections, the Criminal Procedures Code states that body searches of detainees are to be made by same-sex staff in a non-offensive way and with respect for the person’s right to privacy.

¹⁶ See Art. 9 of Law No. 254/2013 regarding the execution of punishments and custodial measures.

¹⁷ *LZ v Romania*, European Court of Human Rights, Application No. 22383/03, 2 March 2009.

¹⁸ *Ticu v Romania*, European Court of Human Rights, Application No. 24575/10, 1 October 2013.

¹⁹ G.E.O. no. 137/2000.

The monitoring programme of 2007, found that only Trans persons who have had their gender identity legally recognised are placed in a detention facility corresponding to that gender.²⁰ However, gender identity recognition is a very complex, medicalised process that also entails a judicial procedure whereby the person is required to ask the court to allow the modification of their civil status documents and to recognize their right to “gender reassignment”. The length of the civil lawsuit is usually over 6 months and the practice of courts is neither consistent nor clear. Trans people whose identity papers only reflect the gender attributed to them at birth are considered to belong to that gender and treated accordingly. Gender non-binary persons, who do not seek legal recognition as either a man or a woman, are not able to choose what prison they are accommodated in.

In 2007, it was also revealed that there was no possibility for Trans people to continue hormonal treatment while imprisoned.²¹ While no recent reports were received by ACCEPT in relation to access to hormones and other treatment for Trans persons, according to the limited information received, such treatment is still unavailable in detention facilities.

Individual case:

T.M. was in detention during 2004-2005 in several penitentiaries. In some of them he claims to have been subjected to ill treatment by inmates who abused him sexually, and by the staff who did not protect him against such treatment. Although he alleged that he complained to one of the supervisors regarding this treatment, there was no official registration of the complaint and no measures were taken. According to his medical records, T.M. repeatedly engaged in self-harm during detention.

T.M. initiated a civil action in 2006, requesting compensation and general measures against the Ministry of Justice, National Administration of Penitentiaries, Ministry of Administration and Internal Affairs, General Inspectorate of Romanian Police, Constanta County Inspectorate of Police. ACCEPT made a third party intervention.²²

Six years later, in December 2012, T.M. obtained a definitive court decision finding that the authorities discriminated against him on account of his sexual orientation by having failed to register and investigate the claims, rewarding him 10,000 Euro in civil damages.

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²⁰ Monitoring Report - Targosor Penitentiary, ACCEPT, 2008 (no link available)

²¹ *Ibid.*

²² *Op Cit*, Iordache, R. E., and Ionescu, I.