

# THE CONCEPT OF DISCRIMINATION AND OTHER CONCEPTS RELATED TO IT IN THE ALBANIAN LEGISLATION - COMPARATIVE OVERVIEW WITH THE EU DIRECTIVES IN THE ANTI-DISCRIMINATION FIELD.

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## Abstract

The Albanian legislation offers a general protection of the human rights and especially of the principle of equality and non-discrimination.

The Constitution of the Republic of Albania provides for the protection of the human rights and fundamental freedoms in a specific chapter. Should be emphasized that it is the Constitution itself that in some specific provisions aims to conduct the respect for the principle of equality and non-discrimination (mainly article 18, and also articles 16, 20), moreover that the limitations of the human rights and fundamental freedoms cannot exceed those provided in the European Convention for the Protection of Human Rights.

With the adoption of the Law "For the Protection from Discrimination", non-discrimination and equal treatment in terms of the legal framework recognized a new level of protection of human rights. The approval of the law "On protection from discrimination" and the appointment of the Commissioner for Protection from Discrimination were considered as an achievement for Albania in the institutional framework as well as with regard to the anti-discrimination policies.

Albania aims to be part of the EU countries and the alignment of domestic legislation with that of EU is a precondition to realize the integration processes.

The Law "On Protection from Discrimination" is drafted in accordance with EU Directives in the field of non-discrimination: European Council Directive 2000/43/CE of 29 June 2000 on "Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin"; European Council Directive 2000/78/CE of 27 November 2000 on "Establishing a general framework for equal treatment in employment and occupation"; European Council Directive 2004/113/CE of 13 December 2004 on "**Implementing the principle of equal treatment between men and women in the access to and supply of goods and services**"; **European** Directive 2006/54/EC of the European Parliament and of the European Council of 5 July 2006 on "Implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation".

What I want to realize through this paper is an analysis of the Albanian legislation on protection from discrimination in comparative overview with these Directives, but also the interpretations made by the European Court of Justice. This comparative analysis will be focused on basic

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concepts addressing discrimination cases, such as: grounds of discrimination, the meaning of the concept of "discrimination" and its forms, treatment of a reasonable justification of an unequal treatment compared to different forms of discrimination, the overthrow of burden of proof as a challenging concept in the implementation of the domestic anti-discrimination legislation and in the implementation of EU directives for the member states of this union.

**Key words:** discrimination, direct discrimination, indirect discrimination, burden of proof, reasonable accommodation, positive actions.

## **INTRODUCTION**

The treatment of the concept of discrimination, in comparative perspective with EU legislation, is an important issue, because in Albania, legal provisions that ensuring citizens from discriminatory behavior, have been limited and haven't been established special mechanisms to ensure the protection of them. The adoption of new laws in the process of approximation with the European legislation and the lack of a previous practice of protecting against discrimination require a depth study of the legal framework and European jurisprudence.

In this paper we will present in a comparative perspective between EU directives in the field of anti-discrimination and Albanian legislation, the basic concepts such as discrimination, ground of discrimination, forms of discrimination, the burden of proof, ... etc. Compared to the national legislation, EU legislation provides a broad and strong protection, by defining some concepts such as the broader definition of disability, wider protection from discrimination on ground of age, for young and elderly workers, overthrow the burden of proof in cases of victimization, to extend protection from discrimination due to association with a person with disabilities, protection from discrimination for job alerts when we have no current application for a job (Handbook on seeking remedies under the EU Non-discrimination Directives, European Union, "How to present a discrimination claim", 2011: 7).

Legal instruments of the EU and Albanian legislation on anti-discrimination.

The Consolidated Version of the European Union, Charter of Fundamental Rights of the

European Union and EU directives in the field of anti-discrimination are the main acts that protect subjects from discriminatory behavior. For the member states of the EU, anti-discrimination directives have precedence in relation to domestic legislation. In practice, the courts should give precedence to EU directives. EU directives in the field of non-discrimination, aimed the equal treatment between persons irrespective of racial or ethnic origin, equal treatment in matters of employment and occupations, equal treatment between men and women in access to and supply of goods and services, equal treatment of men and women in matters of employment occupations.

It is worth mentioning "the Charter reaffirms the rights arising from common international obligations for the Member States from the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charter adopted by the Union and the Council of Europe and the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights ". It is for this reason that we will refer to the decisions of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR).

The Albanian law "On Protection from Discrimination", adopted on 4.02.2010 has consolidated protection from discriminatory behavior and has treated some important concepts that addressed us to identify discriminatory behaviors. This law is in accordance with the abovementioned Directives of the EU anti-discrimination. The law provides for the Commissioner for Protection from Discrimination as an institution that "provides effective protection from discrimination and any form of behavior that incites discrimination" (Article 21/ 1). The Commissioner has the power not only "to make recommendations for any issue related to discrimination" (Article 32, paragraph f), but also "to impose administrative sanctions as defined by the law" (Article 32, paragraph d).

## **THE GROUNDS OF DISCRIMINATION**

EU legislation provides protection of every individual, regardless of citizenship, nationality or residential status. This legislation is implemented both in relation to individual and legal persons. This protection is closely associated with a specific personal characteristic of the victim of discriminatory behavior. This characteristic is the ground of discrimination.

EU legislation does not contain an open list of grounds for which provides protection while many member states have such a list. Charter of Fundamental Rights of the European Union has expanded the grounds on which discrimination is prohibited in relation to the Consolidated Version of the European Union (Consolidated Version of the European Union and Charter of Fundamental Rights of the European Union, 2008: 377). Directives already provide limited protection in relation to the grounds of discrimination. The European Court of Justice has the right to interpret the definition of the grounds of discrimination, through examination of concrete cases. As grounds of discrimination there are included: race, color, ethnic or social origin, genetic features, language religion or belief, political or other types association with a national minority, property, birth, disability, age or sexual orientation.

Albanian Law No. 10221 "Protection from Discrimination " contains a non-exhaustive list of grounds for which offers protection from discriminatory behavior(article 1). We note that this law expands the number of grounds for which offers protection related the previous legislation, such as the Constitution of the Republic of Albania in Article 18 or the Labour Code, which provide equal treatment and non-discrimination for a limited number of grounds.

The recent changes to the Criminal Code

([http://www.qbz.gov.al/botime/fletore\\_zyrtare/2013/PDF-2013/83-2013.pdf](http://www.qbz.gov.al/botime/fletore_zyrtare/2013/PDF-2013/83-2013.pdf)) have adapted the

grounds of discrimination according the anti-discrimination law provision for "violation of the equality of citizens" (Article 253), have provided gender identity and sexual orientation as an aggravating circumstance in the commission of the offense, have criminalized the incitement to hatred on grounds of sexual orientation.

Albanian law provides protection for a non-exhaustive list of grounds, including "for any other ground". It is necessary to discuss with lawyers, sociologists, psychologists. The jurisprudence of the ECHR offers many circumstances that qualify as "other reasons". Jurisprudence has hesitated to consider the financial and material status as another ground.(Nowicki,A.M., "Rreth Konventës Evropiane", Komentari i shkurtër mbi Konventën Evropiane të të Drejtave të Njeriut, 2003: 281). It must be stressed that this status is a ground expressly provided by the Albanian legislation .

European directives give definition only for sex / gender that includes not only biological sex, but also the concept of how individual is feeling about its gender. European legislation does not provide a definition of race and ethnic origin, but refers to the fact that ethnic minorities identify themselves and are identified by others through common history, language, culture and traditions. The dividing line between race and ethnic origin is the duration of time that minority group stayed in the Member State of the EU. So, a Turkish immigrant can be treated as an ethnic minority in Bulgaria and racial minorities in Germany.(Handbook on seeking remedies under the EU Non-discrimination Directives, European Union,"How to present a discrimination claim", 2011: 21).

Albania doesn't have a law on minorities and there isn't a legal definition for them. Albania and EU member countries have signed the United Nations Convention "For the Elimination of All Forms of Racial Discrimination (ICERD), which is addressed in the Preamble to the Racial Equality Directive. ( Council Directive 2000/43/EC of 29 June 2000 "On the principle of equal treatment between persons irrespective of racial or ethnic origin") This Convention provides the meaning of racial discrimination as "any distinction, exclusion, restriction or bias based on race, color, descent or national or ethnic origin". Despite the understanding that the terms used above or overlaps that may have them, it is important to note that this does not exclude individuals who have these as personal characteristics by the protection offered by EU directives or Albanian law.

EU legislation doesn't provide a definition of disability, but this concept is handled by the ECJ. There are two models of disability treatment: medical model (which leaves the problem to the ill person) and social model (which draws attention to the obstacles that society creates through negative attitudes, stigma and prejudice). The European Court of Justice also extends protection to persons who are discriminated because of their association with a disabled person.

Protection from discrimination doesn't know age limits in EU legislation, although the practice has excluded persons under 16 years. Mostly this is on occupation field. (Council Directive 2000/78/EC of 27 November 2000 "Establishing a general framework for equal treatment in employment and occupation") Although religion and beliefs don't find a definition in EU

directives, the best experience comes from the ECHR, which has handled several discrimination religion or faith cases.

Sexual orientation refers to the capacity of individual to deep emotional withdrawal, love and sex, intimate and sexual relationships with individuals of different sex (heterosexual) or the same sex (gay, lesbian, gay), or more than one gender (bisexual) (Studim i Këshillit të Europës, (2011), Diskriminimi për shkak të orientimit seksual dhe identitetit gjinor në Europë). Referring to the conclusions of Féret v Belgium, The European Court of Human Rights, emphasizes for the first time in the case Vejdeland and others v. Sweden, "discrimination based on sexual orientation is as serious as discrimination "race, origin or color".(Vejdeland and others v. Sweden, nr.1813/ 07, on 09. 02. 2012).

Racial Equality Directive has highlighted the possibility of multiple discrimination. It specifically refers to the combination of gender or race ethnicity. Presumption of ground of discrimination, whether true or not, does not preclude protection from discrimination through EU legislation.

## **WHAT DO WE UNDERSTAND BY DISCRIMINATION?**

EU legislation provides good protection at the individual level while the inclusion of vulnerable groups and NGOs challenging structural discrimination. Discrimination is any behavior or illegal act, the omission to avoid discriminatory situation, considered such. EU legislation does not define the behaviors that are prohibited.

Albanian legislation understands discrimination "any distinction, exclusion, restriction or preference based on any cause mentioned in this law, intended or due obstacle or making it impossible to exercise in the same way with others, the rights of fundamental freedoms recognized by the Constitution of the Republic of Albania, with international acts ratified by the Republic of Albania and the laws in force. It is clear that it has exceeded the definition of the European Convention of Human Rights, taking into account the Protocol 12 to the ECHR, which "expands the scope of the prohibition of discrimination, ensuring equal treatment in the enjoyment of any right, including those that are protected by national legislation.(European Union Agency for Fundamental Rights; European Court of Human Rights-Council of Europe, Handbook on European non-discrimination law, 2010: 13). Discrimination occurs as an action and inaction of public or private entities that would expose a person or group of persons in a disadvantage situation in comparison with others.

Direct discrimination. Unfavorable treatment of a person in relation to another, current, former or future potential is direct discrimination. *There are three aspects that must be present during the treatment of a case of discrimination:*

- It must demonstrate less favorable treatment.

- We need to find a "comparative" person in the same situation that has not the personal characteristic that distinguishes the victim of discrimination. We can find a "comparative" person from the past, a hypothetical comparative or minimum standard of treatment (ECJ Case C-267/06 Maruko from).

Referred to the ECJ it could be considered discrimination when there is no victim identified, which could not be accomplished before the ECHR. (Nowicki, A.M., "Rreth Konventës Evropiane", Komentari i shkurtër mbi Konventën Evropiane të të Drejtave të Njeriut, 2003: 285). We emphasize ECHR has decided for the substantive discrimination as the same treatment when individuals or groups are not in a similar situation. Discrimination does not imply any change in the enjoyment of rights and freedoms. The practice of democratic states shows that the difference in treatment is discriminatory if it has no objective and rational argument. There are important in this regard objectives and effects of actions and dominant principles in a democratic society (Thlimmenos v Greece, 04.06.2000, Great Room, No. 34369/97 § 44).

Indirect discrimination. This kind of discrimination is associated with the application of a provision, criterion, practice that apparently is not only legitimate, but is neutral. The goal is an important element to determine whether we are dealing with a discriminatory situation, but indirect discrimination takes precedence result of applying these provisions or practices. Indirect discrimination is justified if: the purpose is lawful, necessary measures and measures commensurate with the expected results. EU legislation sets out some principles that limit the justification of indirect discrimination, among which financial conditions can never be an acceptable excuse. While direct discrimination is justified by specific exemptions based on reasons of discrimination, indirect discrimination is justified by a general test. Albanian legislation provides the same definition of indirect discrimination.

## **OTHER FORMS OF DISCRIMINATORY BEHAVIORS.**

Harassment. According to European legislation harassment can be displayed through the use of racist or homophobic words or sending messages with the above contents. Addressing the issue of harassment as a form of discrimination the aim to create a " hostile environment " is sufficient to establish harassment (Case C-303/06 Coleman).

I want to focus here on the concept of "hate speech", which is also a form of harassment according the anti-discrimination Directives of the EU. Commissioner for Protection from Discrimination has addressed several issues relating to hate speech and discrimination on the grounds of sexual orientation, gender identity, ethnicity and language(see: [http://kmd.al/skedaret/1374673638-Vendim\\_57.pdf](http://kmd.al/skedaret/1374673638-Vendim_57.pdf); [http://kmd.al/skedaret/1374673668-vendim\\_58.pdf](http://kmd.al/skedaret/1374673668-vendim_58.pdf)).

Victimization. EU legislation does not require a comparative discriminatory treatment when the victim comes after complaints about unequal treatment. This form of discrimination is related to the inability of member states to provide protection when there are complaints of unequal

treatment. While exist the need for transposition of the EU directives into national legislation of member states, Albania included in the Law "On Protection from Discrimination" this form of discrimination

Instruction for discrimination. EU Directives prohibit this form of discrimination. Even Albanian legislation provides for this form of discrimination. This happens when: commerce units or nightclubs where the entry is prohibited for individuals or groups because of one of the grounds of discrimination, instructions never to sell or lease homes for members of minorities, or instructions for agencies to not address employment seekers over a certain age.

Denial of a reasonable accommodation. This require appropriate measures for a particular case so the person with disabilities may be employed, educated or receive services as any other person. Reasonable accommodation is limited by "disproportionate burden". Beyond Directive, some Member States have set detailed rules to become applicable obligations under Directives. The Albanian legislation is anticipated this form of discrimination, but lacking further regulations to determine the meaning of two important terms as "reasonable accommodation" and " excessive burden".

### **THE DISTRIBUTION AND INVERSION OF THE BURDEN OF PROOF .**

The distribution and inversion of the burden of proof was initially conducted by a decision of the ECJ (C-109/88 Danfoss) and was adopted by European legislation giving the opportunity to prove discrimination under the Anti-Discrimination Directive. The essence of this principle has to do with the assertion that, if the victim brings facts from which it may be presumed that discrimination has had a direct or indirect liability exceed the person against whom the complaint is made or suit is filed in court to prove that there has been a breach of the principle of equality (case C-127/92 Enderby, ECJ).

This does not release the obligation of the victim to convince the judge or institution that we are dealing with a case of discrimination. The person against whom the complaint or petition is addressed has the right to defend his position. Economic justifications are those that appear most often. But here is the difference between economic justification for direct discrimination and indirect discrimination. The ECJ has some issues that have received specific justifications, mainly in relation to inequality in wages on account of sex. (Directive of the European Parliament and of the Council 2006/54/KE of 5 July 2006 "On the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation")

The law "On Protection from Discrimination" does not fully explain the concept of burden of proof in the administrative investigation procedure followed by the Commissioner. Referring to the right of subjects to appeal before the Commissioner, the law has determined that the applicant "may file a complaint with the available evidence before the Commissioner" (Article 33, item 1).

The Code of Administrative Procedure, in Article 82, paragraph 1 has clearly defined “the burden of proof the burden of proof concerning the pretended evidence falls on the interested parties”, despite obligation under other provisions of the active role to be played by the administration in an administrative investigation procedure.

The anti-discrimination law provides "plaintiff has the obligation to provide evidence to support the claim, using any legitimate evidence that can prove discriminatory behavior." The burden of proof in this case exceeds significantly to the defendant. Once the plaintiff presents evidence on which he bases his claim on the basis of which the court may presume discriminatory conduct, the defendant must prove that the facts did not constitute discrimination under this law (Article 36, paragraph 5, 6).

This shifting of the burden of proof has been expressed before the adoption of anti-discrimination law. Labor Code, Article 115, paragraph 3 (Equality in pay between the sexes) provides "when the employee presents serious data imply the existence of discrimination, the employer is obliged to prove the contrary." Also in Article 105 / a, paragraph 2 (Protection of Employment of Women) provides "in cases of employment contract settlement by the employer, when the wife is at work during pregnancy or return to work after childbirth, according Article 30 of this Code, the employer had the obligation to prove that the cause of the dismissal was not the child's birth or pregnancy.

## **CONCLUSIONS**

The law "On Protection from Discrimination" is in compliance with the EU Directives of antidiscrimination. Albanian law provides protection for a non-exhaustive list of grounds, including "for any other ground". We recommend clarifying the meaning of “genetic predisposition”, “reasonable accommodation”, “excessive burden”. It is necessary to revise the provision of “burden of proof” according the relevant EU Directives. It is necessary also to have a discussion about the meaning of “another grounds” according the jurisprudence of European Court of Justice and European Court of Human Rights. Other laws and bylaws need to approximate with the concept of discrimination and different forms of discrimination.

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