

PROTECTION AGAINST DISCRIMINATION THROUGH CRIMINAL LAW

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Abstract: *The study examines the impact of digitalization on contemporary forms of discrimination, emphasizing their immaterial and transnational character. It analyses the role of criminal law as an ultima ratio instrument in protecting equality of opportunity, focusing on relevant Romanian criminal provisions such as discriminatory abuse of office, incitement to hatred or discrimination, and the aggravating circumstance of discriminatory motive. The paper argues that criminal intervention should be limited to the most serious discriminatory acts, particularly those involving physical or psychological violence, complementing existing civil remedies and ensuring effective protection of victims.*

Key words: discrimination, digitalisation, aggravating circumstances

1. Introduction

In a general definition, discrimination means treating a person less favorably than another in a comparable situation, without an objective or reasonable justification, on the basis of a legally protected characteristic. This may be qualified as “negative” (unlawful) discrimination, and it is to be distinguished from situations that require differential treatment between persons who are not in comparable circumstances, where discrimination is in fact warranted as an absolutely necessary derogation from the principle of equality. The criminalization of discrimination and the establishment of a form of legal liability, regardless of rank, constitute a guarantee of the principle of equality before the law, enshrined in Article 16 paragraph (1) of the Constitution and subsequently reinforced by infraconstitutional legislation. At the legislative level, protection against negative discrimination is ensured, at the national level, primarily through non-criminal legislation, while the instrument of criminal law is employed only subsidiarily, in light of the *ultima ratio* character of criminal law. Thus, the main normative act is Government Ordinance No. 137/2000 on the prevention and sanctioning of all forms of discrimination, as subsequently amended by various

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legislative acts. This ordinance defines discrimination in Article 2 (Government Ordinance No. 137/2000), and establishes criteria such as race, nationality, ethnicity, religion, gender, sexual orientation, age, or disability, criteria that most often take the form of direct or explicit discrimination. However, Article 2 paragraph (2) also recognizes indirect or concealed discrimination, arising from provisions, criteria, or practices that are apparently neutral but place certain persons at a disadvantage, based on the criteria listed in Article 2 paragraph (1) of the Ordinance, in comparison with other persons. From a sanctioning perspective, Government Ordinance No. 137/2000 provides for administrative (contraventional) sanctions applicable to the various forms of discrimination it regulates. Article 2 paragraph (4) also includes a subsidiarity clause, stipulating that any active or passive conduct which, through its effects, unjustifiably favors or disadvantages, or subjects to unfair or degrading treatment, a person, a group of persons, or a community in relation to other persons, groups, or communities, entails administrative liability under the provisions of the Ordinance, insofar as such conduct does not fall within the scope of criminal law.

Another relevant normative act is Law No. 202 of April 19, 2002 (republished) on equal opportunities and equal treatment between women and men, which regulates the measures for promoting equality of opportunity and treatment between women and men, with a view to eliminating all forms of discrimination based on sex, in all spheres of public life in Romania. According to Article 4 letter (g) of the Law, discrimination based on sex means direct and indirect discrimination, harassment and sexual harassment of a person by another person at the workplace or in any other place where the person carries out professional activities, as well as any less favorable treatment caused by the refusal of such behavior by that person or by their submission to it. At the same time, the Law also provides for administrative offences (contraventions) in cases of violation of certain provisions, and similarly to Government Ordinance No. 137/2000 (the general legal framework in the field of discrimination) acknowledges the subsidiary nature of its regulation, stipulating in Article 36 that the breach of its provisions entails disciplinary, material, civil, administrative, or criminal liability, as applicable, for the persons responsible. A person who has been subjected to discrimination may submit a complaint to this authority or, moreover, may file a claim before the competent court, in accordance with common law, seeking material and/or moral damages, as well as and/or the removal of the consequences of the discriminatory acts by the person who committed them. Of particular relevance in employment relations, discrimination is prohibited under Law No. 53/2003 the Labour Code, which in Article 5 paragraph (1) stipulates that the principle of equal treatment applies to all employees and employers within employment relationships. The subsequent provisions define the forms of direct and indirect discrimination in this context, alongside workplace harassment. Thus, discrimination in employment relations is recognized on various grounds, including race, gender, disability, and age.

Finally, when the infringement of rights and legitimate interests reaches a degree of gravity that qualifies the act as a criminal offence, discrimination is sanctioned under the provisions of criminal law, which will be the subject of the following analysis.

2. Criminal Law Provisions for Protection against Discrimination

The principal normative act in criminal matters is the current Criminal Code (Law No. 286/2009), supplemented by criminal provisions contained in special laws. Thus, there are two mechanisms through which discrimination may be sanctioned: first, by the criminalization of specific discriminatory conduct as distinct offences; and second, by the establishment of general or special aggravating circumstances, or aggravated forms, in relation to other criminal offences. It should be noted, however, that under Romanian criminal legislation, discrimination is not regulated as an autonomous offence, but rather under this title:

a) the aggravating circumstance of committing an offence on discriminatory grounds – article 77 letter (h) of the criminal code.

As a factual circumstance regulated as a general aggravating factor, Article 77 letter (h) of the Criminal Code provides that committing an offence for reasons related to race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, chronic non-communicable disease, or HIV/AIDS infection, or for any other similar circumstances regarded by the perpetrator as causes of a person's inferiority in relation to others, constitutes an aggravating circumstance. This aggravating circumstance employs a mixed regulatory criterion for the forms of discrimination (conceptually derived from the body of the aforementioned civil legislation in the same field), by enumerating the principal forms of discrimination and supplementing them with a homogeneous analogy clause referring to other circumstances of a similar nature, regarded by the perpetrator as causes of a person's inferiority in relation to others.

In the case law of criminal justice authorities, this aggravating circumstance is relatively rare, even though, in practice, it occurs more frequently, particularly in offences motivated by ethnicity, most often involving persons of Roma origin. In any event, for this circumstance to be applicable, a mere generic reference containing discriminatory overtones, made incidentally or as a result of cultural inertia, is not sufficient. It must be proven, with certainty, that in the specific case the perpetrator committed the act driven by a form of discrimination based on one of the unlawful motives expressly provided by law.

For instance, in a relevant case concerning an attempted murder (Sălaj Tribunal, Criminal Division, Judge for Rights and Liberties, Criminal Order No. 115 of September 5, 2025), it was established that on August 31, 2025, around 1:00 a.m., in the context of a spontaneous conflict and motivated by the victim's Roma ethnicity, the defendant struck the victim several times with his fist in the head area, then grabbed a broken bottle with which he attempted to hit the victim in the head and chest, with the intention of taking his life, an outcome that was prevented due to the victim's act of self-defense. The victim defended himself with his left forearm, sustaining injuries requiring 40–45 days of medical care, absent complications. In the case at hand, the victim, an employee of a street cleaning company, observed that the defendant was littering and mocking the company's workers who were cleaning the area. The victim asked the defendant to stop throwing garbage on the ground, upon which the latter

began uttering insulting remarks, approached the victim, kicked the shovel the victim was using to collect trash, then grabbed him by the neck, punched him in the face, called him a “filthy gypsy,” and threatened to kill him. Given that the defendant addressed the victim as a “filthy gypsy,” it was determined that the act was committed on discriminatory grounds related to ethnicity, and therefore, the application of the aggravating circumstance provided under Article 77 letter (h) of the Criminal Code was warranted.

Similarly, but on grounds related to Hungarian ethnicity, the case prosecutor, and subsequently the first-instance court, found that on September 19, 2020, around 8:00 p.m., the defendant, while on a forest road and driven by feelings of hatred toward persons of Hungarian ethnicity, threatened the victims with death and acts of violence, wielding a bat and a box cutter. In the same context, he struck one of the victims, motivated both by the victim’s ethnic background and the family’s modest financial situation, calling the victim “poor” and hitting him on the head with the bat, causing injuries requiring two to three days of medical care. Upon re-examining the case on appeal (Cluj Court of Appeal, Criminal and Juvenile Division, Criminal Decision No. 1357/A of August 5, 2025), the Cluj Court of Appeal set aside the aggravating circumstance of discrimination, reasoning that if the motive for the offence had indeed been ethnicity, the defendant would have mentioned it from the outset. Several minutes of the argument were recorded on video or audio, and no reference to ethnicity was made. The fact that the defendant eventually referred to “gypsies” and “hungarians” was considered merely an additional insult directed at the victims. Both the threats and the physical assault occurred well before this racist remark and were unrelated to the victims’ ethnicity, being instead connected, as previously noted, to issues concerning land use and agricultural disputes. Furthermore, the victim’s statement that the defendant had approached him with the words “I’ll kill you, Hungarian” was not supported by evidence.

In another case from the relevant jurisprudence of the Cluj Court of Appeal, an offence committed on the grounds of religious discrimination was identified (Cluj Court of Appeal, Criminal and Juvenile Division, Criminal Decision No. 934/A of June 5, 2024). The defendant, M., was indicted and convicted at first instance for the offence of assault or other acts of violence, provided under Article 193 paragraph (1) of the Criminal Code, in conjunction with Article 77 letter (h) of the Criminal Code. It was established that on October 22, 2019, around 6:40 p.m., while in the *Iulius Mall* commercial complex in Cluj-Napoca, the defendant physically assaulted the victim, G., while she was performing a prayer specific to the Islamic faith, by forcefully grabbing her by the back of the neck and then striking her twice with his fist in the abdominal area, the act being motivated by the victim’s adherence to the Islamic religion.

In fact, on October 22, 2019, around 6:35 p.m., while inside the *Iulius Mall Shopping Center*, the injured party went to a more secluded area in order to perform his prayer, as he was of Islamic faith and required to pray five times a day. In order not to provoke Romanian citizens, he chose a less crowded place on the first floor, between the Marty restaurant and the IPB stationery shop. He placed his backpack in front of him and began the prayer ritual, standing still for a few moments with his hands near his

abdomen, then bowing on his knees and touching his forehead to the backpack placed before him. After a few minutes, the injured party was approached by a male individual, later identified as the defendant, M., who forcefully grabbed him by the back of the neck, insulted him personally in English, and also uttered insults directed at Allah, then struck him with his fist in the right abdominal area. The injured party asked the attacker in English whether he was a security guard at *Iulius Mall* or a police officer, while stepping back, but the assailant did not answer and instead approached him again, asking where he was from and hitting him once more in the same area. The victim replied that he was from Egypt, whereupon the aggressor asked what he was doing in Romania; when the victim answered that he was a programmer, the aggressor told him to "go back to your country" and kicked the backpack lying on the floor.

A witness heard in the case stated that while the defendant was approaching the injured party, he asked him in English, "What are you doing here? Do you have any intentions? Are you planning to do something?" and demanded that he leave the country. From the documents attached to the case file, including articles from the local press, it resulted that the defendant was a supporter of the "Noua Dreaptă" (New Right) movement and was publicly known as a critic of immigration by persons adhering to the Islamic faith. The court found that the witness had also recognized the defendant, knowing him from various public demonstrations of a nationalist character in which the latter had participated, a fact he reported both to the police and in court. Consequently, the defendant's conduct and public expressions were held to attest to his hatred toward Muslims.

In his defense, the defendant justified his conduct by claiming that he intended to check whether the assaulted person was carrying weapons or wearing an explosive vest, as he believed that the latter was about to commit a terrorist attack. The defendant stated that he had this suspicion because he had seen the victim praying in a public space and noticed that he had "something" in his backpack. Knowing that the man belonged to the Islamic faith, the defendant declared that "radical representatives (of the Islamic religion) usually perform a similar ritual in a public place before becoming martyrs, namely by committing suicide with the intention of killing as many people as possible along with themselves." On this basis, the defendant claimed he believed it necessary to intervene in order to prevent an attack.

The court found that the applicability of the aggravating circumstance provided under Article 77 letter (h) of the Criminal Code resulted from the corroboration of the evidence administered in the case, consisting of documentary evidence and the statements of the injured party, a witness, and the defendant himself. These demonstrated that the motive underlying the offence was the perpetrator's contempt toward persons belonging to the Islamic faith. The defendant believed that the injured party was about to commit a terrorist attack, basing this assumption solely on the victim's appearance as a person of foreign origin and on the fact that he was praying in the manner specific to Muslims, in a secluded area of a public space.

In a similar vein, in another case (Bucharest District Court, Sector 2, Criminal Division, Judge for Rights and Liberties, Criminal Order of August 27, 2025) also concerning the offence of assault, it was established that on August 26, 2025, around 10:30 p.m., while

in Bucharest, at the intersection of Colentina Road and Teiul Doamnei Street, Sector 2, the defendant, acting out of racial and national motives and with the purpose of compelling the injured party to leave the country, committed acts of physical violence against the victim, H., a citizen originally from Bangladesh, striking him with his fist in the facial area and thereby causing traumatic injuries that required one to two days of medical care for recovery.

b) the criminal offence as an instrument of protection against discrimination

From among the criminal provisions that directly address discrimination, the following may be cited by way of example:

b¹) abuse of office (equivalent form) by discrimination – article 297 paragraph (2) of the criminal code.

Within the scope of the good-faith exercise of duties by public or private officials, Article 297 paragraph (2) of the Criminal Code (corresponding to Article 247 of the 1969 Criminal Code¹) provides that the act of a public official who, in the exercise of his or her official duties, restricts the exercise of a person's rights or creates for that person a situation of inferiority on grounds of race, nationality, ethnic origin, language, religion, sex, sexual orientation, political affiliation, wealth, age, disability, chronic non-communicable disease, or HIV/AIDS infection, constitutes a criminal offence punishable by imprisonment from 2 to 7 years and by the prohibition of the right to hold public office.

This normative provision must be correlated with the basic rule established in paragraph (1) of Article 297 of the Criminal Code, which following the intervention of the Constitutional Court through Decision No. 405/2016 and the subsequent legislative amendment introduced by Law No. 200/2023, sets forth the requirement that the public official commits the act in the exercise of his or her official duties, either by failing to perform an act required by a law, a government ordinance, an emergency government ordinance, or another normative act that, at the time of its adoption, had the force of law, or by performing such an act in breach of a provision contained in such a normative act, thereby causing damage or harm to the rights or legitimate interests of a natural or legal person.

In practice, it is generally accepted that under the first normative form, the active subject, without any legal justification, restricts or prevents a person from exercising a right provided by the Constitution or by a special law, in whole or in part. The restriction of the exercise of a person's right may result from any act or omission depriving that person of the ability to exercise that right through the performance of legal acts. In the second normative form of abuse of office, the one under analysis, the perpetrator, taking into account a person's belonging to a particular race, nationality, ethnic origin, language, religion, sex, sexual orientation, political affiliation, wealth, age, disability, chronic non-communicable disease, or HIV/AIDS infection, creates for that person a situation of inferiority, that is, a situation worse than that of others, thereby violating the constitutional principle of equality before the law enshrined in Article 16 of the Constitution. To fulfill the material element of the offence of abuse of office, in either of its forms, it is required that any of the incriminated acts be committed by a public

official in the exercise of his or her official duties, or by a person who performs, permanently or temporarily, with or without remuneration, a public service, during or in connection with the performance of those duties.

Likewise, in judicial practice it has been held that, with respect to the assimilated form of the offence of abuse of office, the motive consisting of hatred based on race, nationality, ethnic origin, language, religion, sex, sexual orientation, political affiliation, wealth, age, disability, chronic non-contagious disease, or HIV/AIDS infection, must be present both in the restriction of a person's exercise of rights and in the creation of a situation of inferiority. In the absence of such a motive, the provisions of Article 297 paragraph (2) of the Criminal Code cannot be deemed applicable (Bucharest District Court, Sector 2, Criminal Division, Criminal Order of July 12, 2024).

In court practice, cases involving indictment and prosecution for the offence of abuse of office with a discriminatory motive are rare, as such proceedings are most often dismissed by means of case closure orders. In a case (Cluj-Napoca District Court, Criminal Division, Criminal Order No. 263 of February 28, 2025) the petitioner M.E., employed by *Babeș-Bolyai* University since November 2004 as a financial administrator within the Human Resources Department, was diagnosed with cancer in May 2019. She benefited from one year and six months of medical leave and was subsequently classified as having a disability. Upon returning to work, she reported instances of marginalization and harassment by her hierarchical superiors, R.M. and R.I., submitting complaints to the Rector, the Ethics Committee, and the University Ombudsman. In May 2022, while disciplinary proceedings against her superiors were ongoing, the director, M.R., ordered the elimination of the position held by M.E., without the approval of the Senate or the Administrative Council, while maintaining a temporary position occupied by another person. Consequently, M.E. was dismissed, and her request for transfer to another position was denied. She subsequently notified the Cluj County Directorate for Social Assistance and Child Protection (DGASPC) and the National Council for Combating Discrimination (CNCD), alleging unfair dismissal and discrimination. By its final judgment of November 3, 2022, the Cluj Tribunal annulled the dismissal decision, ordered her reinstatement in the same position, and granted compensation for lost wages.

After her reinstatement, M.E. claimed that she had been subjected to continuous abusive and discriminatory treatment aimed at pressuring her to leave "voluntarily." However, the criminal investigation authorities ordered the closure of the case, finding no indication that the alleged acts were motivated by her disability. The preliminary chamber judge upheld this decision, noting that the conflicts between the petitioner and her superiors pertained to employment relations and could be examined within other branches of law, rather than through criminal proceedings, in accordance with the *ultima ratio* principle of criminal law.

From a legislative standpoint, it should be noted that a particular form of abuse of office is also encountered in the offence of abusive conduct as provided under Article 296 of the Criminal Code, when the act is committed on discriminatory grounds. An independent and specific, yet collective, form of abuse is represented by the offence of **genocide**, regulated under Article 438 paragraph (1) of the Criminal Code, which criminalizes the commission, with the intent to destroy, in whole or in part, a national,

ethnic, racial, or religious group, of any of the following acts: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) subjecting the group to living conditions calculated to bring about its physical destruction, in whole or in part; d) imposing measures intended to prevent births within the group; e) forcibly transferring children of the group to another group. This offence is punishable by life imprisonment or by imprisonment from 15 to 25 years, together with the prohibition of certain rights. By correspondence, one may also refer to one of the forms of **crimes against humanity**, as provided in Article 439 paragraph (1) letter (g) of the Criminal Code, consisting in the persecution of a group or a particular collectivity by depriving them of fundamental human rights or by severely restricting the exercise of such rights, on political, racial, national, ethnic, cultural, religious, or sexual grounds, or based on other criteria recognized as inadmissible under international law.

For example, in jurisprudence, the defendant A.V. was sentenced to 20 years of imprisonment for the commission of the offence of *inhumane treatment*, in its continued form, as provided under Article 358 paragraphs (1) and (3) in conjunction with Article 41 paragraph (2) of the 1968 Criminal Code. In fact, it was established that between July 1, 1956, and April 13, 1963, in his capacity as commander of the Râmnicu Sărat Penitentiary, the defendant subjected, on political grounds, the community of detainees considered "counterrevolutionaries" to inhumane and degrading treatment, physical and psychological torture, as well as acts of extermination. These acts, committed systematically and over a prolonged period, consisted of starvation, deprivation of medical assistance, exposure to cold and squalid conditions, beatings, abusive disciplinary sanctions, and the complete isolation of prisoners. As a result, six of the detainees died in conditions of extreme suffering (High Court of Cassation and Justice, Criminal Division, Criminal Decision No. 51/A of February 10, 2016).

b²) incitement to hatred or discrimination – Article 369 of the Criminal Code.

According to Article 369 of the Criminal Code (regarding incitement to violence, hatred, or discrimination), the act of publicly inciting, by any means, to violence, hatred, or discrimination against a category of persons or against an individual belonging to a particular category of persons defined on grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, chronic non-communicable disease, or HIV/AIDS infection, is punishable by imprisonment from 6 months to 3 years or by a fine.

Article 369 of the Criminal Code was recently amended by Law No. 258/2023 (Official Gazette No. 871 of September 28, 2023), which expanded the material element of the offence. The amendment was adopted in order to align the incrimination with the requirements set forth in Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law. Following this amendment, the condition previously introduced by Law No. 170/2022 was removed, namely, the requirement that the discriminatory criteria enumerated in the article be regarded by the perpetrator as causes of a person's inferiority in relation to others. This additional requirement had previously restricted the scope of application of the Framework Decision.

An examination of judicial case law reveals a certain reluctance on the part of criminal investigation authorities to document and prosecute the offence referred to above, with relatively few cases being brought to trial, despite the fact that, in recent years, most such acts have been committed through electronic communication platforms. For instance, in one case (Craiova District Court, Judge for Preliminary Chamber Proceedings, Criminal Order of May 15, 2025) the court ordered the commencement of trial against a defendant charged with the offence provided under Article 369 of the Criminal Code. The charge concerned the fact that, based on the same criminal resolution, on multiple dates, the defendant, using the social network Facebook and the website <https://www.incorectpolitici.com/>, publicly posted videos inciting his followers to hatred against Jewish people. It was further established that, through the same online platforms, the defendant publicly disseminated videos promoting antisemitic ideas, conceptions, and doctrines, asserting that Jewish people are responsible for Romania's social problems, that they have historically harmed the Romanian state and undermined Romanian history, and that they seek to destroy other nations, while invoking Adolf Hitler's actions against Jews.

In another, more recent case (Bucharest District Court, Sector 2, Judge for Preliminary Chamber Proceedings, Criminal Order of April 29, 2025), the court ordered the commencement of trial against a defendant for the same offence, finding that on December 1, 2024, the defendant posted on the social network Facebook the message: "*With some crowbars and axes against those scoundrels*," which incited the commission of acts of violence against the political opponents of Călin Georgescu, a candidate in the 2024 Romanian presidential elections.

b³) normative form in the case of other offences – Torture (Article 282 of the Criminal Code).

According to Article 282 paragraph (1) letter (d) of the Criminal Code, the act of a public official performing a function involving the exercise of state authority, or of any other person acting at the instigation of, or with the express or tacit consent of such an official, who intentionally inflicts severe physical or mental suffering upon another person, *inter alia* on grounds based on any form of discrimination, shall be punishable by imprisonment from 2 to 7 years and by the prohibition of certain rights.

4. Conclusions

As a general conclusion, at the level of criminalization, negative discrimination is sanctioned both through criminal legislation and, more prominently, through secondary legislation, in Romanian law as well as in the legal systems of other European states. Conversely, at the national jurisprudential level, there is a relatively limited number of cases addressing discrimination, whether in relation to the application of the general aggravating circumstance or to specific offences committed with such a special discriminatory motive.

The transition to the digital age has, among other effects, exacerbated certain discriminatory behaviours, with electronic platforms providing an accessible and frequently used means of materializing, sometimes instantaneously, discriminatory motives, often serving as a prelude to more serious offences (such as blackmail, child pornography, etc.). The adaptation of judicial authorities to new forms of cybercrime, including those driven by discriminatory motives, appears to have taken place; however, this progress should also be reflected in judicial case law, since without the active involvement of the judiciary, the voluntary fight against discrimination remains theoretical and illusory.

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