

ROMANIA

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Executive summary

Definitions

- [1]. Romania signed but did not ratify the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol. The terminology ‘persons with mental disorder or persons with intellectual disability’ is not present in the Romanian legislation or case law.
- [2]. The terminology in the Romanian legislation varies: while the Romanian Constitution, the Family Code and the Civil Code use the notions of ‘the mentally deficient’ (*debilii*) or ‘alienated persons’ (*alienații mintal*) or of ‘handicapped persons’ (*persoane cu handicap*), the specific legislation on persons with disabilities refers to ‘handicapped persons’ (*persoane cu handicap*), and the specific legislation on mental health speaks about persons with psychological disorders (*persoane cu tulburări psihice*). The Criminal Code and the Administrative Litigation Law mention lack of discernment, irresponsibility (*iresponsabilitate*) as a waver for criminal and administrative liability.
- [3]. The case-law regarding the rights of persons with mental disorder and persons with intellectual disability is under-developed as individual victims are reluctant to sue. The majority of cases on grounds of disability concern misapplication of the joint order of the Ministry of Health and by the Ministry of Labour, Family and Equal Opportunities establishing the medical and social criteria for each degree of disability and the correlative entitlements and benefits.

Anti-discrimination

- [4]. Romanian anti-discrimination legislation transposing the Employment Equality Directive provides for disability listed as ‘*handicap*’ as one of the protected grounds. The protection guaranteed by the Anti-discrimination Law applies not only to work relations but also to other areas such as health, education, access to services etc.

Specific fundamental rights

- [5]. The Romanian Constitution provides for limitations to the right to vote, the right to be elected and the right to be elected in the European

Parliament in the case of persons placed under interdiction. Restrictions of any other fundamental rights can be done solely under a strict scrutiny test according to Art. 53 of the Constitution. The right to marry and the right to adopt are specifically limited by law in the case of ‘the mentally deficient’ (*debilii*) or ‘alienated persons’ (*alienații mintal*).

- [6]. In spite of the general constitutional and legal provisions protecting the rights of persons with mental disorder and persons with intellectual disability, as well as the scarce case law, the reports of national and international governmental and non-governmental organizations emphasize the infringements as well as the arbitrary limitations to the exercise of their fundamental rights.

Involuntary placement and involuntary treatment

- [7]. Involuntary placement and involuntary treatment entail numerous shortcomings regarding the procedures and their practical application leading to serious abuses of the right to liberty and security of the person and the right to effective access to a review body or to an effective remedy.
- [8]. The newly introduced ‘Informed Consent’ form contains a general consent for any treatment carried out during the hospitalization, including consent that his/her medical case is a subject of scientific research or education without any additional authorisation from the patient. This is contrary to the Law on Patient’s Rights and may be a gateway for abuses regarding biomedical research in psychiatric hospitals. Furthermore, the use of ECT is unregulated and dangerously outdated; physical restraint and seclusion are used in serious disregard of the standards, as reported by NGOs regularly monitoring such institutions.

Competence, capacity and guardianship

- [9]. The legal framework on capacity and guardianship is completely outdated and does not take into account the situation of each individual with mental disorder or intellectual disability. The New Civil Code adopted in 2009 did not improve this situation. The institution of ‘placing a person under interdiction’ (*punere sub interdicție*) creates a complete removal of capacity. Such a system is discriminatory and in disregard of the State’s obligation of effective respect and protection against human rights violations, since the

person placed under interdiction can no longer exercise any rights by himself/herself.

Miscellaneous

- [10]. The mental health care in Romania is still institution centred, with institutions in remote places, underfunded, overcrowded and understaffed, with little legal protection for the patients. Both international governmental organizations and Romanian non-governmental organizations plead for the Government to take further steps to ensure the human right to mental health care for persons with mental disabilities, including improving and extending community-based mental health care and other community-based services to support persons with mental disabilities.

1. Definitions

- [11]. Romania signed the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol on 26 September 2007 but failed to ratify it in spite of calls of human rights and anti-discrimination groups.¹

1.1. Terminology used in the Constitution, the Family Code and the new Civil Code

- [12]. The Romanian Constitution uses the notions of ‘mentally deficient’ (*debilii*) or ‘alienated persons’ (*alienații mintal*) in Art. 36 on the right to vote, and of ‘handicapped persons’ (*persoane cu handicap*) in Art. 50 on special protection, without defining any of these notions.²
- [13]. The same language is used by the Family Code which provides in Art. 142 that ‘the person having no discernment to take care of his or her own interests, because mental alienation (*alienație mintală*) or mental debility (*debilitate mintală*), will be placed under interdiction’ and provides for the applicable procedures.³ The Family Code does not define further the two notions.
- [14]. The New Romanian Civil Code, adopted as a result of the engagement of governmental responsibility in June 2009, to enter into force at a later date, provides in Art. 163 that ‘the person who does not have the necessary discernment to take care of his or her interests due to mental alienation of debility (*alienație ori debilitate mintale*) will be put under judicial restraint.’ The new Civil Code maintains the prohibition of marriage and the prohibition of adoption for the person with a mental alienation or debility.⁴

¹ UN Treaties Collections, Convention on the Rights of Persons with Disabilities, status information available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (09.10.2009).

² Romania/ Constituția României (29.10.2003). The Constitution of Romania of 1991 was amended and completed by the Law 429/2003 on the revision of the Constitution of Romania, (29.10.2003). Official English translation available at: <http://www.cdep.ro/pls/dic/site.page?id=371> (10.01.2008).

³ Romania/Codul Familiei, Legea 4/1954, Family Code. (31.01.1954).

⁴ Romania/Legea 287/2009 Noul Cod Civil, New Civil Code (17.07.2009) available at: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=10256 (10.10.2009).

1.2. Terminology used in Criminal Code and Administrative Law

- [15]. The Criminal Code and the Administrative Litigation Law mention lack of discernment, irresponsibility (*iresponsabilitate*) as a waiver for criminal and administrative liability. The Administrative Litigation Law defines lack of discernment in Art. 19 in respect of the person who 'during the illegal action or inaction was in a state of lack of responsibility, meaning he or she could not understand his or her actions or to control them, due to a chronic psychiatric illness, a temporary confusion of psychic activities, mental debility or another pathological condition (*boli psihice cronice, unei tulburări temporare a activității psihice, debilității mintale sau a unei alte stări patologice*).'⁵
- [16]. The case law further defining or regarding the rights of persons with mental disorder and persons with intellectual disability remains underdeveloped as individual victims are still reluctant to sue due to lack of resources as well as due to fear of publicity as there are no support groups or self-advocacy groups having the resources for legal work.⁶ The vast majority of cases brought in respect of disability in general, and particularly regarding persons with mental disorder or persons with intellectual disability, are cases challenging the degree of disability assigned by the special commissions or the application of the methodological norms of the Law on the rights of persons with disabilities in the particular medical diagnosis and social situation of the plaintiffs.

1.3. Definitions in Mental Health Law

- [17]. Romanian legislation includes a special chapter regarding the protection of persons with psychological disorders (*persoane cu tulburări psihice*) as a part of the special Mental Health Law. The provision is not distinguishing between persons with mental disorder and persons with intellectual disability.⁷

⁵ Romania/ Legea 554/2004 privind contenciosul administrativ [Law on administrative litigation] (02.12.2004).

⁶ Giorgiana Nicula (2004) 'Discriminarea persoanelor cu probleme de sănătate mintală în România', in: C. Necula coordinator, (2004) *Combaterea discriminării- eficiența inițiativelor guvernamentale și neguvernamentale*, Bucharest: Agenția de Monitorizare a Presei, p.135.

⁷ Romania/Legea sănătății mintale și a protecției persoanelor cu tulburări psihice, Law 487/2002 on mental health and the protection of persons with psychological disorders [Mental Health Law] (08.08.2002). The official translation uses 'mental disorder' to translate 'psychic

- [18]. The Law on Mental Health and for the Protection of Persons with Psychological Disorders uses the following definitions in Art. 5:⁸
- a. Person with psychological disorders (*persoană cu tulburări psihice*) means a person suffering from a mental illness, a person with a lack of mental balance or with incomplete mental development or alcohol or drug addiction, as well as a person who manifests other disorders that can be classified, according to the diagnostic norms presently used in medical practice, as psychological disabilities;
 - b. Person with severe psychological disorder (*persoană cu tulburări psihice grave*) means a person with psychological disorder who is not capable of understanding the significance and consequences of his or her behavior, so that he/she needs immediate psychiatric help;
 - i. Psychological handicap (*handicap psihic*) means the inability of a person with psychological disorder to meet the requirements of life within society, this situation being a direct consequence of the presence of the psychological disorder.
- [19]. The definition provided uses medical lenses only and does not distinguish between the two categories, bringing under the same umbrella of person with psychological disorders (*persoană cu tulburări psihice*) both persons with mental disorder and persons with intellectual disability. The Mental Health Law fails to distinguish between the two categories or to indicate different approaches, medical protocols or regulatory regimes.

1.4. Definitions in Disability Law

- [20]. Romanian Anti-discrimination Law does not define 'disability' (Romanian legislation uses the term *handicap*) though specifically mentioning it as protected ground in Art. 2.⁹
- [21]. The framework legislation providing for the rights of persons with disabilities (*persoane cu handicap*) [Law 448/2006] still uses the

disorder', in Romanian 'tulburări psihice' covering both mental disorder and intellectual disability. Official English translation available at http://www.ms.ro/fisiere/pagini_virtuale/114_163_Law_on_Mental_Health.pdf (10.10.2009).

⁸ Romania/Legea sănătății mintale și a protecției persoanelor cu tulburări psihice, Law 487/2002 on mental health and the protection of persons with psychological disorders (08.08.2002).

⁹ Romania/ Legea 324/2006 pentru modificarea și completarea Ordonanței Guvernului 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare, Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (20.07.2006).

concept of 'handicap' defined in Art.2 as 'persons lacking abilities to normally carry out daily activities due to a physical, mental or sensorial impairment and who require protective measures for rehabilitation, integration and social inclusion.'¹⁰ The law further defines disability (*handicap*) in Article 5 (16) as:

'the generic term for impairments/deficiencies, limitations in the activity and restrictions in participation, defined according to the International Classification of Functioning, Disability and Health adopted by the World Health Organization, and which highlight the negative aspect of the interaction between the individual and the environment.'

- [22]. Law 448/2006 refers to mental disabilities also in the context of the assessment of a particular condition as disability, an assessment which triggers various entitlements under social protection legislation.¹¹
- [23]. No specific definition of persons with mental disorder and persons with intellectual disability is provided. The general disability-related legislation delves into employment relations and participation in professional life, but also on social solidarity, prohibition of discrimination in general, the role of the community in the integration of the person with disabilities, a beneficiary-focused approach in providing services, protection against neglect and abuse, selecting the less restrictive alternative in designing the type of assistance and support, integration and social inclusion of persons with disabilities.
- [24]. The Law 448/2006 regulates: health and integration, education, housing, culture, sport and tourism, transportation, legal assistance, fiscal facilities, social services, social benefits granted to persons having a disability, accessibility, labour relations. The Law establishes the different categories of disability and the procedure for being recognised as having a certain type of disability,¹² the financing of the system of protection for persons with disabilities and the role of

¹⁰ Romania/Lege privind protecția și promovarea drepturilor persoanelor cu handicap, Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06/12/2006) republished 03.01.2008. Official English translation available at <http://www.anph.ro/eng/> (08.10.2009).

¹¹ Romania/Lege privind protecția și promovarea drepturilor persoanelor cu handicap, Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06.12.2006).

¹² Law 448/2006 provides for special rights and facilities for persons with disabilities which vary depending on the type of disability and the category of disability assigned following a strict procedure. There are four different categories of disability depending on the gravity of the infliction: light, medium, accentuated and serious according to Article 86 (1) and the law lists various types of disability in Article 86 (2): physical, visual, hearing, somatic, mental, psychical, HIV/AIDS, associated, rare diseases. The criteria for assigning a particular degree of disability are established in secondary legislation.

the *Autoritatea Națională pentru Persoanele cu Handicap* [National Authority for Persons with a Disability (NAPD)].¹³

- [25]. Art. 84(5) of the Law 448/2006 provides that the medical and social criteria to be taken into consideration when establishing the degree of handicap (and the correlative rights and benefits) are spelled out in a joint order of the Ministry of Health and of the Ministry of Labour, Family and Equal Opportunities following the proposal of the NAPD.¹⁴ This Order implementing Law 448/2006 defines as ‘handicap’ the different types of disability which are either ‘congenital, neonatal, acquired in childhood or teenage and those specifically mentioned by the Law,’ (*persoane cu handicap dobândit congenital, neonatal, în copilărie sau adolescență și cele menționate expres in lege*).¹⁵ The Order provides also for a limited list of categories of medical conditions leading to recognition of the disability regardless of the age, the status and the date when the disability was inflicted.¹⁶

1.5. Relevant case law

- [26]. In practice, the enforcement of the joint order approving the medical and social criteria for assessing the degree of disability generated a vast amount of litigation in respect of disability in general, with plaintiffs challenging the type of disability assigned by the assessment commissions or the application of the criteria provided by the joint order to their particular medical diagnosis.¹⁷ There were also cases

¹³ Romania/ *Autoritatea Națională pentru Persoanele cu Handicap* [National Authority for Persons with a Disability (NAPD)]. The official website of the institution is available at: www.anph.ro (06.05.2009).

¹⁴ Romania/ *Ordin nr. 205 din 27 februarie 2008 pentru modificarea art. 2 din Ordinul Ministrului Muncii, Familiei și Egalității de Sanse și al Ministrului Sănătății Publice nr. 762/1.992/2007 pentru aprobarea criteriilor medico-psihsociale pe baza cărora se stabilește încadrarea în grad de handicap*, Joint Order of the Ministry of Health and of the Ministry of Labour, Family and Equal Opportunities approving the medical and social criteria for assessing the degree of disability (27.02.2008).

¹⁵ Romania *Ordin MSF nr. 726 din 01/10/2002, criteriile pe baza carora se stabileste gradul de handicap pentru adulti si se aplica masurile de protectie speciala a acestora*, Order of the Ministry of Health 726 regarding the criteria for establishing the degree of disability for adults and the measures of special protection(24.10.2002).

¹⁶ Romania/*Ordin MSF nr. 726 din 01/10/2002, criteriile pe baza carora se stabileste gradul de handicap pentru adulti si se aplica masurile de protectie speciala a acestora*, Order of the Ministry of Health 726 regarding the criteria for establishing the degree of disability for adults and the measures of special protection(24.10.2002).

¹⁷ For example, Romania/ *ÎNALTA CURTE DE CASAȚIE SI JUSTIȚIE, SECȚIA DE CONTENCIOS ADMINISTRATIV ȘI FISCAL*, Decizia nr. Decizia nr. 1009/2004 (9.03.2004) in which the Court decided that the assessment commission failed to grant the disability degree the plaintiff was entitled to according to the provisions of the Order.

challenging the very content of the order or the absence of certain medical conditions from the list of conditions protected by the order.¹⁸

- [27]. In applying the secondary legislation listing medical and social criteria for assigning the type of disability, the courts many times struggled with distinguishing between an illness and a disability reaching conflicting verdicts.¹⁹

1.6. United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol

- [28]. Romania signed the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol on 26.09.2007 but failed to ratify it in spite of calls of human rights and anti-discrimination groups.²⁰
- [29]. No specific response was received after a call initiated by the Anti-discrimination Coalition of NGOs in the Fall of 2008. Lacking official responses and public debates it is unclear which are the grounds for the delays of the ratification and implementation. In its contribution to the Consultative meeting with stakeholders on legal measures key for the ratification and effective implementation of the CRPD, the Romanian government acknowledged that ‘a comprehensive plan of legislative amendments is envisaged’ and added that ‘given the complexity and the inter-disciplinary nature of the topic, it is difficult to indicate a timeframe for the completion of this task.’²¹

¹⁸ Romania/ ÎNALTA CURTE DE CASAŢIE SI JUSTIŢIE, SECŢIA DE CONTENCIOS ADMINISTRATIV ŞI FISCAL, Decizia nr. 1008/2004 (9.03.2004) available at: <http://www.iccj.ro/cautare.php?id=12880> (02.10.2009).

¹⁹ Romania/ ÎNALTA CURTE DE CASAŢIE SI JUSTIŢIE, SECŢIA DE CONTENCIOS ADMINISTRATIV ŞI FISCAL, Decizia nr. 2986/2008 (19.09.2008), available at: <http://www.iccj.ro/cautare.php?id=43566> (13.10.2009). See also, Romania/ ÎNALTA CURTE DE CASAŢIE SI JUSTIŢIE, SECŢIA DE CONTENCIOS ADMINISTRATIV ŞI FISCAL, Decizia nr. 2107/2007, Dosar nr. 7960/54/2006 (19.03.2007), available at: <http://www.iccj.ro/cautare.php?id=4030> (13.10.2009).

²⁰ UN Treaties Collections, Convention on the Rights of Persons with Disabilities, status information available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (09.10.2009).

²¹ Romania’s contribution on legal measures for the ratification and implementation of the Convention on the Rights of Persons with Disabilities, available at <http://www2.ohchr.org/english/issues/disability/contributions.htm> (10.10.2009).

2. Anti-discrimination

- [30]. A general provision on equality and non-discrimination in broad terms is provided by the Romanian Constitution without mentioning disability specifically. A more specific prohibition of discrimination on grounds of disability is enforced in all fields and in relation to all rights and fundamental freedoms as entailed by the Anti-discrimination Law. Ratification of the UN Convention and further rethinking and subsequent amendments of the Romanian specific legislation for the protection of persons with disabilities is still needed.

2.1. Incorporation of United Nations standards

- [31]. Though signed, the UN Convention on the Rights of Persons with Disabilities still needs to be ratified.²² No legislation was amended prior or after the ratification of the Convention. The Romanian legislation would have to be substantially amended in order to respond to the standards of the Convention.

2.2. The anti-discrimination national framework

2.2.1. Constitutional anti-discrimination norms

- [32]. The Romanian Constitution provides for non-discrimination in broad terms in Art. 4 without mentioning discrimination on grounds of disability:

Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin.²³

²² UN Treaties Collections, Convention on the Rights of Persons with Disabilities, status information available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (09.10.2009).

²³ Romania/ Constituția României (29.10.2003).

- [33]. The equality clause consists of a general provision in Art. 16: '(1) Citizens are equal before the law and public authorities, without any privilege or discrimination. (2) No one is above the law.' The Constitution also includes a provision regarding the protection of persons with disabilities in general in Art. 50 (*persoane cu handicap*):

Persons with disabilities (*persoanele cu handicap*) shall enjoy special protection. The State shall provide the accomplishment of a national policy of equal opportunities, disability prevention and treatment, so that disabled persons can effectively participate in community life, while observing the rights and duties of their parents or legal guardians.

- [34]. The constitutional text does not suggest preferential treatment arrangements in respect of persons with mental disorder and persons with intellectual disability. The only reference is under Art. 36 restricting the right to vote for 'the mentally deficient' (*debili*) or 'alienated persons' (*alienații mintal*), put under interdiction.
- [35]. The constitutional provisions are not self-enforcing and require special legislation for further implementation. No cases had been reported by the *Curtea Constituțională* [Romanian Constitutional Court (RCC)] interpreting the understanding of Art. 50.

2.2.2. Anti-discrimination legislation

- [36]. Specific anti-discrimination legislation was adopted by Romania in August 2000 and amended subsequently in 2002, 2003, 2004 and 2006 to enhance transposition of the Directive 2000/43/EC and the Directive 2000/78/EC. In 2006, the Anti-discrimination Law was amended, improved and republished.²⁴
- [37]. The general prohibition provided by the Anti-discrimination Law in Art. 2 reads:

any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability (*handicap*), chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in

²⁴ Romania/ Legea 324/2006 pentru modificarea și completarea Ordonanței Guvernului 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare, Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (20.07.2006).

the political, economic, social and cultural field or in any other fields of public life.

- [38]. Romania did not use the option to defer implementation of Directive 2000/78/EC to 2.12.2006 in relation to age and disability. The scope of the protection against discrimination of persons with disabilities has a broader scope of application than the one of Directive 2000/78/EC or than the one foreseen in the Draft Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation and it is applicable *ratione materiae* to any rights, going beyond areas other than employment, health care, social protection education and housing and protecting, for example, the right to dignity.
- [39]. Besides the prohibition of discrimination on grounds of disability in general, which covers also mental disorder or intellectual disability, the Anti-discrimination Law does not include any specific provision in respect of persons with mental disorder and persons with intellectual disability.
- [40]. The Anti-discrimination Law includes in Art. 2(9) a definition of special measures of preferential treatment and affirmative measures without linking it specifically to any ground, including disability.²⁵
- [41]. The Anti-discrimination Law does not provide for reasonable accommodation for persons with disabilities though the national equality body applied the concept in cases of physical disabilities referring to the duties provided by the Law 448/2006 on the promotion and protection of the rights of persons with disability.²⁶ When corroborating disability and anti-discrimination legislation in order to sanction failure to ensure reasonable accommodation, the courts and the NCCD are bound to observe the test introduced by Art.

²⁵ Art.2(9): 'Measures taken by public authorities or by legal entities under private law in favour of a person, a group of persons or a community, aiming to ensure their natural development and the effective achievement of their right to equal opportunities as opposed to other persons, groups of persons or communities, as well as positive measures aiming to protect disadvantaged groups, shall not be regarded as discrimination under the ordinance herein.'

²⁶ Romania/ Consiliul Național pentru Combaterea Discriminării, decision M.E.R. v. dr. PG and Mayoralty of V. , from 17.09.2007. The plaintiff, a dentist technician with a hearing impairment complained that her patients can not reach her office as her neighbour PG h is locking the doors thus making access impossible. In its decision, the NCCD applied also the provisions of Law 448/2006, particularly of Article 74 providing for 'the right of the person with disabilities to enjoy all the conditions required for choosing and exercising his or her profession or trade, for getting and maintaining a job, as well as to develop professionally' and for the correlative duty of public authorities to 'a) promote the idea that a person with disabilities who is working constitute added value to the society and for his or her community; b) promote a work environment open, inclusive and accessible for persons with disabilities.' The NCCD found that discrimination occurred and issued an administrative warning against the defendant.

9 of the Anti-discrimination Law which allows exemptions from the prohibition of discrimination in labour relations when the employer:

refuses to hire a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.

- [42]. The Anti-discrimination Law can be enforced by *Consiliul Național pentru Combaterea Discriminării* [National Council for Combating Discrimination (NCCD)]²⁷ which is mandated to ensure its enforcement, or by civil courts if the plaintiff seeks only civil remedies. In undertaking its mandate, the NCCD used the definition of disability (*handicap*) provided by Law 448/2006 which does not provide a specific definition of mental disorders or intellectual disabilities.
- [43]. There are no reported decisions of the NCCD or of the courts elaborating on the concept of disability. The practice of the NCCD shows that the plaintiffs were not requested to provide a medical diagnosis or the disability certificate issued by NAPD, their own statements being sufficient to make their cases. Most of the cases on grounds of disability decided by the NCCD are in respect of physical disabilities.
- [44]. In a case regarding persons with mental disorders, the NCCD found that the inadequate standards of treatment in relation to persons suffering from mental disabilities hospitalised in the Predeal hospital when compared to patients from other hospitals, amounts to discrimination and it 'recommended to the Ministry of Health to ensure adequate treatment of persons hospitalised in the Predeal Sanatorium for persons suffering of neurosis and of persons suffering of mental diseases in general, including by preparing objective criteria for financing medical facilities (hospitals and sanatoriums) and for their periodic monitoring.'²⁸ The recommendation was not followed by subsequent changes.
- [45]. No equality or anti-discrimination rules or preferential treatment arrangements had been developed by the courts in respect of persons with mental disorder and persons with mental disability.

²⁷ Romania/ Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)]. The official website of the institution is available at: www.cncd.org.ro (06.05.2008).

²⁸ Romania/ Consiliul Național pentru Combaterea Discriminării, Decision 350 from 16.06.2008, Asociația Increderea v. the Ministry of Public Health on file with FRALEX team.

2.2.3. General disabilities legislation

[46]. The Law 448/2006 does not include an anti-discrimination or equality clause but mentions in Art. 3 that the protection and promotion of the rights of disabled persons are based, among others, on: the prevention and fight against discrimination; equal opportunities; equal treatment for access to labor employment and occupation of labor force.

[47]. The Law 448/2006 provides for the duty to ensure reasonable accommodation in accessing various public and private services and facilities and in labour relations. The Law 448/2006 defines reasonable accommodation in the workplace in Art. 5 as:

all the changes undertaken by the employer in order to facilitate the exercising of the right to work of the person having a disability (*handicap*); this entails adjusting the work schedule, buying supporting equipment, devices and technologies related to the disability and other similar measures.²⁹

[48]. Reasonable accommodation in the work place is ensured both to persons with disabilities seeking a job and for those already hired, according to Art. 83 of the Law, no matter what type of disability they might have. Law 448/2006 does not provide for any limitation or restriction regarding persons entitled to claim reasonable accommodation. There is no sanction provided by the Law in case of failure to comply but the provisions of the Anti-discrimination Law had been applied. There is no interpretation of what is 'reasonable' and what constitutes a 'disproportionate burden' neither in the practice of the NCCD or of the NAPD.

2.2.4. Mental Health Legislation

[49]. The Law on mental health and protection of people with psychological disorders (*persoane cu tulburări psihice*) [Mental Health Law] provides in Art. 35 that 'there shall be no discrimination on the grounds of psychological disorder.'

[50]. The Mental Health Law fails to include any sanctions for non-observance of Art. 35, as the only sanctions provided for in the Law regard the obligations of the professionals working in the field in

²⁹ Romania/Lege privind protecția și promovarea drepturilor persoanelor cu handicap, Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06/12/2006).

relation to confidentiality, consent and observance of medical procedures and standards.³⁰

3. Specific Fundamental Rights

[51]. The treatment of persons with mental disorder and persons with intellectual disability had been highlighted repeatedly as a major human rights concern by international and national human rights reports monitoring serious violations of human rights in institutions.

[52]. The Constitution mentions that ‘disabled persons (*persoane cu handicap*) can effectively participate in community life,’ in Art. 50. Also, the principle of universality provided for in Art. 15 states that:

all citizens enjoy the rights and freedoms granted to them by the Constitution and other laws, and have the duties laid down thereby.

[53]. Consequently, unless limited in the Constitution and other laws according to a strict constitutional test of proportionality, the fundamental rights of persons with mental disorder and persons with intellectual disability should not be restricted.³¹

[54]. Art. 36 of the Romanian Constitution on the right to vote states that:

the mentally deficient (*debilii*) or alienated persons (*alienații mintal*), [who had been] put under interdiction, as well as the persons disenfranchised by a final decision of the court cannot vote.

[55]. The Constitution and the subsequent legislation did not define ‘mentally deficient’ (*debilii*) or ‘alienated persons’ (*alienații mintal*)

³⁰ Art. 60 of the Mental Health Law: ‘Non-observance by professionals working in the field of mental health of confidentiality of information related to a person with mental disorder, violation of the principles and procedures related to obtaining a person’s consent, to establishing and maintaining the treatment, violation of procedures of involuntary admission of a patient, as well as violations of the rights of patients admitted to an institution result, depending on the circumstances of the case, in disciplinary or criminal liability, according to the law.’

³¹ Art. 53 of the Constitution provides for the restriction on the exercise of certain rights and freedoms: (1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defense of national security, of public order, health, or morals, of the citizens’ rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe. (2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.

but this was the language used in relation to persons with mental disorder and persons with intellectual disability at the time of the writing of the Family Code (1954).

- [56]. As only persons having the right to vote have also the right to be elected (Art.37) and the right to be elected in the European Parliament (Art. 38), it follows that persons placed under interdiction cannot enjoy these rights.
- [57]. No other constitutional rights are expressly limited in respect of persons with mental disorder and persons with intellectual disability.
- [58]. The current Family Code as well as the new Civil Code prohibit marriage and adoption in the case of those suffering of mental alienation or debility, while the new Civil Code extends the prohibition to adopt also to those with serious psychiatric illnesses.³²
- [59]. The Mental Health Law includes a full section on the rights of persons with psychological disorders (*persoane cu tulburări psihice*). The Law states in Art. 35(4) that:

any person suffering from a psychological disorder has the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, as well as in other international conventions and treaties in this field, to which Romania has adhered or is a party, except in cases specified by law.³³

- [60]. In spite of the broad legal provisions, the protection of basic rights of people with mental disorder or with intellectual disability, particularly in the case of persons placed in psychiatric establishments, was challenged repeatedly.³⁴

³² Romania/Legea 287/2009 Noul Cod Civil, New Civil Code (17.07.2009).

³³ Romania/Legea sănătății mintale și a protecției persoanelor cu tulburări psihice, Law 487/2002 on mental health and the protection of persons with psychological disorders (08.08.2002).

³⁴ Amnesty International, Romania: "Protection of basic rights of people with mental disabilities placed in psychiatric establishments - an imperative for the Romanian state", AI Index: EUR 39/014/2004 (5.1..2004) available at: <http://www.amnesty.org/en/library/asset/EUR39/014/2004/en/c92e14db-fa9e-11dd-999c-47605d4edc46/eur390142004en.pdf> (10.10.2009). See also, Amnesty International, Romania: Memorandum to the government concerning inpatient psychiatric treatment, Index Number: EUR 39/003/2004, 3 May 2004, available at: <http://www.amnesty.org/en/library/asset/EUR39/003/2004/en/f2d3ad75-d5f7-11dd-bb24-1fb85fe8fa05/eur390032004en.pdf> (10.10.2009).

3.1. The Right to Life

- [61]. The right to life, physical and mental integrity is guaranteed by Art. 22 of the Constitution.³⁵ In spite of the constitutional provisions, international and national reports raised the issue of unexplained deaths in psychiatric establishments.³⁶ For example, Amnesty International mentioned that in 2003 at least four patients in psychiatric hospitals died following assaults by other patients.³⁷ Poor conditions are also blamed for causing death: in December 2001 lack of heating in the psychiatric hospital in Jebel reportedly resulted in the deaths of five patients from hypothermia, while in the psychiatric hospital in Poiana Mare, 81 patients died in 2003 and 18 patients had died in January and February of 2004, reportedly mostly from malnutrition and hypothermia.³⁸ No relevant national case law is available on the right to life related to persons with mental disorder and persons with mental disability but cases had been filed before the European Court of Human Rights.³⁹

³⁵ Romania/ Constituția României (29.10.2003).

³⁶ Economic and Social Council, Commission On Human Rights, Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Paul Hunt, Report, Addendum- MISSION TO ROMANIA, E/CN.4/2005/51/Add.4 (21.02.2005). See also, Amnesty International, Romania: "Protection of basic rights of people with mental disabilities placed in psychiatric establishments - an imperative for the Romanian state", AI Index: EUR 39/014/2004 (5.1..2004) available at: <http://www.amnesty.org/en/library/asset/EUR39/014/2004/en/c92e14db-fa9e-11dd-999c-47605d4edc46/eur390142004en.pdf> (10.10.2009)

³⁷ Amnesty International, EUR 39/008/2005 , ROMANIA State duty to effectively investigate deaths in psychiatric institutions, 30 November 2005, <http://www.amnesty.org/en/library/asset/EUR39/008/2005/en/00789410-d47f-11dd-8743-d305bea2b2c7/eur390082005en.pdf> (08.10.2009). See also Amnesty International, Romania: Memorandum to the government concerning inpatient psychiatric treatment Index Number: EUR 39/003/2004, 3 May 2004, available at: <http://www.amnesty.org/en/library/asset/EUR39/003/2004/en/f2d3ad75-d5f7-11dd-bb24-1fb85fe8fa05/eur390032004en.pdf> (10.10.2009)

³⁸ Amnesty International, Romania: Memorandum to the government concerning inpatient psychiatric treatment, Index Number: EUR 39/003/2004, 3 May 2004, available at: <http://www.amnesty.org/en/library/asset/EUR39/003/2004/en/f2d3ad75-d5f7-11dd-bb24-1fb85fe8fa05/eur390032004en.pdf> (10.10.2009).

³⁹ Bestea and others v. Romania, petition filed before the ECHR on behalf of seven patients who died in Poiana Mare Psychiatric Hospital in January-February 2004 available at <http://www.interights.org/poiana-mare> (01.10.2009) and Câmpeanu v Romania, petition filed before the ECHR on behalf of a young man who died in Poiana Mare Psychiatric Hospital in February 2004, available at <http://www.interights.org/campeanu> (01.10.2009).

3.2. The Right to Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment

- [62]. According to Art. 22 of the Constitution ‘no one shall be subjected to torture or to any kind of inhuman or degrading punishment or treatment.’⁴⁰ Also, Art. 35 of the Mental Health Law provides for the right ‘to be protected...from harmful and degrading treatment.’ The Criminal Code sanctions torture in Art. 343 with prison from two to seven years.⁴¹ The New Criminal Code adopted in July 2009 to enter into force at a later date also sanctions torture and inhuman and degrading treatments in Art. 282.⁴²
- [63]. Romania signed the UN Optional Protocol to the Convention against Torture on 24 September 2003 and ratified it on 02 July 2009.⁴³ No National Preventive Mechanism had been put into place so far.
- [64]. In practice, reports of NGOs⁴⁴ and of international governmental institutions argued that the living conditions and lack of adequate treatment, when so deplorable, amount to cruel, inhuman and degrading treatment.⁴⁵ Following its 1995 visit, the European

⁴⁰ Romania/ Constituția României (29.10.2003).

⁴¹ Romania /Legea 301/2004 Codul Penal (12.04.2005).

⁴² Romania/Legea 286/2009 Noul Cod Penal, New Penal Code (17.07.2009) available at: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=10255 (10.10.2009).

⁴³ APT, Global Status of OPCAT Ratifications, available at <http://www.apr.ch/content/view/40/82/lang/en/> (14.10.2009).

⁴⁴ See also, Centrul de Resurse Juridice, Mecanismele de protecție a persoanelor cu dizabilități mintale din instituțiile medico-sociale: de la iluzie la realitate (2007) available at www.crj.ro. See also, Amnesty International, Romania: "Protection of basic rights of people with mental disabilities placed in psychiatric establishments - an imperative for the Romanian state", AI Index: EUR 39/014/2004 (5.1..2004) available at: <http://www.amnesty.org/en/library/asset/EUR39/014/2004/en/c92e14db-fa9e-11dd-999c-47605d4edc46/eur390142004en.pdf> (10.10.2009). See also, Mental Disability Rights International, Hidden Suffering: Romania's Segregation and Abuse of Infants and Children with Disabilities, available at: <http://www.mdri.org/mdri-reports-publications.html> (14.10.2009).

⁴⁵ Economic and Social Council, Commission On Human Rights, Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Paul Hunt, Report, Addendum- MISSION TO ROMANIA, E/CN.4/2005/51/Add.4 (21.02.2005). See also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Rapport au Gouvernement de la Roumanie relatif à la visite effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) en Roumanie du 24 septembre au 6 octobre 1995, CPT/Inf (98) 5 [Partie 1] available at :[Http://www.cpt.coe.int/documents/rom/1998-05-inf-fra-1.pdf](http://www.cpt.coe.int/documents/rom/1998-05-inf-fra-1.pdf) (14.10.2009) or Rapport au Gouvernement de la Roumanie relatif à la visite effectuée en Roumanie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 15 au 21 juin 2004 CPT/Inf (2006) .

Committee for the Prevention of Torture found that the conditions found in Poiana Mare hospital were so egregious that it decided to make use of Art. 8 and communicated its findings to the authorities without delay requiring immediate reaction.⁴⁶ Similarly, after the 2002 visit the CPT made use of the Art. 8 procedure to request to immediately disband the cages from the Voila Hospital.⁴⁷

- [65]. There were also reports stating that existing conditions in some facilities amount to ill treatment and torture.⁴⁸
- [66]. In 2004, Amnesty International found that ‘reported living conditions in many of the psychiatric wards and hospitals, the ill-treatment of patients, methods of restraint and enforcement of seclusion, the lack of adequate habilitation and rehabilitation or adequate medical care as well as the failure to investigate impartially and independently reports of ill treatment.’ Restraint and seclusion practices in many psychiatric wards and hospitals were not in line with international standards and in some instances amounting to cruel, inhuman and degrading treatment or punishment.⁴⁹
- [67]. No relevant national case law is available on the right to freedom from torture related to persons with mental disorder and persons with mental disability but petitions had been filed before the European Court of Human Rights on behalf of former patients of Poiana Mare.⁵⁰

⁴⁶ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, documents available at: <http://www.cpt.coe.int/en/states/rom.htm> (14.10.2009).

⁴⁷ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, <http://www.cpt.coe.int/en/states/rom.htm> (14.10.2009).

⁴⁸ Amnesty International, AI Index EUR 39/003/2005, Medical Action Update Romania: Conditions in psychiatric hospitals, 14.02.2005, available at: <http://www.amnesty.org/en/library/asset/EUR39/003/2005/en/6634aa66-d520-11dd-8a23-d58a49c0d652/eur390032005en.pdf> (08.10.2009). See also Amnesty International, Romania: Patients at the Poiana Mare psychiatric hospital AI Index: EUR 39/002/2004 available at: <http://web.amnesty.org/library/index/engeur390022004> (02.09.2009).

⁴⁹ Amnesty International, Romania: Memorandum to the government concerning inpatient psychiatric treatment, Index Number: EUR 39/003/2004, 3 May 2004, available at: <http://www.amnesty.org/en/library/asset/EUR39/003/2004/en/f2d3ad75-d5f7-11dd-bb24-1fb85fe8fa05/eur390032004en.pdf> (10.10.2009).

⁵⁰ Bestea and others v. Romania, petition filed before the ECHR on behalf of seven patients who died in Poiana Mare Psychiatric Hospital in January-February 2004 available at <http://www.interights.org/poiana-mare> (01.10.2009) and Câmpeanu v Romania, petition filed before the ECHR on behalf of a young man who died in Poiana Mare Psychiatric Hospital in February 2004, available at <http://www.interights.org/campeanu> (01.10.2009).

3.3. The Right to Freedom from Exploitation

- [68]. Art. 42 of the Romanian Constitution includes a prohibition of forced labour.⁵¹ Similarly, Art. 35 of the Mental Health Law provides for the right ‘to be protected from any form of economic, sexual or other kind of exploitation,’ while Art. 36 states that: ‘No patient can be compelled to forced labour. The activity carried out by a patient in a mental health facility cannot allow for his or her physical or psychological exploitation.’
- [69]. Also the Criminal Code sanctions forced labour in Art. 203 with imprisonment from one to three years, the provision being maintained in Art. 212 of the new Criminal Code.⁵² No relevant national case law is available on the right freedom from exploitation related to persons with mental disorder and persons with mental disability.

3.4. The Right to Liberty and Security

- [70]. The right to individual freedom and security is guaranteed as inviolable under Art. 23 of the Romanian Constitution. Still, the placement of people for involuntary psychiatric treatment who have not been charged with any criminal offence or people who have been placed in hospitals on nonmedical grounds (allegedly solely because they could not be provided with appropriate support and services to assist them and/or their families in the community) was considered as amounting to arbitrary deprivation of liberty and denial of fair trial rights. Also, when it concerned patients who were admitted for treatment on a voluntary basis, seclusion enforced as punishment was reported as amounting to arbitrary deprivation of liberty and detention.⁵³ In spite of reports, no relevant national case law is available on the right to liberty and security related to persons with mental disorder and persons with mental disability.

⁵¹ Romania/ Constituția României (29.10.2003).

⁵² Romania/Legea 286/2009 Noul Cod Penal, New Penal Code (17.07.2009).

⁵³ Amnesty International, Romania: Memorandum to the government concerning inpatient psychiatric treatment, Index Number: EUR 39/003/2004, 3 May 2004, available at: <http://www.amnesty.org/en/library/asset/EUR39/003/2004/en/f2d3ad75-d5f7-11dd-bb24-1fb85fe8fa05/eur390032004en.pdf> (10.10.2009). See also, Centrul de Resurse Juridice, Mecanismele de protecție a persoanelor cu dizabilități mintale din instituțiile medico-sociale: de la iluzie la realitate (2007) available at www.crj.ro (14.10.2009).

3.5. The Right to Fair Trial

- [71]. The right to free access to justice is guaranteed by Art. 21 of the Constitution which also provides that ‘the exercise of this right shall not be restricted by any law.’⁵⁴
- [72]. The Code of Civil Procedure states in Art. 42 that ‘the persons who do not have legal capacity (are placed under interdiction) cannot have locus standi in court unless they are represented, assisted or authorized as established by specific legislation.’⁵⁵ The lack of capacity (discernment) can be invoked in any moment of the legal proceedings and the procedural acts filed by a person without discernment may be annulled, however the representative (guardian) of the person lacking discernment (*incapabil*) can ratify all acts according to Art.43. See also Chapter 5 on capacity, competence and guardianship.
- [73]. In case of emergencies, if the person lacking discernment (*incapabil*) does not have a legal representative, or in cases of conflicting interests between the person lacking discernment and his/her guardian, the court can appoint a special curator according to Art.44.
- [74]. In the cases regarding the rights and the legitimate interests of persons lacking discernment (*incapabil*), the Public Ministry can initiate any action, except those personal and can participate in the proceedings according to Art.45.
- [75]. Legal guarantees are provided by the Law on judicial taxes⁵⁶ as updated and republished, which states in Art. 15 e) that actions regarding the rights of persons with disability are exempted from judicial tax. This legal entitlement is confirmed by the practice of the courts.⁵⁷
- [76]. In practice, in order to have access to free legal assistance, the persons under interdiction have to fulfil the same requirements as the general population in spite of such generous legal provisions (they have to prove lack of resources).⁵⁸

⁵⁴ Romania/ Constituția României (29.10.2003).

⁵⁵ Romania/Codul de Procedură Civilă, Civil Procedure Code (09.10.1865).

⁵⁶ Romania/ Legea 146/1997 privind taxele judiciare de timbru, Law on judicial taxes (24.07.1997).

⁵⁷ Romania/ ÎNALTA CURTE DE CASAȚIE ȘI JUSTIȚIE SECȚIA DE CONTENȚIOS ADMINISTRATIV ȘI FISCAL, Decizia nr. 1635/2009, High Court of Cassation and Justice, Administrative Law section, (24.03.2009) available at: <http://www.iccj.ro/cautare.php?id=44603> (10.10.2009).

⁵⁸ Romania/Ordonanța de Urgență 51/2008 privind ajutorul public judiciar in materie civila, Emergency Ordinance 51/2008 regarding the public aid in civil cases (25.04.2008).

[77]. Lack of discernment in the moment of perpetrating a criminal deed is mentioned as a waiver for criminal liability by Art. 31 of the Criminal Code stating that:

It is not a crime the deed provided for in the Criminal Law if the perpetrator could not understand his actions or inactions or could not control them, at the moment when perpetrating the criminal deed, due to mental alienation (*alienatie mintală*) or due to other causes.⁵⁹

[78]. The Criminal Code provides for safety measures which can be taken according to Art. 113 and Art. 114 if the perpetrator presents a danger for the society due to an illness, including the measure of involuntary internment.

[79]. In recent case law, the High Court found that ‘the (safety) measure of medical internment can be issued against the person who perpetrated a deed sanctioned by the criminal law, if the person is a danger for the society due to mental alienation, irrespective of whether the deed is a crime or not or if the perpetrator is condemned or benefits from a waiver from the punishment.’⁶⁰ The safety measure of involuntary internment was hence linked to the health condition of the perpetrator and not to the decisions issued in a criminal trial and the High Court instructed the lower courts to apply the law as stating that ‘the measure of medical internment must be taken without delay, no matter in what procedural stage the criminal procedure might be, even in case of non-indictment of the perpetrator, as long as the situation of social danger is triggered by a deed provided for in the criminal law.’

3.6. The Right to Privacy, including the access to one’s own confidential medical records

[80]. The right to privacy is guaranteed by Art. 26 of the Romanian Constitution.⁶¹ The Mental Health Law provides for the right to privacy in Art.36 and mentions that non-observance by professionals working in the field of mental health of confidentiality of information related to a person’s mental disorder, may lead to disciplinary or criminal liability, according to Art. 60 of the Law.

⁵⁹ Romania/ Legea 301/2004 Codul Penal (12.04.2005).

⁶⁰ Romania/ ÎNALTA CURTE DE CASAȚIE ȘI JUSTIȚIE, SECȚIILE UNITE, DECIZIA Nr. 13 (18.02.2008) available at <http://www.scj.ro/Decizii%20SU%5Cdecizie%20XIII%202008.html> (02.10.2009).

⁶¹ Romania/ Constituția României (29.10.2003).

- [81]. The Law 46/2003 on the Rights of the Patient states in Arts. 21-22 that ‘all the information regarding the situation of the patient, the results of the medical investigations, the diagnosis and prognosis, the treatment, the personal data are confidential even after the death of the patient’ and that ‘confidential information can be provided only when the patient agrees explicitly or when the law creates a clear obligation.’⁶² The Law 46/2003 states in Art. 37 that ‘if the medical personnel fails to observe the confidentiality of the patient’s data and the confidentiality of the medical act, as well as other rights of the patient, disciplinary, administrative or criminal liability are triggered according to the Law.’ However, Law 46/2003 does not include a mechanism for reporting, investigating, or enforcing sanctions in cases of breaches of confidentiality and also lacks clear and effective sanctions.
- [82]. Art. 214 of the Romanian Criminal Code punishes illegal disclosure of professional secrets with a criminal fine or a prison term between three and twelve months if the disclosure causes damage to a person. The criminal investigations can only be initiated based on a complaint by the victim, who must show that the disclosed information is a professional secret, defined as information received or conveyed in the course of the individual’s professional activity, and must also prove that damage occurred.⁶³
- [83]. In spite of the legal guarantees, an Amnesty International report found that ‘hardly any psychiatric facility in Romania provides patients and residents with adequate space to ensure their privacy,’⁶⁴ while the Center for Legal Resources 2007 report found that ‘it was unacceptable to deny access to patients in such institutions to envelopes for correspondence with the family or to exercise their right to petition.’⁶⁵
- [84]. No relevant national case law is available on the right to privacy, including access to the confidential medical records related to persons with mental disorder and persons with mental disability.

⁶² Romania/Legea drepturilor pacientului, Law on the rights of the patient (21.01.2003).

⁶³ Romania/ Legea 301/2004 Codul Penal (12.04.2005).

⁶⁴ Amnesty International, Romania: Memorandum to the government concerning inpatient psychiatric treatment, Index Number: EUR 39/003/2004, 3 May 2004, available at: <http://www.amnesty.org/en/library/asset/EUR39/003/2004/en/f2d3ad75-d5f7-11dd-bb24-1fb85fe8fa05/eur390032004en.pdf> (10.10.2009).

⁶⁵ Centrul de Resurse Juridice, Mecanismele de protecție a persoanelor cu dizabilități mintale din instituțiile medico-sociale: de la iluzie la realitate (2007) available at www.crj.ro (14.10.2009).

3.7. The Right to Marry, to found a family and to respect of family life

- [85]. Art. 48 of the Romanian Constitution provides for the protection of the family as established by law.⁶⁶ The Family Code prohibits the marriage of ‘the mentally alienated (*alienatul mintal*), the person with a mental debility (*debilul mintal*) and the person temporarily lacking mental capacity as long as he/she does not have the discernment of his/her deeds.’⁶⁷ Art. 19 of the Family Code declares void the marriage contracted without observing this prohibition. The same prohibition is present in Art.276 of the new Civil Code.⁶⁸
- [86]. In the case law, the courts specified that ‘only mental alienation and debility existing at the date when the marriage was concluded are causes for annulment.’⁶⁹ In this context, the courts struggled with medical concepts relying on medical expertise to identify whether particular medical conditions amount to alienation or debility as prohibited by the Family Code or whether the medical condition invoked started before the marriage thus triggering annulment. The case law confirmed that the marriage would be void irrespective whether the person had been placed under interdiction or not or whether he or she had temporary discernment when contracting the marriage. Lack of discernment can be proved using any means of evidence.
- [87]. The High Court stated that ‘persons suffering from mental alienation or debility cannot get married not only because their condition excludes a free agreement, but also due to reasons of biological concern.’⁷⁰ Furthermore, the Court speaks of a social interest when mentioning that it is irrelevant if the husband or the wife knew about the condition of the persons suffering from mental alienation.⁷¹

⁶⁶ Romania/ Constituția României (29.10.2003).

⁶⁷ Art.9, Romania/Codul Familiei, Legea 4/1954, Family Code. (31.01.1954).

⁶⁸ Romania/Legea 287/2009 Noul Cod Civil, New Civil Code (17.07.2009).

⁶⁹ Romania/ CURTEA SUPREMĂ DE JUSTIȚIE, SECȚIA CIVILĂ, Decizia nr. 1206 , High Court of Justice, civil section, decision 1206 from 26.03.2003 available at <http://www.iccj.ro/cautare.php?id=562> (02.10.2009).

⁷⁰ Romania/ CURTEA SUPREMĂ DE JUSTIȚIE, SECȚIA CIVILĂ, Decizia nr. 1206 , High Court of Justice, civil section, decision 1206 from 26.03.2003 available at <http://www.iccj.ro/cautare.php?id=562> (02.10.2009).

⁷¹ Romania/ CURTEA SUPREMĂ DE JUSTIȚIE, SECȚIA CIVILĂ, Decizia nr. 4385, 29.10.2003, available at: <http://www.iccj.ro/cautare.php?id=1618> (14.10.2009).

3.8. The Right to have children and maintain parental rights

- [88]. Art. 48 of the Constitution guarantees the right and duty of the parents to ensure the upbringing, education and instruction of their children.⁷²
- [89]. The Family Code allows an exemption to the rule stating that challenges to paternity are personal, in the case of a husband who is under interdiction (declared as lacking discernment) in Art.54. In such cases the action can be initiated by the guardian with the consent of the Tutelary Authority and the statute of limitation applies differently (the term of six months for filing the action denying paternity starts from the moment when the guardian found about the birth).⁷³
- [90]. The Family Code in Art. 68 provides that persons under interdiction cannot adopt. Furthermore, the New Civil Code in Art. 459 provides that ‘the persons who do not have full legal capacity, those suffering of mental alienation or debility as well as those with serious psychiatric illnesses cannot adopt.’⁷⁴
- [91]. Parental rights are enjoyed by both parents unless ‘one parent is deceased, lost parental rights, was put under interdiction, or, for any reason, is unable to express his or her will’ according to Art. 98 (2) of the Family Code. This means that persons with mental disorder or intellectual disability can fully enjoy their parental rights if they were not put under interdiction.
- [92]. No relevant national case law is available on the right to have children and maintain parental rights related to persons with mental disorder and persons with mental disability.

3.9. The Right to Property

- [93]. The Romanian Constitution guarantees the right to property in Art. 44.⁷⁵ Persons with mental disorder and persons with intellectual disability have the right to property, the only limitation appears for those put under interdiction, in the case of disposing of their properties as legal acts of persons put under interdiction are void unless are conducted by the guardian appointed by the court.⁷⁶ No important

⁷² Romania/ Constituția României (29.10.2003).

⁷³ Romania/Codul Familiei, Legea 4/1954, Family Code. (31.01.1954).

⁷⁴ Romania/Legea 287/2009 Noul Cod Civil, New Civil Code (17.07.2009).

⁷⁵ Romania/ Constituția României (29.10.2003).

⁷⁶ Art. 172, Romania/Legea 287/2009 Noul Cod Civil, New Civil Code (17.07.2009).

national case law is available regarding the right to property related to persons with mental disorder and persons with mental disability.

3.10. The Right to Vote

[94]. Art. 36 of the Romanian Constitution on the right to vote states that:

mentally deficient (*debilii*) or alienated persons (*alienații mintal*), [who had been] laid under interdiction, as well as the persons disenfranchised by a final decision of the court cannot vote.⁷⁷

[95]. As only persons having the right to vote have also the right to be elected (Art.37) and the right to be elected to the European Parliament (Art. 38), it follows that persons with mental disorder and persons with intellectual disability who had been placed under interdiction cannot enjoy these rights. In practice, there are reports of persons with mental disorders and persons with intellectual disability that have not been placed under interdiction who were also deprived of their right to vote or could not effectively exercise it due to lack of access to information or restraints of their liberty but there is no important case law available to allow an analysis of the application of these rights by the courts.⁷⁸

4. Involuntary placement and Involuntary Treatment

[96]. On 18.12.1990, Romania ratified the UN Convention Against Torture. However, until now, the UN Committee Against Torture did not issue any concluding observations on Romania as the State did not send four periodic reports due in 1996, 2000, 2004 and 2008.⁷⁹ In addition, only on 2.07.2009, Romania ratified the Optional Protocol to the

⁷⁷ Romania/ Constituția României (29.10.2003).

⁷⁸ On the occasion of the 2007 Referendum, two anecdotal cases have been notified to the Center for Legal Resources. Young people from a rehabilitation centre were refused the right to vote in Bucharest because they were living in a rehabilitation centre. See Interview with Georgiana Pascu, Program Manager, Center for Legal Resources, 07.10.2009, on file with the FRALEX team.

⁷⁹ See United Nations, Report of the Committee against Torture, Forty-first session (3-21 November 2008) Forty-second session (27 April-15 May 2009), General Assembly Official Records, Fifty-fifth session, Supplement No. 44 (A/64/44), pp. 259-263, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G09/441/61/PDF/G0944161.pdf?OpenElement> (10.10.2009).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to the ratification law, the Government postponed for three years the implementation of the obligations under Part IV of the Optional Protocol, concerning national preventive mechanisms.⁸⁰

[97]. The 2008 CPT Report on Romania reflected worrying findings:

- Numerous shortcomings in the involuntary placement procedure and its application into practice – large number of people qualified as being in voluntary placement, while *de facto* being deprived of liberty; the commissions in charge of assessing involuntary placement are established ad-hoc; doctors member of the first instance commissions are appointed also in the revision commissions; patients are not heard during the procedures; there is a minimal justification of decisions and information is missing on available appeal; the prosecutor's supervision of the legality of decisions is missing or ineffective, although prescribed by the law; lack of periodic revisions of the involuntary placement decisions; lack of application of the procedure for transforming the voluntary placement into involuntary placement; no special procedure for persons placed under interdiction; no procedure for involuntary placement in social institutions (rehabilitation centres);
- Problems with treatment - medication treatment as only therapy; abusive use of tranquilizers for troublesome patients without trying to approach them by other means, including physical or verbal constraints; unregulated, inhuman use of ECT - outdated equipment, ECT is used without anaesthetics and myorelaxants, encephalograms are not performed to assess treatment results; unregulated use of physical constraints;
- Abusive practice of biomedical research programs of antipsychotic medicines carried out by the pharmaceuticals industry - patients presumed incapable of consent (although not 'placed under interdiction') are included in research programs upon signing a consent form, patients are not informed on the consequences of the treatment or of being administered a treatment altogether, the use of social cases as subjects although they do not have any mental health illness;
- Lack of information on patients' rights and lack of effective complaint procedures;
- Placement of social cases in mental health hospitals despite lack of medical indication to support such placement.⁸¹

⁸⁰ See Declaration made by Romania to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 18 December 2002, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9-b&chapter=4&lang=en#EndDec (10.10.2009).

⁸¹ See Council of Europe, Rapport au Gouvernement de la Roumanie relatif à la visite effectuée en Roumanie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 8 au 19 juin 2006 [2008 CPT Report],

4.1. Legal Framework

- [98]. The Mental Health Law regulates involuntary placement, its scope being limited to ‘psychiatric hospitals with adequate conditions to provide specialized care in specific conditions,’ leaving out involuntary placement in social rehabilitation establishments where the persons with intellectual disabilities are usually placed.⁸² However, the Ministry of Public Health has still not approved a list with the psychiatric hospitals allowed to use involuntary placements, due in May 2006.⁸³ The Criminal Code also regulates the involuntary treatment (Art.113) and involuntary placement (Art.114) of offenders with mental disorders or persons with addictive behaviour.⁸⁴
- [99]. On various occasions in 2006, 2007, and 2008, the *Centrul de Resurse Juridice* [Center for Legal Resources], an NGO that carries out independent human rights monitoring in mental health institutions regularly, proposed to the Ministry of Public Health a list of amendments to the Mental Health Law resulting from their findings.⁸⁵ So far none of these amendments have been included in the legislative process:
- Suggestions on involuntary placement: the psychiatrist should no longer be able to take the measure of involuntary placement, except for emergency cases when he/she can order an ‘emergency involuntary placement’ for maximum 24 hours (in the meantime, this decision is reviewed by the revision commission); in cases that are not urgent, the involuntary placement decision should be taken by the revision commission in maximum 48 hours from receiving the case from the psychiatrist; the doctor who evaluated the person must not be a member of this commission and the presence of the representative of the civil society should be mandatory; instead of the prosecutor, the review should be done by the first instance court from the jurisdiction of the mental health institution; the patient, or his/her legal

Strasbourg, 11 December 2008, CPT/Inf (2008) 41, pp.67-104, available at <http://www.cpt.coe.int/documents/rom/2008-41-inf-fra.pdf> (14.10.2009).

⁸² Art.46 of the Mental Health Law.

⁸³ Romania/Ordin Nr. 372/10.04.2006 privind Normele de aplicare a Legii Sănătății Mintale și a Protecției Persoanelor cu Tulburări Psihice Nr. 487/2002 cu modificările ulterioare, Order No. 372/10.04.2006 regarding the Norms of Application of the Mental Health Law and the Protection of Persons with Psychiatric Disorders No. 487/2002 amended [Norms of Application of the Mental Health Law], Art.27 (10.04.2006). See also Center for Legal Resources, Raport privind respectarea drepturilor și libertăților persoanelor aflate în instituții medico-sociale pentru persoane cu dizabilități mintale, Report on the respect of the rights and liberties of the persons placed in medico-social institutions for persons with mental disabilities [2009 CLR Report], October 2009, p.8, on file with FRALEX team.

⁸⁴ Arts.113-114 of the Criminal Code.

⁸⁵ The Center for Legal Resources concluded a collaboration protocol with the National Center for Mental Health within the Ministry of Health to monitor human rights in the mental health institutions in Romania. See Collaboration Protocol No. 121/25.03.2009 on file with FRALEX team.

representative or personal representative if the patient's health does not allow him to participate, must be involved throughout the procedures; free legal aid should be guaranteed as well as the possibility to ask for a forensic-psychiatric re-evaluation; impose periodic revisions of the involuntary placement each four months or earlier case by case and at the patient's or his/her legal representative's or personal representative's requests.

- Suggestions regarding further safeguards for the persons placed under interdiction and minors: the doctor's obligation to obtain the consent of the legal representative in case of persons placed under interdiction, similar with the case of minors, and update them for every involuntary measure applied; the mental health institution's obligation to notify the competent authorities in case of lack of legal representative.
- Suggestions on treatment: clarifying that the revision commission established for involuntary placement should function also in cases of involuntary treatment.
- Suggestions on placement and treatment of offenders: clarifying that the Mental Health Law applies jointly with the Criminal Code and Criminal Procedure Code.⁸⁶

[100]. The legislative framework makes a distinction between involuntary placement and involuntary treatment. First, the Criminal Code makes a distinction in the criteria for ordering one of the measures in case of offenders that are in a situation that represents a danger to the society: for the persons with mental illness the court can order the measure of involuntary placement, while for persons with addictive behaviour or other illnesses, the measure can be involuntary treatment or involuntary placement, the last one being taken in cases when the treatment ordered is not observed. Second, for persons that are not offenders, in case of involuntary placement, the Mental Health Law establishes certain safeguards (see below), while in case of involuntary treatment these safeguards no longer apply.

[101]. However when it comes to patient's informed consent, the distinction between the two is no longer enforced. A form called 'Informed Consent' should be signed by the person who agrees to be placed into psychiatric hospital. By signing this form the person gives also a general consent for any treatment carried out during his/her stay in the hospital.⁸⁷ According to the form, the patient also consents that his/her medical case is a subject of scientific research or education without any additional authorisation from the patient, which may be a gateway for abuses regarding biomedical research in psychiatric

⁸⁶ See e.g. Center for Legal Resources, Letter of 14.06.2006 to the Ministry of Public Health on file with FRALEX team.

⁸⁷ See Annex 1 of the Norms of Application of the Mental Health Law.

hospitals.⁸⁸ According to the aforementioned form, the person has the right to object to treatment after giving this general consent, but additional consent is not taken for each treatment, except for ‘invasive therapeutic methods, with a higher degree of risk’ which will be authorised individually. Such a general consent taken at the beginning of the placement in the hospital is not informed consent, because health care providers cannot predict every single intervention and provide information to the patient accordingly at the moment of placement. This comes in violation with the principles on informed consent set in the Law on Patient’s Rights.⁸⁹

[102]. There is no provision in the legislation on involuntary placement without treatment. The involuntary placement is decided for medical reasons. The legislative framework pursues aims such as treatment of the mental disorder, rehabilitation, and protection against harm for the person or other persons (see below).⁹⁰

[103]. The legal framework does not expressly stipulate adequate aftercare following involuntary placement or treatment. Such cases fall under the general provisions regarding access to public health care. Moreover, when a revision commission or a court finds that a person should not be in involuntary placement, the person has the possibility to continue the treatment upon his/her consent.⁹¹

[104]. In case of persons placed under interdiction and minors, the placement should be made with the consent of the personal representative or legal representative and when he/she is not available, the doctor is obliged to announce the *Autoritatea Tutelara* [Tutelary Authority].⁹² It is not clear if the involuntary placement procedure applies in their case, too, as well as what happens when the personal representative or legal representative does not respond and the person objects to placement. In addition, the treatment can only be provided with the consent of the personal representative or legal representative.⁹³ Yet, the aforementioned provision disregards the obligation to involve the person placed under interdiction or the

⁸⁸ ‘Biological material collected with the aim of making a medical diagnosis (blood, tissue, organs) can be examined also with the aim of scientific research, education, can be taken pictures of it and published, without another express authorization from my part, respecting confidentiality.’ See Annex 1 of the Norms of Application of the Mental Health Law.

⁸⁹ Romania/Legea drepturilor pacientului Nr. 46/2002, Law on Patient’s Rights No. 46/2002 [Law on Patient’s Rights], Arts.6, 13, 16, 17, 18, 19, 20.

⁹⁰ Arts.45, 51 of the Mental Health Law.

⁹¹ Art.57 of the Mental Health Law.

⁹² Art.50 of the Mental Health Law.

⁹³ Art.29.(2).d), (3) of the Mental Health Law.

minor patient in the decision-making process to the extent of his/her evolving capacities, according to the Law on Patients' Rights.⁹⁴

- [105]. In cases when the personal representative or legal representative is not available or does not want to consent, the Mental Health Law gives the doctor the permission to take an individual decision regarding treatment which is later on reviewed by the revision commission, while the Law on Patient's Rights allows this only in cases of emergency medical intervention when the legal representative is not available and when the legal representative objects to the treatment, providing for a specialized arbitration commission formed of three or two doctors which decides.⁹⁵
- [106]. The Mental Health Law is the only law that uses the term 'personal representative' (*reprezentat personal*) in addition to the term 'legal representative,' although only the last one is recognized by the law on legal capacity (see below). While such an institution might be useful in the case of persons with mental disabilities who often find themselves neglected by their legal representatives, the law must regulate this new institution, clarify the relations between the two types of representation, and guarantee special safeguards, at least similar to the ones applicable for legal representation.
- [107]. Art.114 of the Criminal Code establishes the measure of involuntary placement of offenders with mental illnesses or persons with addictive behaviour (*toxicomani*) in case they are in a situation that represents a danger to the society. This measure is ordered by court 'until recovery' or for a limited time when taken during the criminal investigation or trial.⁹⁶

4.2. Criteria and Definitions

- [108]. The Mental Health Law prescribes that only persons evaluated by a competent psychiatrist as having a mental disorder can be placed involuntary in psychiatric hospitals if one of the following conditions is *also* met:
- a. due to the mental disorder there is an imminent danger of causing injuries to himself/herself or other persons,
 - b. in case of persons with serious mental disorders and reduced discernment,

⁹⁴ Art.16 of the Law on Patient's Rights.

⁹⁵ Art.15 of the Law on Patient's Rights.

⁹⁶ Romania/ Legea 301/2004 Codul Penal (12.04.2005).

- c. if not placing him/her in a psychiatric hospital would lead to a serious health deterioration or would obstruct administration of adequate treatment.⁹⁷

[109]. For persons who are offenders, the Criminal Code prescribes that the involuntary placement can be ordered if the person has a psychological illness and he/she is in a situation that represents a danger to the society, cumulatively.⁹⁸ According to reports, the number of persons in involuntary placement is very low (in 2006 this was estimated around one percent by the Ministry of Health) although the majority of patients want to leave the hospital.⁹⁹ Many methods of by-passing the Law were identified by the NGOs monitoring psychiatric institutions: the persons brought to the psychiatric hospital by the police, ambulance or relatives are persuaded to give their consent to placement; allegedly the person gives his/her consent orally or the informed consent form is signed sometimes the next day after placement, 'when the person calms down;' the police signs the informed consent instead of the person.¹⁰⁰

[110]. The legislation requires adopting less intrusive alternatives before deciding on involuntary treatment. The principle of adopting less intrusive alternatives does not apply in case of involuntary placement. The requirement to persuade first the person to give his/her consent for voluntary placement is not a real application of the abovementioned principle.¹⁰¹ In addition, the Criminal Code prescribes involuntary treatment as a less intrusive alternative to involuntary treatment only for persons with addictive behaviour or illnesses other than psychological illnesses.¹⁰²

[111]. According to the Law on Patient's Rights, the patient should give his/her consent for all medical interventions or treatments.¹⁰³ In the case of mental health treatment, the Mental Health Law prescribes a wide list of cases when the psychiatrist can provide treatment without the patient's consent:

- a. the patient's behaviour represents an imminent danger of injury for himself/herself or for other persons;

⁹⁷ Arts.45, 51 of the Mental Health Law.

⁹⁸ Art.114 of the Criminal Code.

⁹⁹ European Commission, Peer Review 2006, Evaluation Mission on Mental Health Romania, Draft Report [2006 Peer Review Report], p.37, ref.Peer 21830, on file with the FRALEX team. See also 2008 CPT Report, paras.183-185.

¹⁰⁰ Center for Legal Resources. 2009 CLR Report, pp.9-15, on file with FRALEX.

¹⁰¹ Art. 44 of the Mental Health Law.

¹⁰² Arts. 113-114 of the Criminal Code.

¹⁰³ Art.13 of the Law on Patient's Rights.

- b. the patient does not have psychological capacity (*capacitatea psihică*) to understand the illness and the necessity of medical treatment;
- c. the patient is placed under interdiction and the guardianship was established;¹⁰⁴
- d. the patient is a minor and the doctor has to have the consent of the patient's personal representative or legal representative.

[112]. This measure is permitted only for a limited period of time as long as the danger persists and it should be notified to and analyzed by the revision commission applicable in the case of involuntary placement.¹⁰⁵

[113]. There is no legal definition of the risk level of danger (to the health or safety of the patient and/or of the public) and the laws do not mention specific danger thresholds. Moreover, in the case of persons who are offenders, the danger is considered in general, with regards to the society, and not a danger of injury for himself/herself or other persons as it is the case in the Mental Health Law.¹⁰⁶

4.3. Assessment, Decision Procedures and Duration

[114]. The temporary involuntary placement of maximum 72 hours is decided by the 'competent psychiatrist' (*medic psihiatru abilitat*).¹⁰⁷ This measure is confirmed by a revision commission (*comisia de revizie*) formed of three members appointed by the hospital director – two psychiatrists, 'if possible others than the one who took the decision in the first place,' and one doctor of another specialty or a representative of the civil society.¹⁰⁸ Consequently, it is the medical authority who decides to begin or to end the involuntary placement and/or treatment. In practice, reports show cases where persons are put under involuntary placement without the psychiatrist's evaluation, this evaluation being carried out a few days later, due to insufficient specialized personnel.¹⁰⁹ Although a Register with all

¹⁰⁴ In case of persons placed under interdiction, the doctor can decide by himself/herself a mental health treatment when the tutor does not give his/her consent or the consent cannot be obtained. See Art.29.(3) of the Mental Health Law.

¹⁰⁵ Art.30 of the Mental Health Law.

¹⁰⁶ Arts.113, 114 of the Criminal Code.

¹⁰⁷ Art.45 of the Mental Health Law.

¹⁰⁸ Art. 52 of the Law 487/2002.

¹⁰⁹ Center for Legal Resources. 2009 CLR Report, pp.9, 11 on file with FRALEX..

involuntary placements and filled-in forms of voluntary placements are required, hospitals do not follow this rule; patients are not required to sign the forms.¹¹⁰

- [115]. The functioning in practice of the revision commission is problematic due to lack of specialized personnel. Reports show that in cases where the involuntary placement procedure is initiated, as a general rule, the commission's and the prosecutor's reviews are purely formal, no cases of overturning the decision have been registered.¹¹¹
- [116]. When a voluntary placement becomes an involuntary placement, the patient's psychiatrist must begin the involuntary placement procedure mentioned above. In practice, reports show that many of the patients want to leave the hospital, yet the personnel does not initiate procedures for involuntary placement.¹¹²
- [117]. There is no regulation regarding the maximum period of time between the psychiatric assessment and the beginning of the compulsory placement, the duration applicable in emergency situation (e.g. nights, weekends or urgent cases), and the maximum duration of an initial placement and at what point in time a new approval is required.
- [118]. No mental health care interventions are particularly regulated by law (e.g. electro-convulsive therapy (ECT), pharmaceutical intervention, forced feeding, etc.). Only physical restraint and seclusion are regulated by the Norms of Application of the Mental Health Law. With regards to both measures, the principle of less intrusive alternatives must apply and efforts should be made to avoid pain or that the person injures himself/herself. However, a case of a patient who died after setting himself in fire in a seclusion room was recently reported as being an example of rooms not being adequate to allow continuous monitoring.¹¹³ Also, instead, of being an exception, at least three of sixteen hospitals monitored by the Center for Legal Resources practice the unlawful permanent placement into the so-called 'supervision rooms' (*saloane de supraveghere*) and 'closed sections' (*secții închise*), which are, in fact, seclusion rooms. Moreover, the chemical constraint is used in excess instead of physical constraint without any regulation.¹¹⁴

¹¹⁰ Art. 33 of the Norms of Application of the Mental Health Law. See also 2009 CLR Report, pp.8-15, on file with FRALEX.

¹¹¹ Center for Legal Resources. 2009 CLR Report, pp.12 on file with FRALEX.

¹¹² Center for Legal Resources. 2008 CPT Report, paras.184-185. See also Center for Legal Resources, 2009 CLR Report, pp.9-15 on file with FRALEX.

¹¹³ Center for Legal Resources. 2009 CLR Report, pp.18 on file with FRALEX.

¹¹⁴ Center for Legal Resources. 2009 CLR Report, pp 16-19, 29 on file with FRALEX.

- [119]. For both physical restraint and seclusion, the regulations prescribe a series of safeguards such as: the patient's legal representative or personal representative must be announced, the measure can be ordered only by a doctor and justified in written, mentioning the time, it is registered in the patient's medical file and in the Register regarding the measures of physical restraint and seclusion, which is confidential.¹¹⁵ Furthermore, these measures cannot be applied as punishment or threats or because of insufficient personnel; they are not a part of the treatment. The physical restraint cannot be applied for more than four hours, and the seclusion needs to be reassessed no later than every two hours. In both cases the patient should be continuously monitored. An assessment of the patient should be carried out at least every 30 minutes in case of use of physical restraint. The Center for Legal Resources reported cases of patients who have been physically restrained for seven hours or more in the County Hospital Drobeta-Turnu Severin.¹¹⁶
- [120]. For seclusion, the room must have facilities to allow continuous monitoring, have light, be aired, have appropriate access to a toilet and bathroom, and be protected in order to prevent injuries. There cannot be more than one person secluded in the same room, a requirement which is usually overlooked.¹¹⁷ Regulations state that only psychiatric units that have the above-mentioned facilities are allowed to use it.¹¹⁸ However hospitals use seclusion although they do not fulfil standards and the personnel extensively disregards these provisions due to ignorance or thoughtlessness regarding the impact on the patient.¹¹⁹
- [121]. In the first 24 hours, the hospital must notify the involuntary placement decision to the prosecutor's office from the hospital's jurisdiction. If the prosecutor considers that the placement is unjustified, he/she orders another psychiatric examination conducted by a forensic-medical commission. The Law does not give any details about the organization and functioning of this additional commission or the term within which the prosecutor reviews the file.¹²⁰ The patient or his/her legal representative or personal representative can file an appeal against the decision of involuntary placement before the competent court. The Law does not specify at what degree of

¹¹⁵ It appears that the registers are not kept by many hospitals. See 2009 CLR Report, pp.15-21.

¹¹⁶ Center for Legal Resources. 2009 CLR Report, p. 17.

¹¹⁷ Center for Legal Resources, 2009 CLR Report, p. 17.

¹¹⁸ Arts.21, 22 of the Norms of Application of the Mental Health Law. See also 2009 CLR Report, pp. 17-21

¹¹⁹ Center for Legal Resources, 2009 CLR Report, pp.15-21.

¹²⁰ The involvement of the prosecutor's office in the involuntary placement's review is criticized by the civil society also because the prosecutor is not an independent magistrate as required by Article 5 and 6 of the ECHR. See e.g. ECtHR, *Vasilescu v. Romania*, Application No. 53/1997/837/1043, 22 May 1998, paras.40-41.

jurisdiction the court and prosecutor are placed, which creates confusions both for the individuals, as well as for the institutions. In a reply to the Center for Legal Resources, the Ministry of Justice mentioned that the ‘tribunal’ (*tribunal*) is competent based on the Law on administrative litigation.¹²¹ The patient should be heard by the court, even if this means that the judge will have to go to the hospital to hear the person. The court procedures should be expedited.¹²² This appeal procedure is not in full compliance with the minimum standards set in Article 25 of the Council of Europe’s Committee of Ministers Recommendation Rec(2004)10. First, the lawfulness of the measure, or its continuing application, is not reviewed by a court at reasonable and regular intervals. In case another request for review is filed by the person or ‘the personal advocate or representative,’¹²³ the application of the principle of *res judicata* requires that new elements (*de facto* or *de jure*) be presented in order for the request to be declared admissible. In case such a review is not filed, there is no provision requiring the responsible authority to inform the court and ensure that the continuing lawfulness of the measure is reviewed at reasonable and regular intervals. Second, there is no lawyer provided to the person for all such proceedings before a court (see below).

[122]. The person concerned does not receive automatic free legal support, but has to apply for legal assistance and/or representation in civil cases like every person having insufficient funds.¹²⁴ The Law 448/2006 mentions access to legal assistance for the persons who are declared ‘person with disabilities’ (*persoană cu handicap*) and are placed under interdiction. Moreover, the Law does not specify that this is free legal aid and the procedure to access it in practice.¹²⁵

5. Competence, Capacity and Guardianship

[123]. A legal framework dating back from the 1950s’ regulates the management of affairs of persons and the protection of adults lacking

¹²¹ See Response from Secretary of State Mihai-Lucian Mătu, Ministry of Justice, No.109665/2007 of 01.10.2007 to the Center for Legal Resources on file with FRALEX team.

¹²² Art. 54 of the Mental Health Law.

¹²³ The concept of ‘personal advocate’ as used in Council of Europe’s Committee of Ministers Recommendation Rec(2004)10 is not transposed in the Romanian legislation.

¹²⁴ Romania/Ordonanța de Urgență 51/2008 privind ajutorul public judiciar in materie civila, Emergency Ordinance 51/2008 regarding the public aid in civil cases (25.04.2008).

¹²⁵ Art.23 of the Law 448/2006 on the protection and promotion of the rights of persons with a handicap.

capacity due to mental disorders or intellectual disabilities.¹²⁶ The New Civil Code, which will come into force at a later date, did not fundamentally change this outdated legal framework.¹²⁷

[124]. The Family Code establishes a ‘curator’ (*curatela*) for the purpose of protecting a person who is capable but unable to manage his or her affairs due to age, illness, or physical disability and cannot appoint a representative. The Tutelary Authority appoints the curator in this case.¹²⁸ Persons with mental disorders or intellectual disabilities who are considered to have kept their capacity should benefit, in principle, of such protection. For these persons, a curator can also be ordered by the court during the procedures of placement under interdiction until the appointment of a legal representative.¹²⁹ The curator acts like an attorney or a representative of the person.

[125]. According to Decree 31/1954, there are two types of capacity:

- The ‘capacity to use rights’ (*capacitatea de folosință*) begins for every person from birth and ends at death and represents the entitlement to own rights and obligations under the law;
- The ‘capacity to exercise rights’ (*capacitatea de exercițiu*) exists in the case of adults (persons 18 year old) who are not placed under interdiction and represents the possibility to exercise the rights that each person is entitled to and to undertake obligations, by way of concluding legal acts.¹³⁰

[126]. The Family Code states that ‘mental alienation’ (*alienația mintală*) and ‘mental debility’ (*debilitatea mintală*) are the mental health related causes determining the legal incapacity of adults. Besides, a cumulative condition needs to be fulfilled: the person does not have discernment to manage his/her affairs.¹³¹ None of these terms are defined in the legislation. The case law provides little guidance:

‘According to Art. 142 of the Family Code, restrictions may be imposed on persons who, due to loss of mental capacity or mental disability, are unable to appreciate the nature and consequences of their actions in a manner that allows for the adequate management of their interests. This legal provision makes it necessary for general and permanent mental difficulties to exist before restrictions may be imposed. Temporary loss of mental faculties, unconsciousness resulting

¹²⁶ Romania/Codul Familiei, Legea 4/1954, Family Code. (31.01.1954) and Romania/Decret nr.31/1954 privind persoanele fizice și persoanele juridice, Decree 31/1954 regarding natural persons and legal persons [Decree 31/1954] (30.01.1954).

¹²⁷ Romania/Legea 287/2009 Noul Cod Civil, New Civil Code (17.07.2009).

¹²⁸ Arts.152 and the following of the Family Code.

¹²⁹ Art. 146 of the Family Code.

¹³⁰ Art.5 of the Decree 31/1954.

¹³¹ Art.142 of the Family Code.

from intoxication, hypnosis, etc. do not meet the standard required for restrictions to be imposed.¹³²

- [127]. The legal framework establishes a total deprivation of capacity – the so-called institution of ‘placing a person under interdiction’ (*punerea sub interdicție*).¹³³ The person placed under interdiction is no longer entitled to exercise or claim any rights, conclude legal acts, etc. Only his/her legal representative is entitled to these activities on behalf of the person. Scholars assert that the person placed under interdiction can only undertake: acts to preserve his/her patrimony (estate) and daily acts without legal significance (purchases in shops, purchases of tickets to shows or for transportation).¹³⁴ The person can be placed under interdiction if the conditions mentioned in the paragraph above are fulfilled. Minors can be placed under interdiction, too.¹³⁵ The measure is for an undetermined period of time. The person can only retrieve his/her legal capacity if a court decides that the causes for placing a person under interdiction no longer exist.¹³⁶
- [128]. Practically, any person may request the court to place under interdiction another person. The list prescribed by the law is very large: the Tutelary Authority, persons close to the individual, neighbours, the administrators of the house where the individual lives, public authorities, public notary, courts, prosecutor’s office, the police, local administration, institutions that ensure the protection of such persons, and ‘any other person.’¹³⁷ This is particularly problematic in case of some of the people on the list where a conflict of interests may exist. The law does not distinguish between them.
- [129]. The first instance court (*judecătorie*) of the place of the affected person’s domicile has jurisdiction to declare the legal incapacity of an

¹³² Romania/Tribunalul Suprem, secția civilă, decizia nr.1035/1970, cited by European Parliament, Directorate General Internal Policies of the Union, Comparative Study on the Legal Systems of the Protection of Adults Lacking Legal Capacity [European Parliament Comparative Study], p.139, November 2008, PE 408.328, available at <http://www.europarl.europa.eu/activities/committees/studies/download.do?file=23687> (10.10.2009).

¹³³ Translations like ‘placement under interdiction’ and ‘person placed under interdiction’ are more accurate than ‘legal incapacitation’ and ‘incapable person’ because the latter ones do not reflect the stigmatizing terminology used by the Romanian law that dehumanizes the person undergoing the procedure of legal incapacitation and placement under guardianship. See Horatiu Rusu, Guardianship provisions in Romania – an open possibility for human rights abuses over persons with mental disabilities, p.3, Paper presented at OSI Fellows Retreat International Conference, Cairo: 2005, on file with the FRALEX team.

¹³⁴ Teofil Pop, Drept civil roman. Persoanele fizice și persoanele juridice, Romanian Civil Law, Natural persons and legal persons, p.162, cited by European Parliament Comparative Study, p.144.

¹³⁵ Minors placed under interdiction change the system of legal protection from tutorship to legal representative when they turn 18 year old. Arts.142, 150 of the Family Code.

¹³⁶ Art.151 of the Family Code.

¹³⁷ Art.143, 115 of the Family Code.

adult or a minor – ‘placement under interdiction’ (see above).¹³⁸ In judging the case, the court is mandated to ask that the prosecutor investigates the case and to order an expert examination from a commission of specialized medical practitioners, hear the opinion of the psychiatrist that is handling the case, if applicable, and hear the public prosecutor and the person affected. Yet, the court is not bound by any of the expert examinations’ conclusions.¹³⁹ The Supreme Court of Justice stated that hearing the person affected is not mandatory when the court ‘finds that it is not possible to conduct a hearing, yet there is probative evidence of the state of health.’¹⁴⁰ The decision of placement under interdiction is communicated to the Tutelary Authority who appoints the legal representative (guardian) and to the local chief doctor to ensure a permanent medical supervision of the person.¹⁴¹

- [130]. The legal representative (*tutore*) is entitled to ensure the protection of the person and to take measures in relation to the property of the person.¹⁴² The law only says who cannot be appointed as legal representative: minors, persons placed under interdiction, persons that are no longer allowed to exercise parental rights or are incapable of exercising parental rights, persons that have their rights limited according to the Criminal Code, persons that have been previously removed from the position of guardians, persons who have contradictory interests with the interests of the minor.¹⁴³
- [131]. The Tutelary Authority (*autoritatea tutelară*) ensures and permanently monitors the implementation and follow-up of the measures of protection. The legal representative must send annually a report of activity to the Tutelary Authority and at all times reply to any of its questions regarding the guardianship.¹⁴⁴ Furthermore, the person placed under interdiction or any other person can complaint against the legal representative to the Tutelary Authority. This institution can order the removal of the legal representative when he/she commits abuses in the exercise of duties, is guilty of gross negligence or wilful acts that make him/her unfit to be a guardian, does not fulfil his/her

¹³⁸ Arts.1.(1), 5 of the Civil Procedure Code.

¹³⁹ See e.g. Romania/Tribunalul Suprem, colegiul civil, decizia nr.459/1957 and Romania/Tribunalul Suprem, colegiul civil, decizia nr.1446/1955 cited by European Parliament Comparative Study, p.138.

¹⁴⁰ Romania/Curtea Supremă de Justiție, decizia nr.2880/2000, cited by European Parliament Comparative Study, p.138.

¹⁴¹ Art.145 of the Family Code. In practice, the placement under interdiction leads automatically to involuntary placement in a mental health institution, at least when the legal representative does not object. See Interview with Georgiana Pascu, Program Manager, Center for Legal Resources, 07.10.2009, on file with the FRALEX team.

¹⁴² The provisions regarding the legal representative in the case of minor’s tutorship apply accordingly. See Arts.123 and the following of the Family Code.

¹⁴³ Art.117 of the Family Code.

¹⁴⁴ The provisions regarding the legal representative in the case of minor’s tutorship apply accordingly. Arts.130 and the following of the Family Code.

duties in a satisfactory manner.¹⁴⁵ The Tutelary Authority is the mayor of the town or village where the person placed under interdiction has his/her domicile, and is supervised by the President of the County Council.¹⁴⁶

- [132]. The court's decision of placement under interdiction can be appealed on matters of law before the tribunal (second instance court), in 15 days from communication, by the person affected or by the person initiating the procedure.¹⁴⁷ The law does not expressly establish the right to appeal against the Tutelary Authority's decision to appoint a certain person as legal representative. However, based on the right of access to court, the person affected should have the possibility to introduce an administrative appeal before the local tribunal (the Tutelary Authority is an administrative body), according to the Law on Administrative Litigation.¹⁴⁸ A problem which may arise in such a case is related to the fact that the person placed under interdiction cannot exercise rights by himself/herself, including the right to file a case before an administrative court.¹⁴⁹ Such a situation infringes the person's rights to appeal, to access to the court, to legal remedy.¹⁵⁰
- [133]. Decisions of placing a person under interdiction, which in Romania are equivalent to the assessment of the need of a guardian, are not reviewed periodically. The person affected or any other person can seek the removal of the interdiction, only than the court will assess if the causes for the placement under interdiction still exist.

6. Miscellaneous

- [134]. Given the intention to amend the Romanian Constitution, it is possible to specifically mention disability as one of the protected

¹⁴⁵ Art.138 of the Family Code.

¹⁴⁶ Romania/Legea 215/2001 Legea administrației publice locale, Law on local public administration [Law 215/2001], Arts.68.(1).s), 69, 116.(1).o) (23.04.2001)..

¹⁴⁷ Art.144 of the Family Code.

¹⁴⁸ Romania/Legea 554/2004 privind contenciosul administrativ [Law on Administrative Litigation] (02.12.2004).

¹⁴⁹ Art. 42 of the Civil Procedure Code. See Section 3.5 - The Right to a Fair Trial.

¹⁵⁰ Two cases posing a similar legal problem of standing, but before the European Court of Human Rights, are presently pending before this Court. See *Bestea and others v. Romania*, petition filed before the ECHR on behalf of seven patients who died in Poiana Mare Psychiatric Hospital in January-February 2004 available at <http://www.interights.org/poiana-mare> (01.10.2009) and *Câmpeanu v Romania*, petition filed before the ECHR on behalf of a young man who died in Poiana Mare Psychiatric Hospital in February 2004, available at <http://www.interights.org/campeanu> (01.10.2009).

grounds both under the equality and under the non-discrimination clauses.

- [135]. NGOs protested against the delays in the ratification of the UN Convention. As the Romanian legislation has a different philosophy than the UN Convention, the ratification of the Convention will likely lead to further amendments of the law. This harmonization is desirable to be a comprehensive effort for thorough and appropriate reform of the mental health care services.
- [136]. Though Romania signed the UN Optional Protocol to the Convention against Torture in 2003 and ratified it in July 2009 it still has to develop a National Preventive Mechanism as currently there is no independent mechanism to monitor human rights in institutions.¹⁵¹ Appointing as a matter of urgency an independent mental health commissioner to monitor human rights in mental health institutions was a recommendation made in other contexts.¹⁵²
- [137]. Although the Norms of Application of the Mental Health Law required all mental health care institutions to have a registry of complaints from the patients and their legal representatives and respond in written to these complaints, in practice institutions do not observe such a rule.¹⁵³ The justifications are mainly based on ignorance or the supposition that patients do not make complaints, consequently there is no need of a registry.¹⁵⁴ The mental health institutions should conform to these legal obligations and the competent authorities that supervise their activity should monitor the implementation and apply sanctions.
- [138]. In response to international pressure, the Romanian officials closed most of the big orphanages finding appropriate solutions for institutionalized children.¹⁵⁵ This necessary change left children with disabilities behind¹⁵⁶ and raised issues of transition procedure from

¹⁵¹ APT, Global Status of OPCAT Ratifications, available at <http://www.apr.ch/content/view/40/82/lang.en/> (14.10.2009).

¹⁵² Report submitted by the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Paul Hunt, Addendum, Mission to Romania [2005 Special Rapporteur Report], para.68, E/CN.4/2005/51/Add.4, 21 February 2005, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G05/111/56/PDF/G0511156.pdf?OpenElement>.

¹⁵³ Art.25 of the Norms of Application of the Mental Health Law.

¹⁵⁴ 2009 CLR Report, pp.5-8.

¹⁵⁵ Mental Disability Rights International, Hidden Suffering: Romania's Segregation and Abuse of Infants and Children with Disabilities, available at: <http://www.mdri.org/mdri-reports-publications.html> (14.10.2009).

¹⁵⁶ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Rapport au Gouvernement de la Roumanie relatif à la visite effectuée en Roumanie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 22 au 26 octobre 2001 CPT/Inf (2004) 8; <http://www.cpt.coe.int/documents/rom/2004-08-inf-fra.pdf> (14.10.2009). See also, The New

the mentally disabled child care system to the mentally disabled adult care system and issues regarding the respect and promotion of child rights within this transition process.¹⁵⁷ This is of primary concern given the ‘widespread provision of the mental health care in large psychiatric institutions, with inadequate rehabilitation services, and the insufficient number of community-based mental health-care and support services’ which was found to be contrary to the right to health.¹⁵⁸ Consequently, the Romanian authorities should take further steps to ensure the human right to mental health care for persons with mental disabilities, particularly children, including improving and extending community-based mental health care and other community-based services to support persons with mental disabilities.¹⁵⁹

- [139]. The Norms of Application of the Mental Health Law introduced the position of social assistant in the so-called ‘therapeutic team’ at the local level. The social assistant could play an important role in the social rehabilitation and reintegration of the persons with mental disorder and persons with intellectual disability, including providing information about rights and supporting them in accessing these rights. In practice, it has been reported that only a few mental health institutions have social assistants and they are assigned bureaucratic duties rather than social assistance work.¹⁶⁰

York Times, Craig Smith, Romania's Orphans Face Widespread Abuse, Group Says, 10.05.2007).

¹⁵⁷ Center on legal Resources, submission under Romania’s Universal Periodic Review, available at: http://www.upr-info.org/IMG/pdf/CLR_ROM_UPR_S2_2008_CentreforLegalResources_uprsubmission.pdf (14.10.2009).

¹⁵⁸ 2005 Special Rapporteur Report, para.65, 68. See also Principles for Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, principles 7 and 3;

¹⁵⁹ See 2005 Special Rapporteur Report, para.68. See also 2006 Peer Review Report.

¹⁶⁰ Art.8 of the Norms of Application of the Mental Health Law. See also Interview with Georgiana Pascu, Program Manager, Center for Legal Resources, 07.10.2009, on file with the FRALEX team.

Annexes-Case Law

In different Sections of the Guidelines, experts have been asked to refer to case law. Please present the case law reference in the format below

Case title	A.V. v. Comisia Superioară de Evaluare a Persoanelor cu Handicap pentru Adulți și Comisia de Expertiză Medicală a Persoanelor cu Handicap pentru Adulți Alba
Decision date	19.09.2008
Reference details	ÎNALTA CURTE DE CASAȚIE SI JUSTIȚIE, SECȚIA DE CONTENCIOS ADMINISTRATIV ȘI FISCAL, Decizia nr. 2986/2008 (19.09.2008), Dosar nr. 1576/57/2007. High Court of Cassation and Justice, Administrative Law section. Available at: http://www.iccj.ro/cautare.php?id=43566 (13.10.2009).
Key facts of the case (max. 500 chars)	The plaintiff A.V. through his guardian (A.C.) thought the annulment of the decision establishing his degree of disability and the recognition of his right to be assigned the degree of disability ‘serious’ requiring permanent support from a personal assistant. His argument was that though his medical diagnosis fits in those listed by the joint Order. 726/2002, the assessment commission refused issuing the disability certificate claiming that his condition is an illness and not a disease. In their defense, the authorities claimed that ,the disability of the plaintiff originated from an illness which lead to the stroke and, consequently, he is not a person with a disability.’
Main reasoning/argumentation (max. 500 chars)	The Court made a thorough interpretation of Law 448 and of the Order and emphasized that the argument of the defendants distinguishing between an illness and a disability based on the cause is not legal as the Law does not condition the assignment of a particular degree of disability on the way in which the person acquired the disability. The Court also added that the fact that the defendant was issued an invalidity pension (in terms of access to social services) should not be seen as an impediment in recognising his disability and in issuing a disability certificate which entitles him to different benefits and rights.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court made a thorough interpretation of Law 448 and of the Order and emphasized that the argument of the defendants distinguishing between an illness and a disability based on the cause is not legal as the Law does not condition the assignment of a particular degree of disability on the way in which the person acquired the disability. The Court also proposed a strict interpretation of the provisions of the joint order.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Court quashed the appeal filed by the defendants and maintained the decision of the Court of Appeal finding in favour of the plaintiff and annulled the decision establishing his degree of disability and recognized his right to be assigned the degree of disability 'serious' requiring permanent support from a personal assistant.
Proposal of key words for data base	Disability/illness

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).

Case title	II v. C.S.E.E.P.H
Decision date	19.03.2007
Reference details	ÎNALTA CURTE DE CASAŢIE SI JUSTIŢIE, SECŢIA DE CONTENCIOS ADMINISTRATIV ŞI FISCAL, Decizia nr. 2107/2007 , Dosar nr. 7960/54/2006 (19.03.2007), available at: http://www.iccj.ro/cautare.php?id=4030 (13.10.2009).
Key facts of the case (max. 500 chars)	The plaintiff II appealed against the defendant, C.S.E.E.P.H (the commission establishing the type of disability and the degree of disability) which refused to issue a disability certificate on grounds that his condition is not a „disability”, it is an „illness.” The authorities justified their response on the fact that the defendant ,does not present a major psychiatric condition, as would be psychosis for example, his condition did not begin early, as a proof being the completion of the military duty, the fact that he was professionally integrated and that he carried out an organized activity, hence he is not falling under the requirements of the joint Order 726/2002 which mention the persons with a mental, psychic disability, caused by non-development or regression or persons with psychiatric deficiencies due to neuro-psychiatric illnesses of accentuated or serious intensity which require special measures of protection.’
Main reasoning/argumentation (max. 500 chars)	The Court applied the medical diagnosis of the plaintiff in the context of the medical criteria established by the joint Order 726/2002 and found that the plaintiff does not suffer from a major psychiatric condition.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court distinguished between the two different types of protection: protection under the social insurances legislation, the plaintiff being retired based on type two invalidity and the special regime of protection offered to persons with disabilities which depends on meeting a set of medical and social criteria established in secondary legislation and provides access to a set of supportive measures and facilities.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Court rejected the appeal of the plaintiff and maintained the decision of the assessment commission that he is not entitled to protection for disability as his medical condition is not a 'disability' as defined by the secondary legislation but an illness as proved by the fact that it incapacitated the plaintiff after years of social integration.
Proposal of key words for data base	Illness/mental disability, social protection and special protection for persons with disabilities

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).

Case title	P.M. v. P.G.
Decision date	26.03.2003
Reference details	CURTEA SUPREMĂ DE JUSTIȚIE, SECȚIA CIVILĂ, Decizia nr. 1206 , High Court of Justice, civil section, decision 1206 from 26.03.2003 available at http://www.iccj.ro/cautare.php?id=562 (02.10.2009).
Key facts of the case (max. 500 chars)	PM filed a civil case seeking divorce in 1998 on fault of the defendant PG and asking the court to entrust their children to him. PG filed her own action seeking divorce based on the exclusive fault of the plaintiff PM (the responsibility for the dissolution of marriage being relevant for property related issues). She also asked the court to decide that the plaintiff should pay her alimony as she got sick during the marriage. During the appeal, the plaintiff invoked the mental condition of the defendant, highlighting that she suffered from a particular medical condition. The first court dissolved the marriage, established that the children will stay with the plaintiff and decided that the plaintiff will pay an alimony to the defendant. The appeal court quashed the decision and affirmed that the action of the plaintiff was not correctly defined as, based on his statements, he was actually seeking a declaration of annulment of the marriage given that at the date when the marriage was contracted the defendant was already suffering from a mental condition which could be read under Art. 9 of the Family Code and the defendant did not warn him on her situation. The case was sent back to the first instance which declared the marriage null based on the medical certificates filed by the plaintiff showing that the defendant suffered of a syndrome with elements of depression (<i>sindrom</i>

	<i>discordant, reactii depressive cu elemente atipice</i>). The appeal court quashed this decision stating that the file contained no evidence that the condition of the defendant pre-dated the marriage, the medical documents showing that the condition started after the marriage was contracted. The appeal court also based its decision to quash the decision of the first court to annul the marriage on the statement that the condition of the defendant does not amount to mental alienation or debility.
Main reasoning/argumentation (max. 500 chars)	<p>The courts struggled with medical concepts relying on medical expertise to identify whether particular medical conditions amount to alienation or debility as prohibited by the Family Code, or whether the condition started before the marriage. The case law confirmed that the marriage would be void irrespective whether the person had been placed under interdiction and can be proved using any means of evidence.</p> <p>The High Court mentioned that ‘persons suffering from mental alienation or debility cannot get married not only because their condition excludes a free agreement, but also due to reasons of biological concern.’ The Court speaks of a social interest when stating that it is irrelevant if the husband or wife knew the condition of the persons suffering from mental alienation or debility.</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The High Court stated that ‘only mental alienation and debility existing at the date when the marriage was concluded are causes for annulment.’</p> <p>Only the medical professionals have the legal competence and ability to decide whether the condition of the plaintiff amounts to mental alienation or not.</p>
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The High Court quashed the decision of the appeal court and sent it back for a new judgement indicating that a report of psychiatric expertise should be realized, asking the medical professionals to indicate whether the condition of the plaintiff amounts to mental alienation or not.
Proposal of key words for data base	Annulment of marriage, prohibition of marriage for persons with mental disorder or intellectual disability, social interest in annulment of marriage

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).

Case title	Asociația Increderea v. the Ministry of Public Health
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Decision date	16.06.2008
Reference details	Consiliul Național pentru Combaterea Discriminării, Decision 350 from 16.06.2008, petition 7.412/17.07.2007
Key facts of the case (max. 500 chars)	The plaintiff, an NGO supporting persons with mental health problems complained that the treatment of patients in the Predeal Sanatorium for persons suffering of neurosis, and of persons suffering of mental diseases in general, amounts to discrimination. The plaintiff showed that the sanatorium is under-financed, that it was not included in the National Programme for Psychiatrics and that it is running the risk of losing the adjacent land due to the lack of interest of the authorities. The equipment of the sanatorium is not appropriate and the services are of poor quality also due to the lack of appropriate resources.
Main reasoning/argumentation (max. 500 chars)	The NCCD compared the number of beds, the number of patients and the resources allocated for a number of hospitals, including the Predeal Sanatorium and found that the inadequate standards of treatment in relation to persons suffering from mental disabilities hospitalised in Predeal hospital when compared to patients in other hospitals amounts to discrimination.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Discrimination against hospitalized persons with mental disabilities triggered by inadequate conditions.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The NCCD recommended to the Ministry of Health to ensure adequate treatment of persons hospitalised in Predeal Sanatorium for persons suffering of neurosis, and of persons suffering of mental diseases in general, including by preparing objective criteria for financing medical facilities (hospitals and sanatoriums) and their periodic monitoring
Proposal of key words for data base	Adequate treatment of persons hospitalized

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).

Case title	FE v. SD
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Decision date	29.10..2003
Reference details	CURTEA SUPREMĂ DE JUSTIȚIE, SECȚIA CIVILĂ, Decizia nr. 4385, 29.10.2003, available at: http://www.iccj.ro/cautare.php?id=1618 (14.10.2009).
Key facts of the case (max. 500 chars)	FE (the mother of the deceased SS) filed a case against SD asking the court to annul the marriage between SS and SD on grounds of Art. 9 of the Family Code as her son, SS was certified as suffering from paranoid catatonic schizophrenia, the defendant knowing the condition of the plaintiff and being interested solely in inheriting his apartment. The court of first instance rejected the application of the plaintiff stating that the defendant married the deceased as she was soon to give birth to his child and added that the scope of the law when sanctioning as null and void the marriage of a person mentally disabled was ‘ to ensure normal relations between the spouses and to avoid the possibility of giving birth to children with psychiatric deficiencies’ while in the case, the two got married without anybody mentioning the impediment to marriage and gave birth to a child. The appeal court quashed the first instance decision and found the marriage null and void based on Art. 19 of the Family Code due to the medical condition of the deceased. The defendant filed an appeal showing that the documentation used for the retirement of the deceased was wrongly used after his death and that in his absence the expertise commission could not decide if his condition amounted to mental alienation.
Main reasoning/argumentation (max. 500 chars)	The High Court found that the documentation used for the retirement of the deceased was wrongly used after his death and that in his absence the expertise commission could not decide if his condition amounted to mental alienation. The court presumed the good faith of the spouses and question the interest of the plaintiff in seeking the dissolution of the marriage after such a long time, given that she had the opportunity to voice her concerns earlier.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Interest in annulment of marriage with one of the spouses allegedly suffering for alienation. Relevance of medical exams conducted with the purpose of retirement in assessing Art. 9 claims. Importance of carrying medical examination to assess alienation or debility.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The High Court accepted the appeal of the defendant, quashed the decision of the court of appeal and maintained the decision of the first instance court rejecting the annulment of the marriage.

Proposal of key words for data base	Annulment of marriage, prohibition of marriage for persons with mental disorder or intellectual disability, social interest in annulment of marriage,
Case title	Appeal in the interest of the law regarding Art. 162 of the Criminal Procedure Code regarding Art. 114 of the Criminal Code regarding the non indictment on grounds of irresponsibility (lack of discernment), without the prosecutor seeking non indictment and issuing temporarily the measure of medical internment.
Decision date	18.02.2008
Reference details	ÎNALTA CURTE DE CASAŢIE ŞI JUSTIŢIE, SECŢIILE UNITE, DECIZIA Nr. 13 (18.02.2008) available at http://www.scj.ro/Decizii%20SU%5Cdecizie%20XIII%202008.html (02.10.2009)
Key facts of the case (max. 500 chars)	The General Prosecutor filed an appeal in the interest of the law regarding Art. 162 of the Criminal Procedure Code regarding Art. 114 of the Criminal Code regarding the non indictment on grounds of irresponsibility (lack of discernment), without the prosecutor seeking non indictment and issuing temporarily the measure of medical internment. The purpose of an appeal in the interest of the law is to seek unitary interpretation for a norm.
Main reasoning/argumentation (max. 500 chars)	<p>The justification of the appeal in the interest of the law was the conflicting practice of the various courts in the cases of non-indictment of the perpetrator, the General prosecutor asked the High Court to establish that in such cases, the measure of medical internment can be temporarily decided by the court upon the request of the prosecutor, if such a measure was not already decided during the criminal investigation.</p> <p>The Court found that ‘the measure of medical internment can be issued against the person who perpetrated a deed sanctioned by the criminal law, if person is a danger for the society due to the mental alienation, irrespective of whether the deed is a crime or not or if the perpetrator is condemned or receives a waver from the punishment.’ The safety measure of mandatory internment was hence linked to the health condition of the perpetrator and not to the decisions issued in a criminal trial.</p>
Key issues (concepts, interpretations) clarified	Some of the courts rejected the measure of internment required by the prosecutor in cases of non-indictment of the perpetrator, stating that the court can only confirm a measure issued temporarily either during the criminal investigation, either in the non-

by the case (max. 500 chars)	indictment decision and a subsequent request of the prosecutor for internment would be illegal.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	‘The measure of medical internment must be taken without delay, no matter in what procedural stage the criminal trial might be, even in case of non-indictment of the perpetrator, as long as the situation of social danger is triggered by a deed provided for in the criminal law.’
Proposal of key words for data base	Special measure of internment of perpetrator following non-indictment

Case title	E.D. v. Ministry of Health and the State Secretariat for Persons with Handicap
Decision date	9.03.2004
Reference details	Romania/ ÎNALTA CURTE DE CASAŢIE SI JUSTIŢIE, SECŢIA DE CONTENCIOS ADMINISTRATIV ŞI FISCAL, Decizia nr. 1008/2004 (9.03.2004) available at: http://www.iccj.ro/cautare.php?id=12880 (02.10.2009).
Key facts of the case (max. 500 chars)	The plaintiff ED filed a court action against the Ministry asking the court to amend the Order 726/2002, to include his condition and to recognize his status of person with a disability of the second degree and grant him the correlative rights and entitlements according to the law.
Main reasoning/argumentation (max. 500 chars)	The Court analyzed the legality of the Order. It also looked at the process of adopting the Order emphasizing that the Commission of Psychiatry of the Ministry of Health agreed with the list of psychiatric conditions included in the order, its specialists being abilitated to decide which medical conditions amount to disability.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The court maintained that the list of psychiatric conditions included in the order, can be established solely by the specialists habilitated to decide which medical conditions amount to disability.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Court rejected the appeal of the plaintiff and his challenge of the Order.
Proposal of key words for data base	List of medical conditions defined as disability under Romanian law.