

THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION



THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION

Analysis of Case Law
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Tirana, March 2021



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EU	European Union
CEDAW	Convention on the Elimination of Discrimination against Women
UDHR	THE UNIVERSAL DECLARATION OF HUMAN RIGHTS
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
UN	United Nations
UCSC	United Colleges of the Supreme Court
CRC	Convention on the Rights of the Child
CPD	Commissioner for Protection from Discrimination
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECRS	European Committee of Social Rights
EC	European Council
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICEAFRD	International Convention on the Elimination of All Forms of Racial Discrimination
HJC	High Judicial Council
LC	Labor Code
CAP	Code of Administrative Procedure
CCP	Code of Civil Procedure
LPD	Law “On Protection from Discrimination”;
CSOs	Civil Society Organizations
SoM	School of Magistrates

The principle of equality is the basis of the Welfare State, which through the provision of social rights in the Constitution makes it possible to guarantee essential equality: of the individual in society, of the individual in the legal order, and social groups that individuals create to realize their personality.

The realization of essential equality requires the intervention of the state organization in many dimensions of life, acting with a variety of policy-making, legal, economic means. Among this variety of means, policy-making and the economic aspect remain discretionary means and always dependent on the real opportunities and priorities that are set. Whereas, the legal means are unlimited in their dimension, as they are not related to contextual limits but to the full realization of constitutional rights which always claim realization beyond possibilities and priorities.

The legal instruments used by the State to exercise its rights are legal and institutional. The legal instrument has its essential moment as it makes possible the realization of social rights by envisaging the manner of realization, the beneficiary subjects and the implementing institutions responsible for the realization. The institutional instrument goes beyond the classical dimension of public administration and focuses on a natural guarantor power: the judiciary power.

Judicial activity is envisaged as final in our legal order. The activity of the courts aims to establish the legal situation, to justify the legal nature of the relationship and ultimately to guarantee individual and social rights.

Therefore, the role of the courts becomes particularly materializing in the enjoyment of rights when it specifically affects the realization of fundamental equality, especially when its object is the conduct of public bodies.

More than a decade ago, the principle of equality, although pervasive in all Albanian legislation, has almost not been claimed by citizens in the courts. This is evident from the fact that the two supreme courts in Albania, the Supreme Court and the Constitutional Court, have never managed to develop a rich and consolidated jurisprudence on the concept of equality and discrimination.

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**THE ACTIVITY OF
THE COURTS
INTENDS TO VERIFY
THE LEGAL
SITUATION, TO
JUSTIFY THE LEGAL
NATURE OF THE
RELATIONSHIPS**



Recently, the courts of civil and administrative jurisdiction have progressively developed valid and consistent jurisprudence regarding equality and non-discrimination.

This study is presented for the first time to shed light on this jurisprudence aiming at exposing the judicial legal opinion on unequal treatment and discriminatory ground as a reason of unreasonable violation of rights. The study is the result of a close cooperation between the institution of the Commissioner for Protection against Discrimination and the United Nations Development Program (UNDP) with the financial support of the Austrian Development Cooperation (ADC).

Given the fact that the institution of the Commissioner for Protection against Discrimination is the only body that has all the court jurisprudence regarding cases of discrimination, as most of its decisions are appealed in the administrative courts, as well as due to the legal obligation that the courts have to inform the UNDP in Albania about the cooperation and technical support provided in the drafting of this analysis.

The analysis has taken into consideration some important and essential aspects of this jurisprudence by identifying the treatment of discrimination forms, grounds, fields, instruments and evaluation tests of unequal treatment and discrimination, recognition of compensation and determination of its entity, but also the institutional role of the Commissioner, the nature of his decisions and the position of the body in court proceedings.

Attention has been paid to the jurisprudence of the Constitutional Court, but especially to the jurisprudence of the European Court of Human Rights which has served as a guiding light for the understanding and reasoning of many decisions of the Commissioner and the courts of both jurisdictions.

Finally, the main purpose of the analysis is to serve as a first instrument for law operators taking into account the School of Magistrates, judges, lawyers, prosecutors as well as interested departments of public administration. This analysis also addresses Universities, law professors, researchers and students to foster a legal debate and shape a doctrine on the principle of equality and the fundamental violation that discrimination causes to individual and social rights.

PhD. Robert Gajda

Commissioner for Protection from Discrimination

EXECUTIVE SUMMARY

INTRODUCTION

“Joy can only spring up among people who feel equal”
Honoré de Balzac

Equality and non-discrimination are constitutional principles and foundations of the rule of law as well as guarantees of peace and social prosperity. Equality and non-discrimination are preconditions for the enjoyment of fundamental rights and freedoms. Guaranteeing them is a process that faces many challenges, therefore it remains essential that fundamental rights and freedoms are not only theoretical and illusory, but practical and effective. Formal equality versus essential equality or non-discrimination remain complex concepts, accompanied by ongoing conceptual and methodological debates and dilemmas. This finding is confirmed by persistent discriminatory practices and various legal positions at the national level, despite the significant developments that have taken place in their protection at the international level, both in terms of equality legislation and jurisprudence.¹

The presence of a comprehensive legal framework in accordance with international instruments does not always constitute sufficient guarantees for the enjoyment of equal rights, if the meaning and practical application of the Law are not uniform. Therefore, the continuous analysis of jurisprudence and case law is an effective instrument that helps to improve the quality of justice, through the uniform application of the Law.²

The purpose of court decision analysis is to study cases and draw substantive conclusions as to how certain legal norms are interpreted and applied by the court. Nowadays, this instrument is considered as an innovative tool, which makes possible the design of analytical analyzes, aiming to generalize the case law, by identifying trends and issues. It is clear that the views or findings are not critical of the professionalism of judges, nor are they binding on them. In essence, the analysis of case law is a process of studying court decisions in all their aspects, in order

- 1 The Concepts of equality and non-discrimination in Europe: A practical approach”, 2009, European Network of legal experts in the field of gender equality, Christopher McCrudden and Sacha Prechal.
- 2 See Court Practice Analysis as an Innovative Tool to Improve Judges’ Training (available at http://www.ejtn.eu/ Documents/News%20articles/Court Practice_Analysis.pdf)

to identify problems of uniform application of the Law by the courts, regarding the implementation of the substantive material or procedural Law. Analysis is a research tool with a more practical approach than academic research and it derives directly from the needs of the judiciary and case law.

Case law analysis is a valuable tool for judges of all three instances. *First*, the findings and results can serve as a signal to the Supreme Court that some cases constitute subject matter for the unification of case law. *Second*, the analysis enables all judges to be informed about the dynamics of case law as well as to know how their colleagues interpret legal norms, compared to their interpretive positions or the way they review cases without compromising their decision-making independence in any way.

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**ANALYSIS AIMS TO
PROVIDE A
PRACTICAL
FRAMEWORK TO
HELP THE VICTIMS OF
DISCRIMINATION**



Third, this analysis can provide opportunities to identify recommendations for legislative improvements to the legal framework that guarantees protection against discrimination. The analysis aims to provide a practical framework that helps victims of discrimination, civil society organizations which provide protection to them or even legal defense counsels, giving them the necessary skills and knowledge to identify a discriminatory situation, and consequently being able to design strategic protection from unequal treatment and restore the violated right/s.

This study also aims to bring to the attention of judges, legal professionals, equality bodies, researchers, law students and any other interested actors, a structured thematic analysis of case law 2013-2020 on the constitutional principle of equality and non-discrimination. Moreover, the study aims to identify ways of interpreting and applying in practice the provisions of Law No. 10 221, dated 04.02.2010 "On protection from discrimination", as amended, challenges or even the need for a comprehensive dialogue among stakeholders interested in harmonization of legislation, unification of case law if necessary, or intensification of awareness and training of judges on international standards and best practices in this regard.

Identification of interpretive trends and conceptual or practical concerns in the implementation of the Law 'On Protection from Discrimination' remains a necessity and in this context, the analysis of case law is in the interest of the judicial system, as the main purpose of this analysis is to promote standardization and increase quality of law enforcement, as well as the development of legal thought, by creating a sound basis for collaborative practices for effective justice and increasing public confidence.

The following objectives outline the main lines of study:

- *Bringing to attention the protection provided by the international legal framework and the latest developments in the jurisprudence of the ECtHR and the ECJ regarding equality and non-discrimination;*
- *Identifying case law that is in line with international standards, as well as different interpretive tendencies of the constitutional principle of equality and non-discrimination, aiming at their uniform application;*
- *Identifying the fields where discriminatory tendencies appear, the protected grounds and forms in which discrimination occurs, as well as the groups most at risk of discriminatory treatment, in order to raise awareness of the authorities responsible for taking positive measures and guaranteeing equal treatment before the Law;*
- *Encouraging legal debate on controversial interpretative issues or positions, aiming at finding quick and effective solutions, in the function of equal enjoyment of constitutional and legal rights;*
- *Identifying the need for legislation harmonization and taking the necessary legislative measures, or other legal steps or actions that need to be taken by judges, prosecutors, lawyers, civil society or other bodies in order to guarantee the principle of equality and non-discrimination.*
- *Highlighting the importance of collecting and analyzing statistics stemming from the case law, as the only way to determine the measures needed to deepen legal knowledge in order to provide effective justice;*
- *Expanding the knowledge of young law professionals on the development of the principle of equality and non-discrimination.*

3. http://www.ejtn.eu/Documents/News%20articles/Court_Practice_Analysis.pdf

The analysis of case law is an initiative undertaken in the framework of cooperation and continuous support of UNDP to increase the capacity of Albanian institutions, namely the Commissioner for Protection against Discrimination, in order to be an effective guarantor of fundamental human rights and freedoms, as well as the commitment to provide long-term contributions to address existing legal gaps and eliminate obstacles that delay and impede the proper protection of human rights and fundamental freedoms, guided by the principles of equality, professionalism, independence and respect for human rights and human dignity.

Specifically, the project "Expanding free legal aid service for women and men in Albania" (EFLAS), in the first 10 years of the activity of the Commissioner for Protection against Discrimination, has enabled the conduct of this legal analysis of court decisions (civil and administrative jurisdiction) that address the principle of equality and non-discrimination, in order to identify court decisions which are a reflection of international standards and best practices in this field, but also a reflection of the problems of interpretation and implementation of the Law, with the aim of taking comprehensive measures for their timely resolution.

The CPD Institution was established in 2010 with the approval of the Assembly of Law No. 10 221/2010 "On protection against discrimination", a law which is fully aligned with the EU Directives on:

- "Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin",
- "Establishing a general framework for equal treatment in employment and occupation".
- "Implementing the principle of equal treatment between men and women in the access to and supply of goods and services" and
- "Implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation".

The CPD functions as an independent institution, **providing effective protection against discrimination and any conduct that promotes discrimination on grounds of gender, race, language, gender identity, color, ethnicity, sexual orientation, political beliefs, religious or philosophical, economic condition, educational or social, pregnancy, parentage**

parental responsibility, age, marital or family status, marital status, residence, health status, genetic predispositions, disability, belonging to a particular group, or any other ground.

Although the CPD can be considered a relatively young institution, this 10-year period has served to shape and identify it as a key actor and factor in the field of protection of fundamental rights and freedoms, providing, in cooperation with other actors, a valuable contribution to Albania's EU integration process, where strengthening the rule of law and guaranteeing fundamental rights and freedoms are among the fundamental pillars.

Currently, there is an increasing number of individual complaints on discrimination, including *ex officio* investigations by the CPD. Law No. 10221/2010 "On Protection from Discrimination" places the Commissioner in a broad relationship with the court, providing sufficient powers regarding the participation of the institution in court proceedings. Decisions given by the Commissioner are subject to appeal in court. In addition, the Law stipulates the obligation of the court to notify the Commissioner of the filing of any discrimination lawsuit (Article 36, point 3) and has the right to request the Commissioner, at each stage of the proceedings, to submit a written opinion on the results of his investigation, if the investigation has been made, or any other information relevant to the case (Article 36, point 4 and Article 32, point 1/gj).⁴

Case law over the years evidences the participation of the CPD in court proceedings with different procedural qualities as a respondent or a third party. There are over 300 court decisions of civil or even administrative jurisdiction which have not been previously analyzed, summarized, systematized in any database based on quantitative or qualitative criteria. Therefore, the need and usefulness of these decisions to be recognized by public bodies, courts, academics, and the public prompted this analysis, which provides:

- (i) **a quantitative evaluation** of decisions by cataloging, classifying and organizing them according to various technical aspects, and
- (ii) **a qualitative assessment** of the evolution of their content, in order to understand the interpretation provided by the judiciary of various concepts and institutes related to equality and non-discrimination.

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<https://www.kmd.al/wp-content/uploads/2020/09/Raporti-KMD-6-mujori-i-l-re-i-vitit-2020.pdf>

Judicial practice research 2013 - 2020 has highlighted the problems and challenges faced by groups in need in the enjoyment of fundamental rights and freedoms; the need for more public awareness regarding the understanding and practical application of the principle of equality and non-discrimination; the growing tendency of discriminatory practices mainly in the field of employment and health care; the different meaning and application of the provisions of the Law 'On Protection from Discrimination' regarding the protected grounds, forms of discrimination, burden of proof, limits of CPD powers, especially regarding the imposition of measures or even the interaction between the norms of various laws which prohibit discrimination.

Based on the above reasons, the establishment of a consolidated case law in the field of non-discrimination is an effective tool for preventing discriminatory behavior and uniform legal treatment of inequalities and differences of different categories in need, in different sectors.

The study is organized in 4 sections:

Section (1) Principle of equality and non-discrimination: "Developments and Challenges", brings an analysis of the principles of equality and non-discrimination from the perspective of constitutional jurisprudence and the evolution of the jurisprudence of the ECtHR and the ECJ. This section is based on comparative research methods and aims to bring a comparative approach of conventional guarantees with those of EU law, as well as the developments of the jurisprudence of the ECtHR and the ECJ through concrete references. The main goal is the identification of the standards and best practices regarding the structural and substantive elements that courts need to possess and reflect in their decision-making. The material is structured in such a way in order to clearly identify the analytical scheme that serves as a guide for analyzing unequal and unfavorable treatment. The test of discrimination, the presumption of discrimination, the comparator, the burden of proof and its shifting, the different treatment based on an objective and reasonable justification and legitimacy in achieving a legitimate aim through proportionate means. Better knowledge of these elements enables the improvement of the legal analysis of the courts, the increase of the clarity of the reasoning, the unification of the case law and the effective protection of the fundamental rights and freedoms.

Section (2) "Legal framework for protection against discrimination" presents a complete picture of the legal framework that implements the principle of equality and non-discrimination. Through an almost exhaustive approach, this section brings to attention the entirety of those laws, whose object and purpose is interconnected with those of the Law "On Protection from Discrimination". The level of interconnection, interaction and harmonization of laws operating in this field confirms the vital need for a broad and comprehensive protection of victims of discrimination. Legislation is generally aligned with the Equality Directives and provides theoretical treatments that reflect international best practices in both protected grounds and forms of discrimination. Therefore, the Labor Code and the Code of Administrative Procedures are harmonized with the LPD in terms of the distribution of the burden of proof, while the Code of Civil Procedure still follows a different approach, shifting the burden of proof on the claimant, creating in this way problems in practical application by the courts.

Specific procedural and substantive laws sanction the commitment to guarantee human dignity, as a fundamental value for the development of societies. Violation of the equality of citizens is punishable by the Criminal Code (Article 253) if it is committed by a worker holding a state function or public service conducted because of his capacity or during its exercise, when the discrimination is based upon origin, sex, sexual orientation or gender identity, health situation, religious or political beliefs, trade-union activity or because of belonging to a particular ethnic group, nation, race or religion, which consists in creating unfair privileges or in refusing a right or benefit deriving from law.

Basic equality issues are regulated in areas such as employment, education and services such as health care, social security, social housing. Laws guarantee gender equality in public life, the equal protection and treatment of women and men, equal chances and opportunities for the exercise their rights, as well as their participation and contribution in the advancement of all areas of social life; protection of employees and the self-employed, classical family members and cohabitants, children, persons with disabilities, the disabled at work, the blind, paraplegics and tetraplegics, juveniles in conflict with the law, prisoners and detainees, asylum seekers unaccompanied minors, national minorities, whistleblowers.

Some laws envisage state obligations in taking positive actions, which recognize the different treatment of certain categories as the only way to equalize inequalities.

Section (3) "Analysis of court decisions" presents a quantitative and qualitative analysis of over 300 court decisions given by the courts of civil and administrative jurisdiction at all three instances of trial. The analysis is structured according to a comparative approach of international standard and the position found in the court decision, aiming to provide a clear picture of the present elements and those that need to be included in the judicial reasoning. The structure is based on a set of problems encountered by the CPD in dealing with the courts over the years, highlighting as key issues the following:

- **Grounds of discrimination, highlighting the interpretive approaches and tendencies of the courts.** *The aim is to identify the protected grounds which are commonly alleged for discriminatory behavior and the positions of the courts in the domestic legal context as well as in the framework of the ECHR, EU law and the jurisprudence of the ECtHR and the ECJ.*
- **Forms of discrimination, highlighting the meaning of direct, indirect or multiple forms of discrimination and their application in practice.** *The aim is to identify whether the courts manage to overcome the internationally accepted difficulties regarding the provability, especially of indirect discrimination, which presents specifics due to the apparent neutrality of the norms or factual situations that cause it.*
- **The burden of proof, identifying how the concept of shifting the burden of proof is understood and how often it has been applied in case law.** *The purpose is to identify the margin of appreciation of the courts in relation to the provability of the presumption of discrimination, given the difficulty that the complainant has in proving discrimination.*
- **Assignment of compensation/ indemnity, identifying the criteria on which the court is based in assessing the amount of compensation, the legal basis on which the claim for property and non-property damage is based, the body which is obliged to compensate, etc.** *The purpose is to determine whether the indemnity is assessed on the basis of the presence of an extra contractual damage, or a damage that is limited to the provisions of the Labor Code, or any other combined approach.*
- **Correction of discriminatory behavior, especially with regard to the CPD measure for the reinstatement of a dismissed employee for a protected ground.** *The purpose is*

to identify whether the measures imposed by the CPD meet the criteria of effectiveness and prevention and how they have been assessed by the courts.

- **Use of evidence, by identifying the elements of evidence towards which courts have a consolidated approach to prove whether or not there is discrimination.** *The aim is to identify the techniques of the provability of the discrimination allegation as well as to measure how the burden of proof is oriented in this aspect.*
- **The ECtHR and the ECJ evidence of the jurisprudence as well as international instruments referred to by the courts in reasoning decisions.** *The purpose is the identification of the level of recognition by the courts of the international framework in defense of equality, jurisprudence, frequency of reference to specific cases, their context, aiming at enriching knowledge in this area.*
- Identifying different interpretive ways or different practices for the same issue. The aim is to identify the prevailing interpretive approaches, different positions and whether deviations from the unified positions are clearly the basis for establishing double standards in protection against discrimination.

The analysis is accompanied by short paragraphs extracted from the reasoning part of court decisions, with the aim of highlighting the uniformity of interpretive tendency of certain legal norms, or diametrically opposed positions on the same typology of cases. The analysis is based on a comparative approach between the interpretive positions of the courts and the examinations of a certain concept by the jurisprudence of the ECtHR or even the ECJ. In this regard, it is paid attention to the fact that the examples brought from international practice be placed as much as possible in the context of domestic issues, bringing realities comparable to those of Albania. The referenced decisions and source and study materials have been selected to bring the latest developments and trends in the protection of the principle of equality and non-discrimination. The jurisprudence of the ECtHR / ECJ has a great development dynamic, a fact which is reflected in the considerable number of decisions referred to in the analysis, which can be investigated by the judges and then brought as a reference in resolving concrete cases. The current workload of the courts can be

considered as a hindering factor for a more in-depth research process, however the grounding in this argument risks to establish an incorrect ratio between "quality" over "quantity" of court decisions.

Courts are recognized as factors of social change and as Tushnet has pointed out "Courts are simply one of many institutions that shape and, most importantly, reflect culture and society."⁵ This contribution to social change becomes even more complete, more sensitive and more authoritative if it comes from the courts, which must be supported by all actors inside and outside a judicial proceeding. Interaction provides a greater guarantee of wider protection of fundamental rights and freedoms, while in terms of case law its uniformity provides legal certainty, effective protection and trust in justice.

Section (4) of the study is *a summary of the findings and recommendations*, which are in function of the objective set at the beginning of this analysis. The most successful approaches are the most comprehensive ones, therefore this study is an invitation and a call for anyone, who in one way or another is involved in the protection of equality and non-discrimination, to seriously assess the need for change and to contribute by believing in the achievement of this change.

METHODOLOGY

The study is based on the combination of qualitative and quantitative methods of data collection and analysis, in order to ensure their reliability and validity. The main sources of information can be summarized as follows:

- Review of legislation in force focusing on a harmonized analysis of legal provisions based on the principles of equality and non-discrimination;
- Review of international standards on the principles of equality and non-discrimination, highlighting the discrimination areas, forms of discrimination, protected grounds and groups that are most at risk of unequal treatment that is not justified by objective and reasonable reasons;
- Research in case law 2013-2020 of courts of three instances, civil and administrative jurisdiction, to identify best practices and to highlight;

5 https://lawreviewdrake.files.wordpress.com/2015/06/lrvol54-4_tushnet.pdf

the interpretive approaches to legal guarantees that accompany equality and non-discrimination.

Qualitative methods

The collection of up-to-date and contentious information on the principle of equality and non-discrimination is ensured by the combination of research, description, interpretation and comparison methods. Referring to the above techniques and methods, the following were consulted:

- **National legislation:** Constitution and legal framework such as: Law No. 10 221/2010 "On Protection from Discrimination", Law "On Gender Equality", Labor Code (LC), Civil Code (CC), Code of Civil Procedure (CCP), Code of Administrative Procedures (CAP), etc.
- Domestic and international reports such as: annual reports of the CPD, EC reports on Albania's progress in the framework of EU integration, study reports of CSOs in the field of equality, assessments and analysis on the situation of discrimination in Albania and in other European countries;
- International legal documents such as: ECHR, Protocol No. 12, CEDAW, Convention for the Protection of Persons with Disabilities, EU Directives, etc.
- **Domestic constitutional jurisprudence** of other European countries, as well as jurisprudence of the ECtHR and the ECJ.
- **Any other document** considered appropriate and necessary for the analysis.

The research of court decisions enabled an in-depth and detailed search of their content regarding the interpretation and application of the principle of equality and non-discrimination, as well as its contentious elements. The description made it possible to clarify the meaning of specific terms and concepts related to the theoretical meaning and practical application of these principles. Interpretation enabled the provision of a certain perspective on the structural and substantive interpretive approaches of court decisions. The comparison made it possible to come up with concrete solutions in the context of best practices and international standards, in order to identify the level of protection or the needs for its advancement.

Collection of quantitative data

The collection of numerical and quantitative data aimed at explaining the phenomenon of discrimination based mainly on a statistical approach, which ensures the identification of trends and

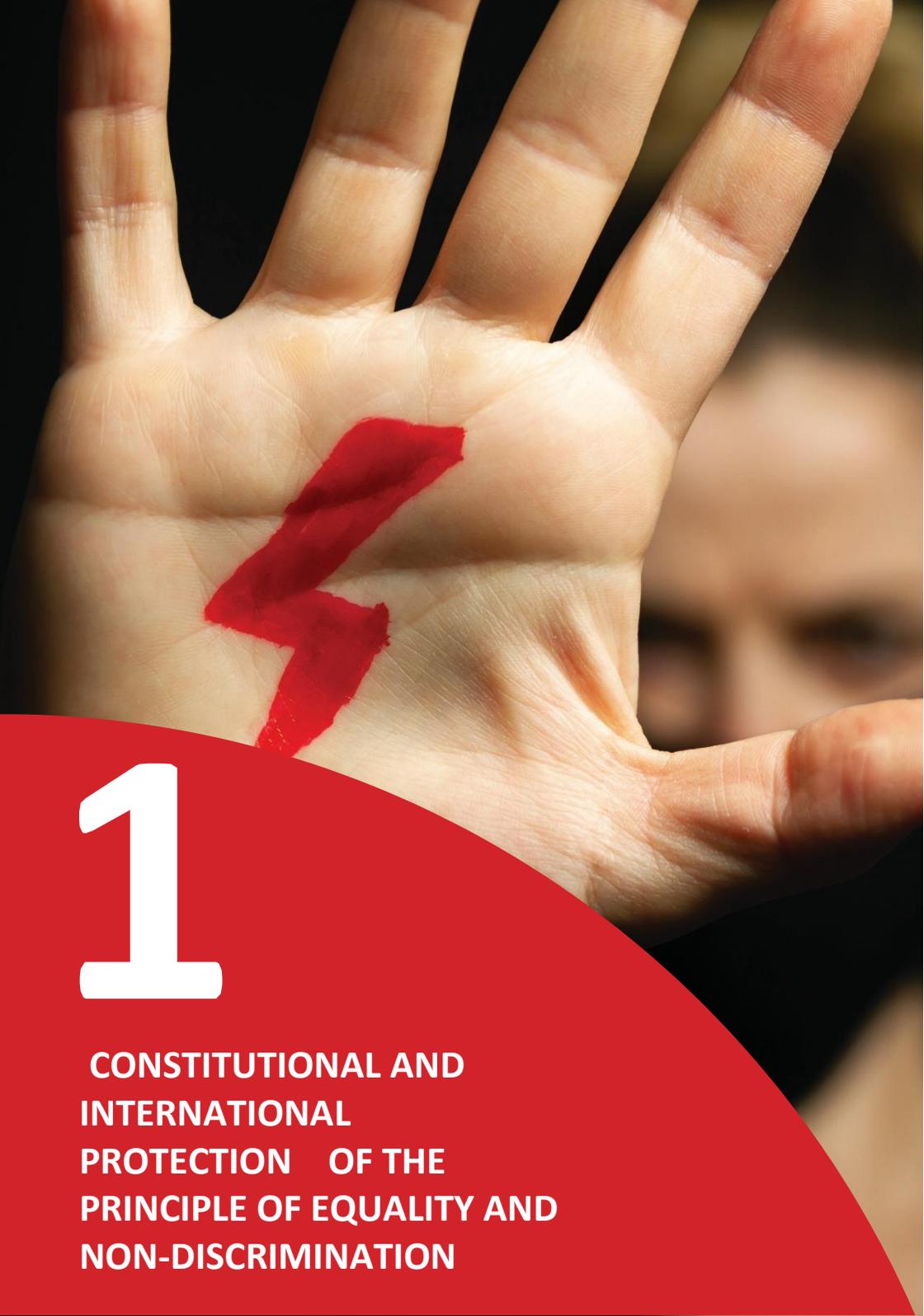
quantitative indicators in case law. Matters of substantive and territorial incompetence, procedural position of the CPD (as a respondent or third party), the ratio between the accepted and rejected cases, the ratio in percentage of violation of the protected grounds, etc., are part of this analysis.

The collected data, considering their nature, have been seen with respect to the principle of personal data protection, as well as have highlighted the need for sensitivity when handling discriminatory practices on gender equality.

Study challenges

The processed data based on 300 court decisions of the civil and administrative courts of the three instances, identified some limitations:

- (1) Lack of a consolidated database in such a format that enables filtering according to different research criteria.
- (2) Judicial decisions are available from the CPD only in scanned format, a quality that significantly increases the time spend for the citation of passages or paragraphs that express the interpretative positions of the courts.
- (3) Decisions are available separately only according to years and judicial jurisdictions, and in terms of the content of these divisions, they identify only the parties, and in some cases even the courts that issued the decision, make it impossible to provide a preliminary orientation regarding trends in the field, the protected ground most often violated or the form of discrimination, etc.



1

**CONSTITUTIONAL AND
INTERNATIONAL
PROTECTION OF THE
PRINCIPLE OF EQUALITY AND
NON-DISCRIMINATION**

CONSTITUTIONAL AND INTERNATIONAL PROTECTION OF THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION DEVELOPMENTS AND CHALLENGES

The principle of equality in Albania was initially affirmed in Constitutional Law No. 7692, dated 01.03.1993 "On fundamental human rights and freedoms", which provided the first constitutional foundations for the construction of a new, democratic and social state of law.

*The constitutional provision guaranteed that "All are equal in the law and before the law. No one shall be discriminated against on the grounds of sex, race, ethnicity, language, religion, economic or financial status, education or social status, political belief, parental affiliation or any other personal circumstance." This constitutional principle was listed among the values and principles such as respect for and protection of human dignity, fundamental rights and freedoms, private property, division and balance among the three powers, etc. The proper constitutional meaning, boundaries and dimension of this principle were given to it by the constitutional jurisprudence of the first years, which states that "... equality in law and before the law does not mean that there are equal solutions for individuals or categories of persons who are in objectively different conditions. Equality in law and before the law presupposes the equality of individuals who are on equal terms."*⁶

The principles of equality and non-discrimination are a cornerstone of democracy, and indeed, they imbue and inspire the whole human rights concept.⁷ There is a direct link between the principle of equality and non-discrimination: they constitute two sides of the same coin; they are positive and negative forms of the same principle, which means that one is treated equally when one is not discriminated against and when one is discriminated against one is not treated equally.⁸

6 See decision No.11, dated 27.08.1993 where the CC decided to reject the request submitted by 265 citizens of Tirana with the object "Unconstitutionality of Law No. 7652, dated 23.12.1992 "On the privatization of state housing" and Law No. 7698, dated 15.04.1993 "On the restitution and compensation of properties to former owners", as they discriminate the tenants of state housing that are being privatized. See also the opinion of the minority in Decision No. 7, dated 21.05.1993.

7 Higgins, Noelle, The Right to Equality and Non-Discrimination with Regard to Language (November 29, 2014). (2003) 10(1) Murdoch University Electronic Journal of Law, (<https://ssrn.com/abstract=2532045>)

8 Besson, Samantha, Gender Discrimination under EU and ECHR Law: Never shall the twain meet?, Human Rights Law Review, Oxford Journal, fq.6 (<http://hrlr.oxfordjournals.org/content/8/4/647.abstract>)

The Constitution of 1998 reaffirmed the principle of equality and supplemented it by providing in Article 18 that:

- "1. All are equal before the law.**
- 2. No one may be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage.²**
- 3. No one may be discriminated against on the grounds mentioned in paragraph 2 without a reasonable and objective justification."**

The constitutional provision does not define the fields of protection from discrimination, but only a closed list of grounds, where it is ascertained the absence of grounds such as age, sexual orientation, disability, gender identity, social origin, etc.

The standards of equality derive from the European Convention on Human Rights, EU law, in particular the EU Directives, and starting from 2000, the Charter of Fundamental Rights, as well as the jurisprudence of the ECtHR and the ECJ. The source that has also influenced the determination of the standards of treatment and interpretation of discrimination cases at the national level is the jurisprudence of the European Constitutional Courts, which is mainly consolidated, but also shows special features from one national context to another.

Jurisprudential positions and case law on the principle of equality and non-discrimination have been created over the years in Albania, guided by interpretations of this principle in the constitutional jurisprudence of European countries as well as developments in international law and jurisprudence.¹⁰ The legal framework against discrimination became a reality only in 2010, upon approval of Law No. 10221/2010 Law "On Protection from Discrimination"; The law is an expression of the most advanced models of protection of equality and non-discrimination, marking an important step towards equality guaranteeing. Article 1 provides an open-ended and comprehensive list of protected grounds, such as **race, ethnicity, color, language, nationality, political, religious or philosophical beliefs, economic, educational or social status, gender,**

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See Article 1 under Law No. 10 221, dated 04.02.2010 "On protection from discrimination", where the amendments made it possible to include "sexual orientation" ground, initially included in the text of Article 18 of the Constitution, during the process of drafting of constitutional amendments in 2016. These constitutional amendments, although welcomed by the Venice Commission in CDL Opinion (2016) 009*, did not find support from certain MPs, the community of lawyers and the public, arguing that the provisions of the Family Code on the institution of marriage could be opposed as unconstitutional, as the amendment made it possible to allow same-sex marriage.

10 For a more detailed analysis of developments in constitutional jurisprudence see also Bala, V, Constitutional Journey. Challenges, Achievements and Perspective of the Constitutional, 2018, pg. 381-387.

gender identity, sexual orientation, sex characteristics, living with HIV/ AIDS, pregnancy, parentage, parental responsibility, age, family or marital status, marital status, residence, health status, genetic predisposition, appearance, disability, belonging to a particular group, or with any other ground.

The legal framework which guarantees equality has been under a dynamic and constant change and improvement as a result of the alignment of the legislation with EU law, in particular with the Equality Directives. The constitutional principle of equality is one of the priorities that need to be considered by the legislator when passing laws, which if in case provide for any restriction on the fundamental rights and freedoms of citizens, such restrictions shall not only meet the criteria set out in Article 17 of the Constitution, but above all they shall not create, *first*, different treatments of groups that are in the same situations and, *second*, unfair discriminatory situations, which are not justified *by reasonable and objective justifications* for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic, education, social status, or parentage.³In principle, it is "at the discretion of the legislator" to make an appropriate choice, however, what is deemed justified or inappropriate in the application of the principle of equality, can not be ascertained in an abstract and general way, but shall be constantly regulated in relation with the special nature of the concrete field.

The following analysis provides a detailed investigation of the sources of protection of the principle of equality, aiming at identifying the standards that shall be the guidelines of the courts in interpreting and resolving cases in which discrimination is alleged.

The Albanian Constitutional Court has interpreted the Constitution broadly and creatively, especially in cases of protection of constitutional human rights. In its decisions are detailed the guarantees mentioned in the Constitution as well as are affirmed new guarantee elements. For example, principles not explicitly stated in the Constitution have been established through interpretation, and such principles are considered as very important guarantee principles to ensure the implementation of fundamental rights and freedoms.¹² The understanding of the principle of equality has been in the focus of constitutional jurisprudence through several processes aiming at abstract control of the legal norm, as well as during concrete trials. There are just a few decisions in which the Constitutional Court has

11 See even Decision No. 20, dated 11.07.2006 of the Constitutional Court of the Republic of Albania.

12 Zaganjori Xh., Anastasi A., Methasani E., "Rule of Law in the Constitution of the Republic of Albania", Adelprint Publishing House, 2011, fq.170 (https://www.kas.de/c/document_library/get_file?uuid=726ef2ee-7a25-2477-3d07-a97bfeb4a8a7&groupId=252038)

found a violation of the principle of equality¹³, while allegations of violation of the principle of equality have been assessed as substantially unfounded in most cases reviewed 14, or unjustified at the constitutional level in some others.

One of the consolidated positions of the constitutional jurisprudence is that **equality before the Law cannot stand as a right in itself**. In cases where the constitutional provision on equality does not have a direct connection with the fundamental freedoms and rights stipulated in the Constitution, it cannot be stated that the right to equal treatment possess the nature of a constitutional right in itself.¹⁵ This means that anyone who claims the violation of the principle of equality must necessarily associate it with one of the fundamental rights such as the right to choose a profession, the right to enter the civil service, the right to receive a pension, etc.¹⁶

Generally, the approach of the Constitutional Court requires a higher responsibility from the authorities assigned by law in respecting the principle of equality during the performance of the respective functions. Respecting the principle of equality is a requirement not only for the legislator in the process of drafting laws, but also for the judges who oversee it. *As long as we can not claim absolute equality, even differences in **treatment are acceptable, but only if they are justified by objective and justified reasons and respect the requirement for a reasonable proportion between means and purpose.*** In this context, the role of constitutional jurisprudence remains an added value in eliminating any discriminatory approach, guaranteeing the constitutional principle of equality on the basis of the test of rationality and non-discrimination.¹⁷

The principle of equality prohibits the treatment of what is

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- 13 See Decisions No. 34, dated 10.04.2017 No. 3, dated 05.02.2010 No. 18, dated 29.07.2008 No. 9, dated 26.02.2007, of the Constitutional Court of Albanian Republic.
- 14 See Decision No. 3, dated 19.01.2005 of the Constitutional Court with the object "Non-compliance with Articles 11, 18, 49 of the Constitution of some Articles and paragraphs of Law No. 9216, dated 01.04.2004 "On Some Addenda and Amendments to Law No. 7829, dated 01.06.1994 "On Notary", amended by Law No. 8790, dated 10.05.2001
- 15 In the case with the object "Repealed as incompatible with the Constitution of the Republic of Albania of Articles 1, 7 (letters "a, b") and 9 of Law No. 9481, dated 16.02.2006 "On some amendments to Law No. 9418, dated 20.05.2005 "On the supplementary social security of the military personnel of the Armed Forces of the Republic of Albania", it was concluded that the legislator has assigned a differentiated pension payment to the military personnel dividing them into two categories and as dividing borders between the groups, has determined the date of entry into force of Law No. 9210, dated 23.03.2004 "On the military status of the Armed Forces of the Republic of Albania". Such a differentiation cannot be based on the criterion of time division as only the date of retirement cannot serve as an objective and reasonable criterion that justifies discrimination.
- 16 See Decisions No. 26, dated 24.04.2001. No. 9, dated 26.02.2007. No. 9, dated 23.03.2010 of the Constitutional Court.
- 17 Sadushi, Sokol "Developing Constitutional Justice", 2012, p.557.

essentially equal as unequal and requires an unequal treatment of what is essentially unequal, in accordance with its particular kind.¹⁸ This principle requires the same treatment of each subject, without excluding the different treatment of individuals, subjects or groups of subjects that are not in the same or similar conditions or when there is a reasonable and objective justification, establishing a reasonable and proportionate ratio between the means employed and the aim sought to be realized.¹⁹ Equality of rights includes both the fundamental rights included in the Constitution and other legal rights, which are not absolute in nature. This element is easily understood based on the very fact of determining the conditions of restriction in the exercise of this right in the third paragraph of Article 18.²⁰

The principle of equality requires the prohibition of discrimination and equal treatment in the rights of all victims of serious violations of human rights. **"Only in exceptional cases and for reasonable and objective reasons could the different treatment of certain categories of persons benefiting from this right be justified."** Different treatment, conditioned not only by the presence of constitutional grounds, but also justified by constitutional criteria of "reasonable and objective justification", constitutes the so-called *"positive discrimination"*.

||
**THE PRINCIPLE OF
EQUALITY REQUIRES
THE PROHIBITION OF
DISCRIMINATION
AND EQUAL
TREATMENT** ||

Subject to constitutionality test is also Law No. 10221, dated 04.02.2010 "On Protection from Discrimination" The review focused on the compliance of the phrase "excessive burden" with the Constitution, which was assessed in accordance with Article 18 of the Constitution, based on the argument that: "lack of defining criteria in the law on excessive burden" does not create non-compliance with the Constitution, as it is the implementing and controlling bodies of this law, which will have the opportunity to interpret the "reasonable adaptation" on a case by case basis. This interpretation will be realized by these bodies depending on the nature of the claims as well as the possibility for making reasonable adjustments/ changes by the subject on which the obligation of adjustment falls and on which a disproportionate burden shall not be imposed".²²

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18 Decision (Beschluss) of the Second Senate, dated March 9, 1994 - 2 BvL 43, 51, 63, 64, 70, 80/92, 2 BvR 2031/92, Summary of Selected Decisions, p.124.

19 Ibid.

20 See Decision No. 9, dated 26.02.2007 of the Constitutional Court of the Republic of Albania.

21 See decision No. 34, dated 20.12.2005, where the CC decided to repeal as unconstitutional Article 1 of Law No. 9260, dated 15.07.2004 "On some Addenda and Amendments to Law No. 7748, dated 29.07.1993 "On the status of politically ex-convicted and prosecuted people by the communist regime", as amended. The principle of equality is mentioned in Decision No. 40, dated 11.03.2002, however, the CC has assessed the violation of the constitutional principle of equality only by finding out "that some persons are excluded from the right to operate with liberalized prices in

22 the market economy", without addressing the meaning of this principle.
See Decision No. 48, dated 15.11.2013 of the Constitutional Court of the Republic of Albania.

The jurisprudential positions of the Constitutional Courts of other European countries confirm common positions, but also highlight differences in the interpretation and understanding of the principle of equality and non-discrimination.²³

In the Czech Republic, the Constitutional Court rejected "an absolute understanding of equality" and stated that "equality of citizens must not be understood as an abstract category, but as a relative equality, a principle included in all modern constitutions." (, ..) The principle of equality has been so understood as constitutionally accepted aspects of differences between subjects and rights. If there is any inequality, the inequality for example in social rights, it must reach an intensity that questions at least in one or another aspect of the principle of equality in itself. This happens especially when along with the principle of equality, another fundamental right is violated.²⁴ The prohibition of discrimination is normally interpreted from two points of views: first, making a difference between groups and their rights, must be excluded; secondly, the aspects of differences must be acceptable. Therefore, any approach taken by the legislator must be based on objective and reasonable reasons and there must be respective adequacy between the objective and instruments to reach such an objective.²⁵

In Slovakia, the Constitutional Court has held that 'The provision of Article 12(2) of the Constitution has a general, declaratory character, rather than a character of a fundamental human right and freedom. Its application may be invoked only in connection with protection of particular fundamental rights and freedoms set out in the constitution.'²⁶ The relevance of attaching the idea of equality or discrimination to fundamental rights is that this is likely to give rise to a somewhat stricter approach to assessing the legitimacy of justifications advanced for breaches of the equality/non-discrimination guarantee.

In Hungary, the Constitutional Court distinguishes between fundamental rights and non-fundamental rights with respect to the permissibility of differentiation. In cases of fundamental rights, the "necessity and proportionality" test applies, like in other cases of limitation of fundamental rights. Regarding non-fundamental rights the action is unconstitutional only if it is "arbitrary", and thus violates the dignity of the person. An action would be arbitrary where there is no "reasonable" or "constitutional" ground for the action taken.

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23 The concepts of equality and nondiscrimination in Europe: A practical approach, 2009, p. 19-20.

24 This position is held in the PI decisions. US 16/93, Pl. US 36/93, Pl. US 5/95, and Pl. US 9/95 of the Constitutional Court of the Czech Republic.

25 See PI cases. US 16/93, Pl. US 36/93, Pl. US 5/95, and Pl. US 9/95.

26 See case No. I. US 17/99.

In Latvia, the Constitutional Court considers that “Article 91 contains two mutually closely connected principles – the principle of equality and the principle of non-discrimination. Both principles prohibit different treatment of persons in similar situations or demands different treatment of persons in different circumstances and allows different attitudes to persons who are in equal circumstances, if there is an objective and reasonable ground.”

In Slovenia, the Constitutional Court held that “Although the legislation may specify the reasons for the termination of an employment relationship, it must not interfere with constitutional rights. Freedom of work, free choice of employment and access to every work position under equal conditions mean that, in the context of the termination of an employment relationship, equal conditions must apply to everyone irrespective of the personal circumstances. For differentiation between individual legal subjects to be permitted, a non-arbitrary, substantiated reason must be demonstrated”.²⁷

In Malta, the Constitutional Court held that “The Constitution guaranteed protection from discriminatory treatment in an explicit, autonomous and independent manner, separately and distinctly from any other freedom, in light of which, discrimination is capable of forming the basis of an action without the need to reference any other fundamental right in order to achieve protection from discriminatory treatment.”²⁸

Constitutional jurisprudence continuously is guided by and reflects the dynamics of interpretations, developments and approaches of international courts. The following analysis provides an overview of developments in the protection of equality and non-discrimination by the ECHR, EU Directives, and the dynamics of the jurisprudence of the ECHR and the ECJ.

European Convention of Human Rights

Article 4 of the ECHR provides that “The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The meaning and significance of this provision of the Convention is confirmed by the views held in ECHR jurisprudence, which has evolved continuously. **The autonomy of Article 14 is not absolute, but relative, which means that the principle of non-discrimination complements the substantive provisions of the Convention and its Additional Protocols.**²⁹

²⁷ See case U-I-49/98, 25 November 1999.

²⁸ The case of Victoria Cassar v. Malta Maritime Authority.

²⁹ Molla Sali v. Greece [GC], 2018, § 123; Carson and Others v. The United Kingdom [GC], 2010, § 63; E.B. v. France [GC], 2008, § 47; Marckx v. Belgium, 1979, § 32.

In other words, Article 14 does not prohibit discrimination as such, but only discrimination in the enjoyment of fundamental rights and freedoms. This confirms the fact that Article 14 does not exist independently,³⁰ but is an integral part of each of the articles that sanction rights and freedoms.³¹ In practice, the ECtHR always considers Article 14 in relation to other substantive provisions of the ECHR.

However, in some cases the principle of non-discrimination applies even in the absence of a violation of a substantive right. Article 14 has been applied even in those cases where no violation of any of the substantive rights has been found.³² In other words, the application of Article 14 –³³ read in conjunction with a substantive provision – does not necessarily presuppose the violation of one of the substantive rights and to this extent it is relatively autonomous.³⁴ In some cases, the ECtHR has dealt first with the alleged violation of the substantive norm and then separately with the alleged violation of Article 14 read in conjunction with the substantive norm.³⁵ In other cases, the ECtHR found a violation of a substantive right read in conjunction with Article 14, and did not deem it necessary to examine the violation of the substantive right taken alone.³⁶

Article 14 of the ECHR provides an illustrative, non-exhaustive, open list of grounds protected against protection against discrimination as it is shown in two respects, *first* through the words "*any ground such as*" (in French "*notamment*") and *second*, through the inclusion in the list of the phrase "*any other status*" (in French "*toute autre situation*").³⁷

The ECtHR has developed a rich jurisprudence, which has expanded the number of grounds of protection from discrimination, interpreting the term "*other status*" in an extended way and in light of today's conditions.³⁸ According to ECtHR "*the*

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Carson and Others v. The United Kingdom [GC], 2010, § 63; E.B. v. France [GC], 2008, § 47.
31 The Belgian Linguistic Case, 1968, § 9 of the "Right" section; Marckx v. Belgium, 1979, § 32; Inze v. Austria, 1987, § 36.
32 Sommerfeld v. Germany [GC], 2003; Marckx v. Belgium, 1979; The Belgian linguistic case, § 4.
33 Sidabras and Dziautas v. Lithuania, 2004, § 38.
34 In the Schmidt case, although the ECtHR found that there was no violation of Article 4(3)(d) prohibiting forced or compulsory labor, the Court went on to hold that an obligation imposed on men (and only on men) to serve in the fire brigade (or pay a financial contribution in lieu of this service) amounted to a breach of Article 14 taken in conjunction with Article 4(3)(d). There may be a violation of Article 14 considered together with another article in a case where there would be no violation of that other article taken alone.
35 Marckx v. Belgium, 1979; Baczkowski and Others v. Poland, 2007; Aziz v. Cyprus, 2004; Nachova and Others v. Bulgaria [GC], 2005.
36 Molla Sali v. Greece [GC], 2018; Rangelov v. Germany, 2012; Andrejeva v. Latvia [GC], 2009; Barrow v. The United Kingdom, 2006; Sidabras and Dziautas v. Lithuania, 2004; Rasmussen v. Poland, 2009.
37 Clift versus The United Kingdom, 2010, § 55; Engel and Others versus the Netherlands, 1976, § 72, Carson and Others versus The United Kingdom [DHM], 2010, § 70.
38 The words "other status" have generally been given a wide meaning (Carson and Others v. the United Kingdom [GC], 2010, § 70) and their interpretation has not been limited to characteristics which are personal in the sense that they are innate

prohibition of discrimination enshrined in Article 14 was meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision was taken into account exactly as it stood. To proceed otherwise by dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by acquiring a certain nationality – would render Article 14 devoid of substance.”³⁹

Article 14 of ECHR does not prohibit all differences in treatment, but only those based on an identifiable, objective or personal characteristic, or “status”, by which persons or groups of persons are distinguishable from one another. The ECtHR has repeatedly stressed that in the enjoyment of the rights and freedoms enshrined in the Convention, **Article 14 provides protection against the differential treatment, without an objective and reasonable justification, of persons in the same situation.** For the purposes of Article 14, **a difference in treatment will be discriminatory if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized”.**⁴⁰

The approach taken by the ECtHR in analyzing the meaning of discrimination is that of **seeking answers to related questions, which aim to find out whether persons have been treated differently from other persons in similar circumstances, through two elements:**

- (1) Has there been different treatment regarding the substantive right in question between the complainant on the one hand and other persons presented for comparison (selected comparator) on the other?**
- (2) Were the comparators selected “in the same or respectively similar situation” to the complainant's situation?**

The protection against discrimination provided by Article 14 in the enjoyment of other substantive rights of the Convention is complemented by Article 1 of Protocol No. 12, which in more general terms prohibits discrimination in the enjoyment of the rights of any right provided by law.⁴¹ Protocol 12 prohibits discrimination in relation to the

or inherent (Kiyutin v. Russia, 2011, § 56; Clift v. the United Kingdom, 2010, § 56). This category of discrimination includes age, gender identity, sexual orientation, health and disability, parental and marital status, immigrant status, employment status, being a member in an organization, being a prisoner, legal and natural person, country of residence, even conflicting decisions of the Supreme Court.

39 Andrejeva v. Latvia [GC], 2009, § 91.

40 Molla Sali v. Greece [GC], 2018, § 134, 135, Fabian v. Hungary [GC], 2017, § 113, Kiyutin v. Russia, 2011, § 56.

41 Protocol No. 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), Explanatory Report, paragraph 22. (<http://conventions.coe.int/Treaty/en/Reports/Html/177.htm>)

"enjoyment of every right enshrined in law" and is thus broader in scope than Article 14, which addresses only the rights guaranteed by the ECHR. This provision is related with discrimination:

- i. in the enjoyment of any right specifically granted to an individual under national law;*
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;*
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);*
- iv. by any other act or omission by a public authority (for example, the behavior of law enforcement officers when controlling a riot).*

Although the Protocol mainly protects individuals against discrimination by the state, it also relates to relationships between private persons, which are usually regulated by the state, for example, "*arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity.*" Broadly speaking, Protocol No. 12 will prohibit discrimination outside purely personal contexts, where individuals exercise functions placing them in a position to decide on how publicly available goods and services are offered. In the only case considered by the ECtHR under Article 1 of Protocol 12, *Sejdić and Finci v. Bosnia and Herzegovina, 2009*, the ECtHR stated that this instrument "constitutes a general prohibition of discrimination", *which also states that the analysis of discrimination cases would be identical to that set out by the ECtHR in the context of Article 14.*

THE LAW OF THE EUROPEAN UNION

Equality and non-discrimination are firmly rooted in EU law.

Article 2 of the Treaty on European Union solemnly states that "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." Article 10 of the Treaty on the Functioning of the European Union stipulates that "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

Equality and non-discrimination are also recognized in the EU Charter of Fundamental Rights, which has the same legal value as the two treaties. Article 21 of the Charter prohibits *any discrimination based on any ground such as sex, race, color, ethnic,*

or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.” While these legal instruments have had and continue to have a profound effect on the development of EU law, it has been the EU Equal Treatment Directives that have had the most visible impact on non-discrimination laws not only in the Member States of the EU, but also beyond it.

The level of protection against discrimination has increased significantly across the EU since the adoption in 2000 of the Racial Equality Directive and the Employment Equality Directive. The purpose of these Directives is to set out a general framework for combating discrimination, with a view to enforcing the principle of equal treatment in the Member States, which is defined as ***“the absence of direct and indirect discrimination. In the first case, the emphasis is on uniformity of treatment, while in the second case, the treatment is not about formal uniformity but about the substantial consequences of treatment.”***⁴²

Employment Equality Directive prohibits discrimination on grounds of *sexual orientation, religion, age and disability in the field of employment*. The Employment Equality Directive prohibits discrimination on the basis ***of race or ethnicity in the context of employment, but also in accessing the welfare system and social security, as well as goods and services***. This was a significant expansion of the scope of non-discrimination law under EU law. It recognized that to allow individuals to reach their full potential in the employment market, it is also essential to guarantee them equal access to areas such as health, education and housing. In 2004, Gender Goods and Services Directive, extended the scope of sex discrimination to the field of goods and services. However, protection on the grounds of sex does not quite match the scope of protection under the Racial Equality Directive. The so-called Gender Equality Directive in Social Security Matters guarantees equal treatment only in relation to social security, and not to the broader welfare system, such as social protection and access to healthcare and education.⁴³ The Gender Equality Directive (revised) states that *indirect discrimination* shall be taken to occur ***where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.***

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42 Handbook 2016, p. 17.

43 https://fra.europa.eu/sites/default/files/fra-case-law-handbook_sq.pdf

Direct discrimination is similarly defined by the ECHR and EU law.

EU law Article 2 (2) of the EU Racial Equality Directive states that direct discrimination is ***“taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.”***⁴⁴ The ECtHR uses the formulation that there must be a ***“difference in the treatment of persons in analogous, or relevantly similar, situations”, which is ‘based on an identifiable characteristic’.***⁴⁵

At the heart of direct discrimination is the less favorable treatment that an individual is subject to. Consequently, the first feature of direct discrimination is proving unfavorable treatment. This can be relatively easy to identify compared with indirect discrimination, where statistical data is often needed. Here are some examples of direct discrimination: refusal of entry to a restaurant or shop, receiving a smaller pension or lower pay, being subject to verbal abuse or violence, being refused entry at a checkpoint, having a higher or lower retirement age, being barred from a particular profession, not being able to claim inheritance rights, being excluded from the mainstream education system, being deported, not being permitted to wear religious symbols, being refused or revoked social security payments.⁴⁶

The comparator: ***Less favorable treatment can be established by making the comparison to someone in a similar situation.*** If someone files a complaint about ‘low’ pay, this is not considered a claim of discrimination unless it can be shown that the pay is lower than that of someone hired by the same employer to perform a similar task. Therefore, ***to determine whether a person was treated less favorably, it is necessary to identify a suitable ‘comparator’: that is, a person in materially similar circumstance.***⁴⁷

In order to rebut the presumption of discrimination, the State may either prove that the applicant is not actually in a similar or comparable situation to their “comparator”, that the differential treatment is not based on the protected ground, but on other objective differences, or that the difference in treatment was justified.⁴⁸ ***The requirement to demonstrate a similar position does not require the comparable groups to be the same.*** A complainant

44 Employment Equality Directive, Article 2 (2) (a); Gender Equality Directive (Revised), Article 2 (1) (a); Gender Goods and Services Directive, Article 2 (a).

45 See Decisions of the ECtHR: Karson and Others v. UK [GC], 16 March 2010; paragraph 61, D.H. and Others v. the Czech Republic [GC], 13 November 2007, paragraph 175, Burden v. the UK [GC], 29 April 2008, paragraph 60

46 See Handbook 2010, p.18

47 See EU Handbook on Anti-Discrimination, 2018, p.44.

48 Khamtokhu and Aksenchik v. Russia [GC], 2017, § 65.

can demonstrate that, given the particular nature of the complaint, he or she was in a situation respectively similar to others who were treated differently.⁴⁹ Elements which characterize different situations, and determine their comparability, must be assessed in light of the subject-matter and purpose of the measure which makes the distinction in question.⁵⁰ In other words, **the analysis of the question of whether or not two persons or groups are in a comparable situation for the purposes of an analysis of differential treatment and discrimination is both “specific” and “contextual”.**⁵¹

Protected ground: The courts have given a broad interpretation of the scope of the "protected ground". It can include “discrimination by association”, where the victim of the discrimination is not only the person with the protected characteristic, but it can also involve the particular ground being interpreted in an abstract manner. **This makes it imperative that practitioners embark on detailed analysis of the reasoning behind the less favorable treatment, looking for evidence that the protected ground is causative of such treatment, whether directly or indirectly.**⁵²

Summarizing the above we can conclude that direct discrimination occurs when these conditions are met simultaneously:

- ***an individual / group is treated less favorably;***
- ***by comparison to how others, who are in a similar situation, have been or would be treated;***
- ***and the reason for this is a particular characteristic they hold, which falls under a ‘protected ground’.***⁵³

49 Fabian v. Hungary [GC], 2017, § 113; Clift v. United Kingdom, 2010, § 66.

50 Ibid, Fabian v. Hungary § 121

51 The ECJ in the case of CHEZ Razpredelenie Bulgaria AD (C-83/14) stated that a person who has been subject to discrimination as she lived in a Roma-dominated neighborhood was entitled to protection under the Racial Equality Directive, even if she had never identified herself as Roma or was perceived as such.

52 Handbook 2010, p.22.

53 Legislation of most EU Member States must comply in terms of the conditions to be met for a discrimination to be called direct: (i) The need to prove less favorable treatment; (ii) Comparison with another person or group in a similar situation but with distinctive characteristics; (iii) Discriminatory ground, i.e origin, belief, sexual orientation, etc.; (iv) The possibility of using a comparative criterion from the past or an assumed comparative criterion; (v) Failure to justify the difference in treatment.

Indirect discrimination is considered **such because it is not the treatment that changes, but rather the consequences of that treatment, which will be felt differently from people with different characteristics.**⁵⁴ Indirect discrimination may take the form of disproportionately prejudicial effects of a general policy or measure which, though defined in neutral terms, has a particular discriminatory effect on a group special⁵⁵. Indirect discrimination does not necessarily require a discriminatory intent, moreover, indirect discrimination may arise both from a neutral rule⁵⁶ or from a de facto *situation*.⁵⁷

EU law and the ECHR jurisprudence recognize that discrimination can result not only from different treatment of people in the same situations, but also by providing the same treatment to people in different situations. Article 2 (2) (b) of the Racial Equality Directive states that **“indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared to other persons.”**⁵⁸

A neutral rule, criterion or practice: The first identifiable criterion is a neutral rule, criterion or practice. In other words, there must be some form of requirement that is applied to everybody.⁵⁹

Significantly more negative in its effects on a protected group
The second identifiable requirement is that the apparently neutral provision, criterion or practice places a “protected group” at a particular disadvantage. Accordingly, indirect discrimination differs from direct discrimination in that it moves the focus away from differential treatment to differential effects.⁶⁰

- 54 In the case C-7/12, *Nadezda Riezniece v. Zemkopības ministrija and Lauku atbalsta dienests*, 20 June 2013, the claimant, a civil servant, had been dismissed after taking parental leave. The official reason for dismissal was the suppression of the applicant’s post. The ECJ decided that the method for assessing workers in the context of the suppression of a post must not place workers who have taken parental leave in a less favorable situation than other workers. The ECJ concluded that there had been indirect discrimination because parental leave is taken by a higher proportion of women than men.
- 55 *Biao v. Denmark* [GC], 2016, § 103; *D.H. and Others v. Czech Republic* [GC], 2007, § [DHM], 2007, § 184; *Sampanis and Others v. Greece*, 2008, § 67.
- 56 *Hoogendijk v. The Netherlands*, 2005.
- 57 *Zarb Adami v. Malta*, 2006, § 76.
- 58 Employment Equality Directive, Article 2 (2) (b); Gender Equality Directive (Revised), Article 2 (1) (b); Gender Equality Treatment Directive regarding access to and provision of Goods and Services, Article 2 (b).
- 59 See *Hilde Schönheit v. Stadt Frankfurt am Main* and *Silvia Becker v. Land Hessen*, Joint Cases C-4/02 and C-5/02, 23 October 2003. In the *Schönheit* case, the payable pensions of part-time employees were calculated using a different rate from that of full-time employees. The difference in payable pensions was not based on differences in the time worked. Thus, part-time employees received a smaller pension than full-time employees, even taking into account the different length of service, meant that part-time employees were, effectively, paid less than full-time employees. This neutral rule for calculating pensions applied equally to all part-time employees. However, because 88 percent of part-time employees were women, the effect of the rule was disproportionately negative for women compared to men.
- 60 *The Concepts of equality and non-discrimination in Europe: A practical Approach*, 2009, p.33.

The concept of indirect discrimination has three important consequences: *First*, it shifts attention from the perpetrator to the victim, that is, it focuses attention primarily on the individual who alleges discrimination rather than on the person alleged to be discriminating. *Second*, it reduces the opportunities for techniques to be adopted to avoid successful challenge if the respondent was engaged in direct discrimination; this is particularly the case where the approach taken to the interpretation of direct discrimination is one that concentrates on the intentions or motives of the person alleged to be directly discriminating. The concept of indirect discrimination renders this interpretation less likely to prevent a finding of discrimination because even if the allegation of direct discrimination is unsuccessful, an allegation of indirect discrimination may succeed. Third, it shifts attention from the victim conceived as an individual to the victim conceived as part of a larger social group of which he or she is a member; claims of direct discrimination are individualistic to a greater degree than claims of indirect discrimination. Legally, the above attitudes meant that an “objective” view had to be taken by the national courts as to what the relevant social group consisted of, rather than being satisfied to rely on the perpetrator’s “subjective” view of the social group. The “subjective” view would be valid if the analysis were to focus on the context of direct discrimination.⁶¹

Like in the case of direct discrimination, even in the case of indirect discrimination, the court may involve a *comparator*, with the aim of determining whether the effect of a particular rule, criterion or practice is far more negative than those proved by other individuals in a similar situation. The approach of courts does not differ in this respect from their approach when analyzing the comparator in the context of direct discrimination.⁶²

However, establishing indirect discrimination requires proving that there are two groups: one advantaged and one disadvantaged by the contested measure. Usually, the disadvantaged group does not exclusively consist of persons holding protected characteristics. *For example*, part-time employees disadvantaged by a certain rule are mostly women, but men can also be affected. On the other hand, not all persons holding a particular characteristic are disadvantaged. *For example*, in a situation in which having a perfect knowledge of a language is a condition for employment, it will mostly disadvantage foreign applicants, but there might be some people among those foreign candidates who are able to fulfil this requirement. In cases where a formally neutral criterion in fact affected an entire group, the ECJ has concluded that there had been direct discrimination.⁶³

61
ibid, pg. 35.

62 Handbook, p. 23-25.

63 See ECJ Decisions C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* [GC], 1 April 2008; C-267/12, *Frederick Hay v. Credit agricole mutuel de*

Discrimination test: When bringing a complaint under Article 14, the **applicant has to show** that he or she has been treated differently from another person or group of persons placed in a relevantly similar situation, or equally to a group of persons placed in a relevantly different situation. **The applicant is then** compared to another person or group of persons. Thus, Article 14 does not prohibit differences in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.⁵ ***A difference in treatment will be discriminatory if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.*** Proportionality test divided in two steps: **firstly**, it will examine the existence of a legitimate aim and, **secondly**, it will check the proportionality *stricto sensu*⁶ of the difference in treatment.

First step: Aims to identify whether there has been a difference in treatment in analogous or relevantly similar situations - or a failure to treat persons differently in relevantly different situations?

Second step: Aims to identify whether such difference or absence of difference is objectively justified? The analysis at this stage includes the following **aspects:**

a. Does it pursue a legitimate aim?

b. Are the means employed reasonably proportionate to the aim pursued?

In order to justify a difference in treatment, in the first place States have to base the measure at issue on a **“legitimate aim”**.⁷ Moreover, they have to show that there is a **causal link** between the legitimate aim pursued and the differential treatment alleged by the applicant.⁶⁷

The ECtHR has identified a number of legitimate aims that can be considered acceptable for the application of Article 14, such as:

- ***achieving the effective implementation of policy developing linguistic unity;***⁶⁸

Charente-Maritime et des Deux-Sevres, 12 December 2013; C-83/14, “CHEZ Razpredelenie Bulgaria” AD versus Komisija za zashchita ot diskriminatsia [DHM], 16 July 2015. G.M.B. and K.M. v. Switzerland (December), 2001; Zarb Adami v. Malta, 2006, 73 §.

Molla Sali v. Greece [GC], 2018, § 135; Fabian v. Hungary [GC], 2017, § 113; Abdulaziz, Cabaales and Balkandali v. The United Kingdom, 1985, § 72; The Belgian Linguistic Issue, 1968, § 10 Of the “Right” section”.

64 Molla Sali v. Greece [GC], 2018, § 135; Fabris v. France [GC], 2013, § 56.

65 Unal Tekeli v. Turkey, 2004, § 66. The ECtHR found that there was no link between the aim of preserving family unity and the bearing of a joint family name based on the husband’s name, resulting in a lack of justification of the obligation on married women to bear their husband’s surname

66 The Belgian linguistic case, 1968.

- *Legal certainty of completed inheritance arrangements;*⁶⁹
- *restoration of peace;*⁷⁰
- *protection of national security;*⁷¹
- *providing a public service wholly committed to the promotion of equal opportunities and requiring all its employees to act in a way which does not discriminate against others;*⁷²
- *maintenance of economic stability and restructuring of the debt in the context of a serious political, economic and social crisis;*⁷³
- *facilitation of rehabilitation of juvenile delinquents;*⁷⁴
- *protection of women against gender-based violence, abuse and sexual harassment in the prison environment.*⁷⁵

Proportionality: The ECtHR has consolidated its position that national courts, which based on *the margin of appreciation*, are competent in assessing whether and to what extent differences in otherwise similar situations justified differential treatment. One of the *criteria* used by the Court to define the State's margin of appreciation in discrimination cases is the existence and *the extent of a consensus among Contracting States on the issue at stake*. Since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond to any emerging consensus as to the standards to be achieved.⁷⁶ This margin of appreciation remains rather wide, because national authorities have direct knowledge of their society and its needs, therefore, they are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds. Based on this interpretation, ECtHR will generally respect the legislature's policy choice unless it is manifestly without reasonable foundation.⁷⁷ However, ECtHR has also identified certain grounds of discrimination to national authorities where such margin is reduced, especially when it comes to some protected grounds such as ethnicity, gender and sexual orientation.⁷⁸

67
 Fabris v. France [GC], 2013..

68 See Sejdic and Finci v. Bosnia and Herzegovina [GC], §45

69 Konstantin Markin v. Russia [GC], 2012, § 137).

70 Eweida and Others v. The United Kingdom, 2013, §105.

71 Mamatas and Others v. Greece, 2016, § 103.

72 See ECtHR, Khamtokhu and Aksenchik v. Russia [GC], 2017, § 80.

73 Ibid, § 82

74 Weller v. Hungary, 2009, § 28; Steck and Others v. The United Kingdom [GC], 2006, §§ 63-

64; Unal Tekeli v. Turkey, 2004, § 54; Stafford v. The United Kingdom [GC], 2002, § 68;

Konstantin Markin v. Russia [GC], 2012, § 126.

75 Belli and Arquier-Martinez versus Switzerland Switzerland, 2018, § 94; Mamatas and Others

versus Greece, 2016, §§ 88-89; Stummer versus Austria [DHM], 2011, § 89; Andrejeva versus

Latvia [DHM], 2009, § 83; Burden versus The United Kingdom [DHM], 2008, § 60; Steck and

Others versus The United Kingdom [DHM], 2006, § 52; Carson and Others versus The United

Kingdom [DHM], 2010, § 61). Chabauty versus France [DHM], 2012, § 50.

76 D.H. and Others v. Czech Republic [GC], 2007, § 176; Sejdic and Finci v. Bosnia and Herzegovina [GC], 2009, §§ 43-44); Abdulaziz, Cabaes and Balkandali v. The United Kingdom, 1985, § 78; Konstantin Markin v. Russia [GC], 2012, § 127; Schalk and Kopf v. Austria, 2010, § 97.

REMINDER

The application of Article 14 of the ECHR has been found to apply in areas such as:

- Employment;⁷⁹
- membership of a trade union;⁸⁰
- Social Security;⁸¹
- Education;⁸²
- Right to respect for home;⁸³
- Access to justice;⁸⁴
- Inheritance rights;⁸⁵
- Access to children;⁸⁶
- Paternity;⁸⁷
- Freedom of expression, assembly and association;⁸⁸
- Right to an effective investigation;⁸⁹
- Eligibility for the death penalty;⁹⁰
- Eligibility for tax relief.⁹¹

Protection against discrimination covers a variety of social benefits such as:

- pension payment;⁹²
- survivor's payment pensions;⁹³
- unemployment benefits;⁹⁴
- Disability benefits;⁹⁵
- Housing benefits;⁹⁶
- parental leave allowance;⁹⁷
- Child benefits;⁹⁸
- Social security;⁹⁹
- social security payment for the purposes of supporting families with children.¹⁰⁰

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- 77 Sidabras and Dziautas v. Lithuania, 2004; Bigaeva v. Greece, 2009.
Danilenkov and Others v. Russia, 2009.
- 79 Andrejeva v. Latvia [GC], 2009; Gaygusuz v. Austria, 1996; Koua Poirrez v. France, 2003; Stummer v. Austria [GC], 2011.
- 80 D.H. and Others v. Czech Republic [GC], 2007; Orsus and Others v. Croatia [GC], 2010; Ponomaryov v. Bulgaria, 2011.
- 81 Buklei v. The United Kingdom, 1996; Karner v. Austria, 2003.
- 82 Paraskeva Todorova v. Bulgaria, 2010; Moldovan and Others v. Romania (No. 2), 2005; Anakomba Yula v. Belgium, 2009.
- 83 Fabris v. France [GC], 2013.
- 84 Sommerfeld v. Germany [GC], 2003.
- 85 Rasmussen v. Denmark, 1984.
- 86 Bączkowski and Others v. Poland, 2007.
- 87 Bączkowski and Others v. Poland, 2007;
- 88 Nachova and Others v. Bulgaria [GC], 2005; Opuz v. Turkey, 2009; B.S. v. Spain, 2012
- 89 Khamtokhu and Aksenchik v. Russia [GC], 2017);
- 90 Guberina v. Croatia, 2016
- 91 Pichkur v. Ukraine, 2013; Andrejeva v. Latvia [GC], 2009
- 92 Aldeguer Thomas v. Spain, 2016; Willis v. The United Kingdom, 2002
- 93 Gaygusuz v. Austria, 1996
- 94 Koua Poirrez v. France, 2003; Belli and Arquier-Martinez v. Switzerland, 2018; Popovic and Others v. Serbia, 2020.
- 95 Vrountou v. Cyprus, 2015
- 96 Petrovic v. Austria, 1998
- 97 Okpiz v. Germany, 2005
- 98 PB. and J.S. v. Austria, 2010
- 99 Weller v. Hungary, 2009



2

**LAW ON
PROTECTION FROM
DISCRIMINATION**

LAW ON PROTECTION FROM DISCRIMINATION¹⁰¹

The Constitution of the Republic of Albania envisages, in its second part, the fundamental human rights and freedoms as values that underlie the entire Albanian legal order. These rights and freedoms are divided into: personal freedoms and rights; political freedoms and rights; as well as economic, social and cultural freedom and rights. Article 18/1 of the Constitution provides for the principle of equality which stipulates that "**All are equal before the law**" and Article 18/2 the principle of non-discrimination, which stipulates that "**No one may be unjustly discriminated against on grounds such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic, educational, and social status or parentage**" and that "**No one may be discriminated against on the grounds referred to in paragraph 2 without a reasonable and objective justification**".

Law No. 10 221, dated 04.02.2010 "On Protection from Discrimination" marked a concrete step in the field of protection of human rights in the spirit of international documents and at the same time, a concrete step towards meeting the standards of EU membership. The Law "On Protection from Discrimination" is in full compliance with the European Union Directives in the field of equality and is fully aligned with:

- Directive 2000/43 / EC on "Application of the principle of equal treatment between persons irrespective of racial or ethnic origin",
- Directive 2000/78/ EC on "Establishing a general framework for equal treatment in employment and occupation",
- Directive 2004/113 / EC on "Implementing the principle of equal treatment between men and women in the access to and supply of goods and services", and
- Directive 2006/54 / EC on "Implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation."

This law regulates the application and observance of the principle of equality in relation to an open-ended and comprehensive list of protected grounds of discrimination, such as *race, ethnicity, color, language, nationality, political, religious or philosophical beliefs, economic, educational or social status, pregnancy, parentage, parental responsibility, age, family or marital status, marital status, residence, health status, genetic features, disability, belonging to a particular group, or with any other ground* (Article 1).

100 The detailed analysis is taken from the Annual Report 2019 of the CPD.

The purpose of this law is to ensure the right of every person to equality before the law and equal protection of the law, equal chances and opportunities to exercise the rights and freedoms of the individual and effective protection against discrimination. This legal protection is provided in several fields including protection against discrimination in employment as well as during the period of employment relationships, in the field of education and in the field of provision of goods and services.

The Commissioner for Protection against Discrimination is the only responsible authority, who ensures effective protection from discrimination and any other form of conduct that incites discrimination through powers that extend not only to the public sector, but also to the private sector.

Due to the dynamics of the development of the Albanian society and the need for more real equality, Law No. 10 221/2010 underwent a process of amendments in 2020, which aimed to improve legal guarantees in the following areas:

- **In substantial terms**, other grounds of discrimination have been added, the wording of existing forms of discrimination has been improved, and some new forms of discrimination have been added and formalized:
 - Added grounds include citizenship, living with HIV/ AIDS, and appearance.
 - New forms of discrimination are as follows: Multiple Discrimination, Intersectional Discrimination, Hate Speech, Segregation, Sexual Harassment; Severe forms of discrimination.
 - Existing forms of re-formulated discrimination are as follows: Guideline on Discrimination by removing the hierarchical condition and Victimization, better formulating it as a form of discrimination.
- Institutionally, the independence of the CPD institution has increased;
- **In the procedural aspect**, more facilitated and well-defined procedures are foreseen in order to have a higher effectiveness in the implementation of the Law. The changes affect the aspects of the CPD powers, administrative investigation as well as his decisions.
- A new aspect of the Law is the definition of a more active role of Civil Society Organizations (CSOs) in the protection of human rights, as well as a wider cooperation with the institution of the CPD.

The constitutional postulate on non-discrimination has been further strengthened through the provision of other laws such as the Labor Code, the Family Code, the Code of Administrative Procedures, the Criminal Code, the Electoral Code, the law "On gender equality in society", etc.

The Labor Code, **as amended**, which has been in force since June 2016, has adapted a series of directives covering non-discrimination at work, parental rights, the right to information, the relationship between employer and employee, etc. Significant amendments of 2015 refer to the follow-up of complaint procedures, set out in the Special Law on Protection against Discrimination, when a person alleges that he has been violated by the non-application of the principle of equal treatment in the exercise of the right to employment and profession. The principle of shifting the burden of proof applies to all complaint procedures. The principle of equal treatment and non-discrimination is provided in some other provisions of the LC such as:

- Prohibition of the use of forced labor as a measure of racial, social, national or religious discrimination (*Article 8, par. 2, letter (e)*);
- “Discrimination” means any differences, exclusions, restrictions or preferences based on gender, race, color, ethnicity, language, gender identity, sexual orientation, political, religious and philosophical beliefs, economic, educational or social situation, pregnancy, parental affiliation, parental responsibility, age, family situation or marriage status, civil status, place of residence, health condition, genetic predispositions, disability, living with HIV/AIDS, joining or affiliation with trade union organization, affiliation with a special group or any other ground, aiming at or a consequence to obstruct or make impossible to practice the right for employment and profession, in the same way as others. (*Article 9/2*);
- Equality in reward(*Article 115*);
- Termination of contract for no reasonable grounds *Article 146* which provides that: “1.The termination of the contract by the employer shall be considered of no reasonable grounds, when: c) it violates the prohibition of discrimination according to the stipulations in this Code and in the special Law for the protection from discrimination”;
- Equal treatment regarding the expiry of fixed-term contracts (*Article 149/2*), which expressly states that “Employees with a fixed duration contract cannot be treated in a less favorable way than the employees with an indefinite duration contract, regarding employment conditions, treatment career opportunities at work The employees with a fixed duration contract enjoy the same rights, proportionally, with the employees with an indefinite duration contract”.
- Prohibition of discrimination against union representatives (*Article 181/3*) and the non-consent of the representatives of the trade union organization for the termination of the contract, if the termination of the contract violates the principle of equal treatment (*Article 181/4*);
- Prohibition of discrimination due to participation or not in the strike (*Article 197/4*)

The Criminal Code underwent significant amendments in 2013 regarding the protection of the LGBTI community, as follows:

- Provision as an aggravating circumstance for the punishment of a crime, the inclusion of sexual orientation as a new ground when the criminal offense was committed incited by motives related, inter alia, to this ground. (Article 50/ j) Specifically, it is provided that: "The following circumstances aggravate punishment: j) the commission of the offence due to motives related to gender, race, color, ethnicity, language, gender identity, sexual orientation, political, religious, or philosophical convictions, health status, genetic predispositions or disability."
- Violation of the equality of citizens (Article 253) provides for the punishment when the discrimination is committed by a worker holding a state function or public service conducted because of his capacity or during its exercise, when the discrimination is based upon origin, sex, sexual orientation or gender identity, health situation, religious or political beliefs, trade-union activity or because of belonging to a particular ethnic group, nation, race or religion, which consists in creating unfair privileges or in refusing a right or benefit deriving from law.
- Inciting hate or disputes (Article 265) includes sexual orientation as a protected ground from discrimination, as well as extending its scope to intentional dissemination or distribution of such content, by any means or forms, that incites hate or dispute. "Inciting hate or disputes on the grounds of race, ethnicity, religion or sexual orientation, as well as intentional preparation, dissemination or preservation for purposes of distributing writings with such content, by any means or forms, shall be punishable by imprisonment of from two to ten years of imprisonment".

Family Code. The legal status of a couple is related to a number of legal consequences in various areas of life. In Albania, marriage can still be concluded between a man and a woman who are 18 years or older. Same-sex marriages are not yet accepted, however, in everyday life, the rights deriving from cohabitation are important for renting an apartment, for insurance contracts, for social benefits, etc. Cohabitation is defined as a de facto union between a man and a woman living as a couple, who live a stable and continuous life together.

The Code of Administrative Procedures provides as one of the general principles the principle of equality and non-discrimination (Article 17), according to which: "1. The public body exercises its activity in accordance with the principle of equality" and "3. The public organ shall, during the exercise of its activity, avoid any discrimination in the act of distinguishing or excluding one individual over the others on grounds of gender, race, color, ethnicity,

citizenship, language, gender identity, sexual orientation; political, religious or philosophical beliefs; economic, social or educational status; pregnancy, parentage, parental responsibility, age, family or marital status, civil status, residence, health condition, genetic predisposition, disability, belonging to a particular group, or any other ground”.

Regarding the means of seeking evidence in the framework of the administrative investigation, the CAP has provided a special regulation that makes it possible to shift the burden of proof on cases of discrimination according to international standards (Article 82, paragraph 2). This principle explicitly sanctions that: “In cases where the party presents evidence on which it bases claims for discrimination, and based on which it may be presumed that there was discrimination, the other party and/ or the public organ shall be obliged to prove that the facts do not constitute discrimination, regardless of the duty of the administration to make available to the parties the evidence under its possession”.

Code of Civil Procedure, where the latest amendments through Law No. 38/2017 have not changed the provisions on the burden of proof during the civil proceedings, in cases where the court considers a case of discrimination, a requirement of the EU Directives in the field of equal treatment and non-discrimination. Law No. 10 221, dated 04.02.2010 "On protection from discrimination", in Chapter VI "Procedures before the court" has provided for the shifting/ distribution of the burden of proof in cases where the court considers a case of discrimination, contrary to the general principle of the burden of proof, according to which the obligation to prove the facts necessary to prove the claim is of the party who asserts it. Law No. 10 221/2010 applies to both the public and the private sector. The distribution of the burden of proof regarding discrimination cases in the public sector has been harmonized and regulated by the Law "On the organization and functioning of administrative courts and the adjudication of administrative disputes", the Code of Administrative Procedures (new Code), as well as recent amendments to Labor Code. In order to regulate and align the shift of burden of proof in discrimination cases even in the private sector, it is necessary to add such a provision in the Code of Civil Procedure.

Code of Criminal Justice for Children, approved by Law No. 37/2017, effective from 1 January 2018, contains special provisions on criminal liability of children, procedural rules relating to investigation, prosecution, court proceedings, execution of criminal sentences, rehabilitation or other measures involving a child in conflict with the Law, as well as a child victim and/ or witness (s) of the criminal offense. The Principles of Juvenile Criminal Justice, among others, in Article 11 provide "Principle of protection against discrimination", that:

- *"1. The rights deriving from this Code are guaranteed without any discrimination to any juvenile in conflict with the Law, victim or witness, irrespective of gender, race, color, ethnicity, language, gender identity, sexual orientation, political, religious or philosophical beliefs, economic situation, educational or social status, pregnancy, parentage, parental responsibility, family or marital status, residence, health status, genetic predisposition, disability, belonging to a particular group and any other status of the juvenile, parents or legal representatives of the juvenile",*
- "2. The rights of the juvenile, provided in this Code, are protected from all forms of discrimination based on one of the grounds provided in point 1 of this Article".

Protection against discrimination of any juvenile in conflict with the Law, victim or witness, parents or legal representatives of the juvenile, is guaranteed for all grounds of discrimination listed by law, but not exhaustive, as well as is guaranteed the protection for all forms of discrimination, which is in full compliance with the provisions of Article 1 and 3 of Law No. 10 221/2010 "On Protection from Discrimination".

Law No. 18/2017, "On the rights and protection of the child", effective since June 2017, sets forth the rights and protection that every child enjoys, the responsible mechanisms and authorities which effectively guarantee the exercise, the respect and the promotion of these rights, as well as the special protection of the child (Article 1).

The principles on which child protection is based include: 1. The child shall be entitled to rights and these rights are universal, inalienable, indivisible, interdependent and progressive. The best interest of the child shall be the primary consideration in any child-related actions. 3. Equality and non-discrimination. 4. The primary responsibility of the parent and guardian shall be to secure the living conditions, the proper upbringing, the development, the well-being, the training and education of the child. 5. Division of responsibilities between the parent or the guardian, state authorities and society for the protection of the child. 6. Every child shall live and grow up in a proper family environment and the separation of the child from the family must be the last resort. 7. Decentralization of child protection services, intersectional intervention and partnership among the public and non-public institutions authorized by law. 8. Provision of tailored and specialized service to every child. 9. Respect for the dignity, honor and personality of the child. 10. Participation, hearing and respecting the views of the child, in accordance with the age and maturity to understand. 11. Guaranteeing stability and continuity in the care, upbringing and education of the child by considering ethnic, religious

cultural and linguistic background. (Article 5). This law provides for a special regulation for children with disabilities (Article 32) and those belonging to national minorities (Article 33).

Law No. 9970, dated 24.07.2008 "On Gender Equality in Society" regulates fundamental issues of gender equality in public life, the protection and equal treatment of women and men with regards to equal chances and opportunities for the exercise of their rights, as well as their participation and contribution in the advancement of all social spheres (*Article 1*). The aim of this law is to ensure effective protection from gender discrimination as well as any other form of behavior that encourages gender discrimination; and to define measures guaranteeing equal opportunities among men and women to eliminate gender based discrimination in any of its forms (*Article 2*). Among other things, this law prohibits discrimination on the grounds of gender, providing that *"1. Any treatment of a person less favorable on the ground of his/her gender, compared with the treatment that is made, was made or would have been made to a person of the opposite gender in a similar situation, shall constitute direct gender discrimination and shall be prohibited (Article 6).*

Moreover, this law provides for equal protection and treatment, based on gender in employment relationships; in education and training; and in the media. The bodies responsible for the progress of gender equality, provided by this law along with the respective duties are as follows: Council of ministers; National Gender Equality Council State authority responsible for the implementation of the Law and state programs on gender equality and local government bodies.



**THIS LAW
PROHIBITS
GENDER
DISCRIMINATION**



Law No. 96/2017 "On the Protection of National Minorities in the Republic of Albania", in force from November 2017, regulates the exercise of the rights of persons belonging to national minorities in the Republic of Albania, in accordance with the principles provided in the Constitution, the Framework Convention of the Council of Europe for the Protection of National Minorities, ratified by Law No. 8496, dated 03.6.1999 and international agreements in the field of human rights, to which the Republic of Albania is a party. This law aims to ensure the exercise of the specific rights of persons belonging to a national minority required to protect the distinctive identity of national minorities as an essential component of an integrated society and guarantee non-discrimination and full equality before the Law (*Article 2/1*)

Article 8 stipulates that: **"1. Any discrimination against any person due to his or her affiliation in a**

national minority. 2. Public, central and local institutions shall adopt and implement the necessary measures: a) to guarantee full and effective equality in economic, social, political and cultural life between persons belonging to a national minority and those belonging to the majority; b) to protect persons belonging to national minorities from threats, discrimination, hostility or violence due to their distinct cultural, ethnic, linguistic, religious or traditional identity; c) to strengthen intercultural dialogue; ç) to foster mutual respect, understanding and cooperation among all citizens of the Republic of Albania, regardless of their distinct cultural, ethnic, linguistic, religious or traditional identity. 3. Measures adopted in accordance with paragraph 2 of this article shall not constitute acts of discrimination." This law also provides for the recognition of national minorities, according to a certain procedure and lists the rights and freedoms of national minorities in the Republic of Albania.

Based on this law, the Committee for National Minorities was established, as a central institution under the Prime Minister, in order to ensure the protection and promotion of the rights and interests of national minorities, in accordance with the provisions of this law and applicable law.

Law No. 111/2017 "On legal aid guaranteed by the state" defines the forms, conditions, procedure and rules for the organization and administration of legal aid guaranteed by the state, in order to protect the fundamental rights of the individual and his legitimate interests. ***The principles of legal aid stipulate that the provision of legal aid is based, inter alia, on principles such as: equal access of individuals to legal aid; equality and non-discrimination of individuals who enjoy the right to legal aid as well as the protection of the rights of vulnerable persons.*** (article 4) This law has provided for special categories of legal aid beneficiaries, according to which: Legal aid is provided to the following persons, regardless of their income and assets: a) victims of domestic violence; b) sexually abused victims and human trafficking victims, at any stage of a criminal proceeding; c) minor victims and minors in conflict with the law, at any stage of a criminal proceeding; ç) children living in social care institutions; d) children under guardianship who request to initiate a proceeding without the approval of their legal guardian or against their legal guardian; dh) persons that benefit from the payment for disability in compliance with the provisions of the law on social aid and services, including also persons that benefit from the status of blindness; e) persons undergoing involuntary treatment in mental health service institutions according to the provisions of the legislation in force on mental health; ë) persons undergoing voluntary treatment in mental health service institutions for serious mental diseases; f) persons against whom the removal or restriction of the capacity to

act is requested, at any stage of this proceeding; g) persons with removed or restricted capacity to act who request to initiate a proceeding against their legal guardian, for regaining the capacity to act without the approval of the legal guardian; gj) persons who are beneficiaries of social protection programs; h) persons to whom the right has been infringed through an action or inaction that constitutes discrimination on the basis of the decision of the competent organ, according to the legislation in force for protection from discrimination (Article 11).

Law No. 93/2014 "On the Inclusion and Accessibility of Persons with Disabilities", aims to guarantee the promotion and protection of the rights of persons with disabilities to enable their full and effective participation in all spheres of society, on an equal term with others, enabling autonomy and independent living for all persons with disabilities, through the provision of assistance and support.

The law provides definitions of concepts such as "Discrimination against persons with disabilities", "Denial of reasonable accommodation" or "Reasonable accommodation" which are in line with the definitions of Law 10221/2010 "On Protection from Discrimination". ***The basic principles of this law, among others, are: a) non-discrimination, which guarantees that persons with disabilities are not treated differently, based on the disability they have; b) equality, including gender equality, which ensures that persons with disabilities have equal opportunities (Article 4)***

The application of this law in accordance with the Convention on the Rights of Persons with Disabilities, is monitored by the CPD in implementation of the obligations set out in Law No. 10 221, dated 04.02.2010 "On Protection from Discrimination".

Law No. 44/2012 "On mental health", as amended, defines the procedure and conditions for the protection of mental health, through the provision of health care, the provision of a social environment suitable for persons with mental health disorders and through preventive policies for the protection of mental health (Article 2). Definitions include the term "discrimination" which is defined in accordance with Law No. 10 221/2010 "On Protection from Discrimination" (Article 3)

The general principles of mental health care services provide, according to Article 5/1, letter (a), equal and non-discriminatory treatment of persons with mental health disorders

in order to respect physical integrity and human dignity. *Article 8 provides for protection against discrimination, according to which "Persons with mental health disorders are provided with effective protection against discrimination and any form of conduct that promotes discrimination, in accordance with this law and applicable law, in this field." The law is generally in line with Article 25 and other articles of the CRPD in terms of services provided for the treatment of persons with disabilities and the protection of their rights. Exceptions are Article 9 which provides for the removal or restriction on the capacity to act and Articles 21-25 on involuntary treatment, which are not in accordance with the CRPD.*

Law No. 7889, dated 14.12.1994 "On the status of the occupational invalids", as amended, provides that *"Society and the state protect the disabled, so that they participate in social life in the same way as others, to ensure their economic level necessary to live in a dignified manner, to have living conditions, to use the external environment, to have a suitable job, as well as to be provided with normal opportunities for medical treatment, education and leisure and entertainment activities" (Article 2).* This law provides some facilities for individuals who enjoy the status of occupational invalid, such as: equipping with: a) motorized mobility vehicles, including cars and various orthopedic devices; b) with special hearing and visual devices; c) with cardiac devices, etc.; the paralyzed and severely disabled who do not move is provided free medical care; state and private means of transport is free for disabled, while travelling by state and private intercity means is 50 percent of the ticket price; disabled people are favored in attending vocational training and re-qualification courses, as well as attending university.

Law No. 8098, dated 28.03.1996 "On the status of the blind", as amended, provides that *all fully or partially sighted persons, whose condition is born or acquired, and who, according to the medical criteria, are unable to work under normal conditions, are eligible to receive this status and the benefits deriving from it (Article 1).* The State shall protect the blind from all types of exploitation, discrimination, abuse, insult, and ridicule. When these constitute a criminal offense, the initiative to file a criminal case, in addition to the guardian, can be taken by the prosecution body or the organization which takes care of them or in which they belong *(Article 3)*

Law No. 8626, dated 22.6.2000 "Status of paraplegic and tetraplegic invalid", as amended, provides that *all paraplegic and tetraplegic invalids, regardless of age, time, location of the accident and moment of insurance (Article 1)* are eligible to

these rights. The state provides conditions for paraplegic and tetraplegic patients to participate in social life in the same way as others, providing them with an economic level necessary to live in a dignified manner, appropriate housing, living and working conditions, as well as it provides normal opportunities for medical treatment, education, leisure, entertainment and sports activities. (*Article 3*) The state protects paraplegic and tetraplegic patients from all forms of exploitation, discrimination, abuse and insult (*Article 4*). This law also provides some facilities and benefits for persons who enjoy this status.

Law No. 44/2016 "On Some Addenda and Amendments to Law No. 9355, dated 10.03.2005, "On social assistance and services", as amended, in accordance with the standards of the Convention on the Rights of Persons with Disabilities (CRPD), as well as Law No. 93/2014 "On the inclusion and accessibility of people with disabilities", has integrated the concepts of "Bio-psycho-social assessment" and "Multidisciplinary assessment commission of disability". Law has:

- included unaccompanied minor asylum-seekers as beneficiaries of social services.
- determined that the payment of beneficiaries, classified by the decision of Medical Commission for Determining Working Ability (MCDWA) in disability groups, is terminated after 48 months of employment, keeping the persons in the scheme for another 24 months, contrary to the previous legal provision.
- also provided for the right of appeal in court.
- determined that applicants for economic assistance and persons with disabilities, who claim that a legal right has been violated and/or denied, enjoy the right to file a lawsuit in court, in accordance with the provisions made in Law No. 49/2012 "On the organization and functioning of administrative courts and the judgment of administrative disputes."

Law No. 121/2016 "On Social Care Services in the Republic of Albania" sets forth the regulations on the provision and delivery of social care services which are useful for the well-being and social inclusion of individuals and families in need of social care. (*Article 1*)

The law determines:

- the type of benefits and facilities,
- the individuals and groups of individuals who fulfil the conditions to benefit
- and the procedures to apply for and to be granted the rights of social care services, as well as the role and responsibilities of public and non-public bodies entrusted with the enforcement of the law (*Article 2*).
- provides a definition of discrimination, which is in line with the Law "On Protection from Discrimination" (*Article 3, point 19*)
- provides that social services are administered on the basis of

the universal principles in the field of protection of human rights and particularly based on these fundamental principles, among other things, the principle of non-discrimination according to which *"It shall be prohibited any form of discrimination of the beneficiaries of social care services based on the grounds mentioned in the legislation in force on protection against discrimination."* (Article 4/ë)

Law No. 22/2018 "On social housing" has as object and purpose the definition of administrative rules and procedures for the ways of planning, provision, administration and distribution of social housing programs, in order to create opportunities for adequate and affordable housing, relying on the solvency of families in need of housing and the assistance of responsible state institutions.

The law envisages the principle of non-discrimination, as one of the principles of housing policies, explicitly stating that:

"1. The rights deriving from this law are guaranteed without any discrimination to any individual, regardless of gender, race, color, religion, ethnicity, language, gender identity, sexual orientation, political, religious or philosophical beliefs, economic, educational, social status, pregnancy, parentage and/or parental responsibility, family or marital status, marital status, health status, genetic predisposition, disability, belonging to a particular group and any situation that has discriminatory consequences. 2. No one can be denied the right to receive housing in one of the social housing programs for the reasons mentioned in point 1 of this Article, unless a social housing program is specifically programmed and expresses the provision of aid of individuals or groups in need." (Article 10)

Law No. 60/2016 "On signaling and protection of whistleblowers", as amended, aims, on one hand, to prevent and fight corruption, both in the public and private sector, and on the other hand, to protect individuals who signal actions or practices suspected of corruption in their workplace. Based on the activity of the CPD institution so far, it has resulted that individuals who denounce or signal corrupt actions occurring in their workplace, have faced discriminatory situations. The legal protection of persons who signal suspected corrupt actions or practices is a positive development in the field of protection against discrimination.

Law No. 69/2012 "On the pre-university education system in the Republic of Albania", as amended, has provided for "sexual orientation" as grounds of discrimination. Article 5/1, although does not include all the grounds provided in Article 1 of the Law "On

Protection from Discrimination "has left enough room for the implementation of the latter by the pre-university education system. Article 5, which provides for the right to education, explicitly states that "1. In the Republic of Albania, the right to education is guaranteed to Albanian nationals, aliens, and stateless persons, without being discriminated against on the grounds of gender, race, color, ethnicity, language, sexual orientation, political or religious beliefs, social or economic status, age, place of residence, disability or others, set forth by the Albanian legislation." The general principles in Article 6/3 sanction that: "Protection against any form of action or omission, which may cause discrimination, maltreatment or moral harm, shall be provided to students and educational employees in the pre-university educational system".

Law No. 81/2020 "On the rights and treatment of prisoners and detainees", provides for the observance of human rights, in Article 5, in which prisoners shall be treated with dignity and respecting fundamental rights in accordance with applicable law, as well as international acts binding on the Republic of Albania. In any case, torture, inhuman, degrading or humiliating treatment of a prisoner is prohibited. Prisoners shall be treated equally,

without bias and without discrimination on any ground provided by the legislation in force on protection against discrimination. Juvenile prisoners shall be treated with respect for their fundamental rights and freedoms based on their best interests, social reintegration, education and prevention of recidivism of criminal offenses by the juvenile, in accordance with the conditions and rules provided for in the Code for Criminal Justice for Children. Women prisoners shall be treated with respect to their fundamental rights and freedoms and without discrimination on any ground provided by legislation in force on protection from discrimination, by preventing any act of gender-based violence that results in physical, sexual or psychological harm, suffering or any other form of abuse and ill-treatment, punishable under the legislation in force.

Prisoners with mental health disorders shall be guaranteed equal treatment, without discrimination, while respecting their physical integrity and human dignity. Their treatment shall be carried out according to health standards

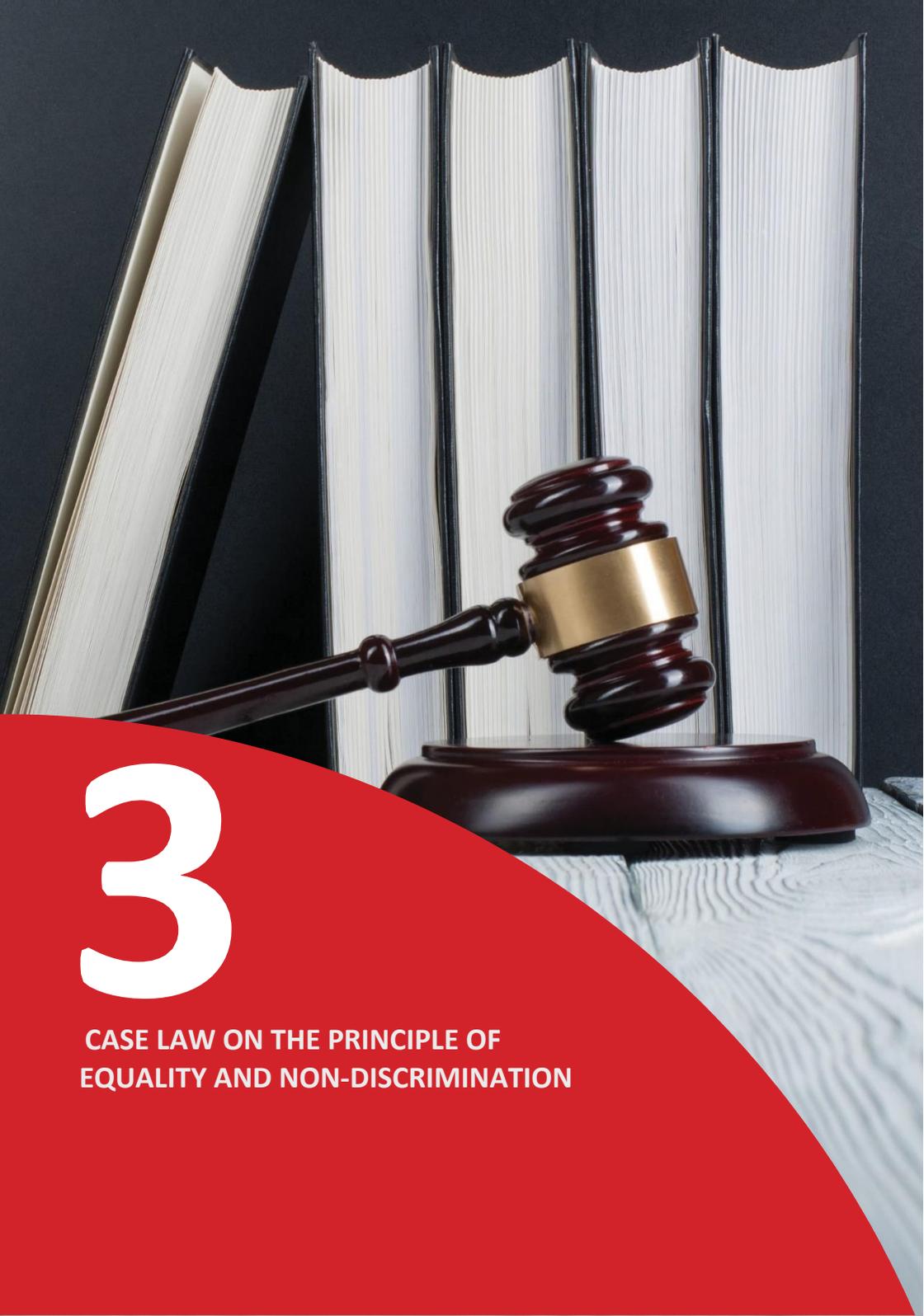
**IN ANY CASE,
TORTURE,
INHUMAN,
DEGRADING OR
HUMILIATING
TREATMENT OF A
PRISONER IS
PROHIBITED**

which apply to the categories of persons with mental health disorders, outside the penitentiary institutions. Prisoners with disabilities shall be guaranteed basic human rights and freedoms, treatment without discrimination of any kind due to disability, by meeting the specific needs for their capacitation and rehabilitation, taking into account the standards of the legislation in force on the inclusion and accessibility of people with disabilities.

Prisoners foreign nationals or stateless persons shall be treated taking into account their special situation and individual needs. The authorities of the institution shall take positive actions to avoid discrimination and to solve specific problems that these persons face in the penitentiary institutions during transfer and after release. Special measures, which are necessary to be applied for the respect the rights and freedoms of certain groups of prisoners, shall not be considered discrimination within the meaning of this law. In addition to the provisions of this article, prisoners belonging to marginalized categories shall be treated in accordance with the requirements of international human rights standards, taking measures so that their specific needs are taken into account during their stay in the institution and support their reintegration into society. Detailed rules for the cases and the manner of carrying out the various legal treatment of prisoners are defined in this law, in the general regulation of prisons and the internal regulations of each institution.

Law No. 97/2013 "On audiovisual media in Albania", as amended in Article 32 stipulates that *audio and/ or audiovisual media services shall not broadcast programmes with content that incite hate on grounds of race, gender, religion, ethnic, national, and any other form of discrimination.* Moreover, Article 42, paragraph 3/b provides that the communications with commercial nature in audio-visual broadcasts are not allowed include or support discrimination on sex, race, ethnic origin, national, age, belief, religion, incapacity or sexual orientation grounds. Also, according to Section 4/10 of the Code of Ethics Guidelines for Audiovisual Broadcasting approved by the Board of the Audiovisual Media Authority (AMA), the broadcast information shall not contain discriminatory content related to grounds such as race, color, ethnicity, language, gender identity, sexual orientation, political views, religious or philosophical beliefs, economic, educational or social status, or for any other grounds.

The state has the obligation to create opportunities for a dignified life of citizens. The legal framework that implements these social policies must be characterized by clarity, comprehensibility, sustainability and harmonization. These features of the legislation guarantee legal certainty, a constitutional principle which also interacts with the principle of the welfare state. Legal guarantees are effective and not illusory if they are interpreted uniformly by the courts and in accordance with international standards. This remains a necessity for real equality.



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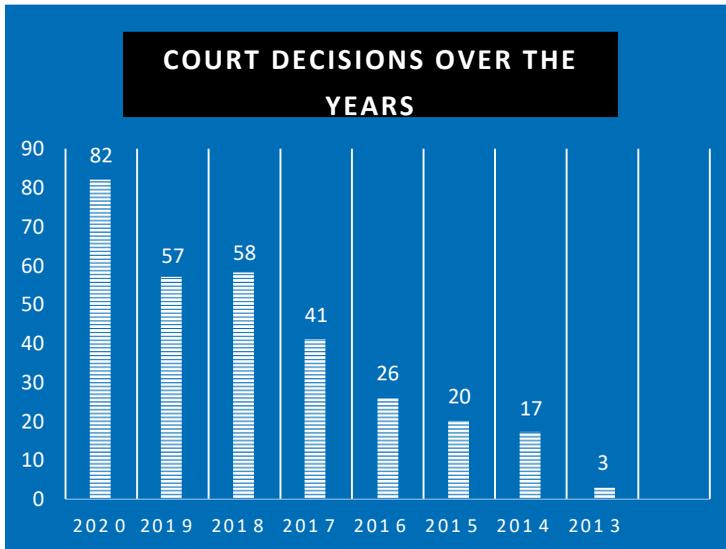
**CASE LAW ON THE PRINCIPLE OF
EQUALITY AND NON-DISCRIMINATION**

SECTION III

COURT PRACTICE ON THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION

Areas, Protected Grounds and Forms of Discrimination

Developments in democratic societies must go hand in hand with respecting and enhancing guarantees of fundamental rights and freedoms, as the foundations of the rule of law. The dynamic evolution of the recognition, guarantee and practical application of the principle of equality and non-discrimination in Albania proves the fact that the challenges that accompany the effective enjoyment of this right remain numerous. One of them remains the inconsistent interpretation and different application of constitutional and legal guarantees in practice.



In the first years after the establishment of the CPD there are just a few court decisions dealing with issues of equality and non-discrimination. Steady growth is recorded in the following years, which culminates in 2020 with the highest number of decision-making.

In fact, this growing tendency of judicial review of discrimination claims is not accompanied by the consolidation of judicial practice, nor by a higher level of protection or enrichment with new guarantees, or expanded interpretations of protected grounds or various forms of discrimination. Good practices are not widely involved in case law, while most decisions leave room for legal debate regarding the interpretation of legal guarantees.

The decisions given especially in the period 2013 - 2014 are characterized by the lack of concrete references to Law No. 10 221/2010 "On Protection against Discrimination", without in-depth legal analysis or references to international practice, despite the developments of international equality protection during those years. Even those decisions that accept discriminatory behavior as grounded are characterized by lack of structured approach according to the discrimination test, while shifting the burden of proof is not taken into account. Even now, although the legal framework is characterized by a generally harmonized guarantee approach provided by different laws, aiming at an effective and realistic protection against discrimination, the various legal regulations regarding the shifting of the burden of proof in the civil proceedings which deal with claims of discrimination still remain problematic.

Discriminatory practices over the years are proven mainly in administrative ways by the CPD, while judicial practice (civil and administrative) is constantly fluctuating in relation to the resolution of cases, legal interpretations which contradict each other, therefore creating confusion and uncertainty in enjoyment of the rights provided by the legal framework in force. Discrimination exists to a considerable extent mainly in the field of employment, followed by education and the provision of health services, which confirms the problems and findings identified in the Annual Reports of the CPD as follows:

- *"Discrimination in the field of employment remains one of the fields with a high tendency of unequal and less favorable treatment of employees without having an objective and reasonable justification from both public and private institutions. Complaints that have been handled in the field of employment have had as alleged ground of discrimination: political beliefs, health status, place of residence, disability, etc.*
- *Discrimination in the field of education is claimed to occur by public entities such as central education institutions and local education institutions. The object of the complaints filed in the CPD regarding discrimination in the field of education is the exclusion of communities in need from enrollment fees in schools and kindergartens, the appointment of an assistant teacher for children with disabilities, the access of children with disabilities to special schools, the phenomenon of bullying in schools, etc. The main grounds claimed in the complaints are disability, race, etc.*
- Discrimination in the field of services and goods is accompanied by complaints that mainly concern the non-provision of necessary services to different individuals, who belong to different communities or vulnerable groups, by local government units. Most

of the complaints are also addressed to the central administration institutions, where the object of the complaints consists in non-provision or guarantee of a series of services such as health service and treatment with the necessary medications, etc. The main reasons for the complaints in the field of services were: race, economic status and disability.”¹⁰²

Vulnerable groups are found to be significantly exposed to discriminatory practices, which come as a result of negligent, abusive, guilty and inactive behavior of the public and private responsible authorities consolidating a false reality with high social and financial costs.

Direct discrimination has occurred most often as a result of apparent differences, preferences or exceptions made on the basis of one or more protected grounds such as *political belief, religion, pregnancy, age, gender, marital status, health status, disability, affiliation to a particular group, education, companionship, victimization, or even any other ground such as motherhood*. Court treatment of the meaning of protected grounds is generally minimal, thus providing an insufficient contribution in clarifying these grounds, the limits of their application, or even cases where different treatment is justified as the only way to mitigate real inequalities.

Indirect discrimination is found in a small number of cases which have been analyzed. The small number of cases is justified to some extent by the very features of this form of discrimination, which being more hidden and unintentional, is more difficult to be addressed. Alleged or proven cases of indirect discrimination are mainly related to situations, legal and sub-legal measures or practices, which at first sight seemed neutral, but in fact raised a reasonable suspicion that they bring discriminatory consequences, which have been in fact confirmed by CPD in a number of decisions. Less favorable treatment has occurred due to the lack of consolidated institutional practices in the provision of certain services or even due to problems arising from the content of regulations applicable to recruitment procedures in some institutions of higher education. In these cases the discrimination was claimed on the following protected grounds: *educational status, age and language*.

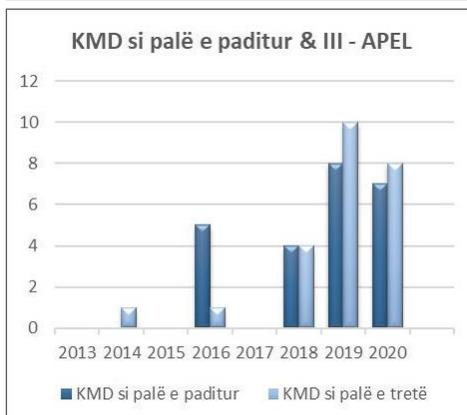
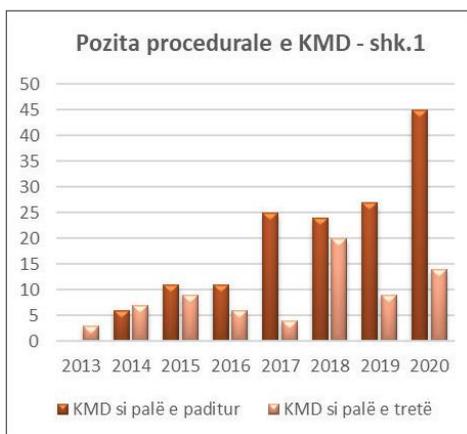
CPD protection practices provide values during legal proceedings in terms of the clarity of the concepts and the provision of a consolidated dimension of efforts to protect equality and non-discrimination. Despite the legal opinions of

101 <https://www.kmd.al/wp-content/uploads/2020/09/Raporti-KMD-6-mujori-i-l-re-i-vitit-2020.pdf>

the CPD, based on legal analysis rich in interpretations of legal concepts and updated jurisprudence of international courts, the approach of the courts remains generally rigid. Indirect discrimination remains unaddressed, despite ongoing international protection developments, which has made it even more difficult to understand and apply it in practice.

Forms of discrimination that are claimed and found to be violated include: direct and indirect discrimination, instruction on discrimination, harassment, denial of reasonable adoption, discrimination on the grounds of companionship and victimization.

Statistical data confirm that the tendency to challenge judicially the decisions given by the CPD remains high, mainly within the administrative judicial jurisdiction, both by public and private institutions. The CPD has participated in court proceedings with various procedural qualities, mainly as a respondent, as well as in the capacity of a third person under trial.



Discrimination in the field of employment has been the subject of many judicial proceedings, some of which provide a comprehensive picture of protection against discrimination. The analysis identifies these decisions as "*good practices*", distinguishing them for interpretive approaches, as well as the depth of legal analysis of domestic legislation enriched with international developments. However, judicial practice in this field also reveals problems of different interpretation and application of legal guarantees, which are addressed in the following analysis, through a comparative approach between international protection guarantees in the field of employment and the degree of recognition and reflection of them in the decision-making of the Albanian courts.

The Law "On Protection from Discrimination" provides special protection for both employees and the self-employed. **Discrimination against a person in relation to his or her right to employment is prohibited on grounds of distinction, differentiation, limitation or exclusion on the basis of gender, race, color, ethnicity, language, gender identity, sexual orientation, political, religious or philosophical beliefs; economic, social or educational status; pregnancy, parentage, parental responsibility, age, family or marital status, civil status, residence, health condition, genetic predisposition, disability, belonging to a particular group, or on any other ground.**

According to Article 12, protection against discrimination in terms of employees includes the following stages:

- a) announcement of vacancies;
- b) recruitment and selection of employees;
- c) treatment of employees in the work place, including their treatment in establishing or changing working conditions, compensation, benefits and the work environment, treatment related to professional training or during disciplinary proceedings, or related to dismissal from work, or termination of the employment contract;
- ç) membership in unions and the possibility of benefiting from the facilities that such membership secures.

With regard to the category of self-employed persons, the law provides protection against discrimination in relation to the conditions for profession admission and obtaining permits to practice the profession.

The above protection is supplemented by providing the obligations of the employer, who is obliged to:

- a) implement, protect and promote the principle of equality and prohibition of any kind of discrimination;
- b) take necessary measures, including disciplinary measures, to protect employees against discrimination and victimization, within one month from the time of becoming aware thereof;

c) respond effectively and in compliance with this law to complaints received for discrimination committed by his or her employees, within one month from receiving them.

The obligation of the employer to raise awareness on issues of equality and non-discrimination has already been raised to the level of the Law "On Protection from Discrimination", which defines the obligation not only to post it in premises with public access at the workplace but also to enable a full understanding of it by his/her own means or with the assistance of specialized entities (Article 13 of LPD).

Non-discrimination in employment, despite some differences, enjoys protection under EU law and the ECHR system.

Under EU law, protection against discrimination in the field of employment is extended across all the protected grounds provided for under the nondiscrimination directives. *It covers access to employment, conditions of employment, including dismissals and pay, access to vocational guidance and training, and worker and employer organizations.* The concept of "access to employment" under the non-discrimination directives has been interpreted widely by the ECJ. It applies to a person seeking employment,¹⁰³ and also in regard to the selection criteria¹⁰⁴ and recruitment conditions¹⁰⁵ of that employment.¹⁰⁶ The ECJ has widely interpreted the concept of employment and working conditions, including in this field issues such as workplace nurseries;¹⁰⁷ the reduction of working time,¹⁰⁸ or also the conditions for granting parental leave¹⁰⁹.

Referring to the ECHR, it is concluded that the right to employment is not expressly guaranteed, however the jurisprudence of the ECtHR held that Article 8 also applies in the field of employment, based on certain circumstances.¹¹⁰ The ECtHR has also prohibited discrimination on the basis of membership of

102 C-415/10, Galina Meister v. Speech Design Carrier Systems GmbH, 19 April 2012.

103 C-317/14, European Commission v. Kingdom of Belgium, 5 February 2015

104 C-416/13, Mario Vital Perez v. Ayuntamiento de Oviedo, 13 November 2014.

105 Racial Equality Directive, Article 3 (1)(a); Employment Equality Directive, Article 3 (1)(a); Gender Equality Directive (revised), Articles 1 and 14 (1)(a).

106 C-476/99 H. Lommers v. Minister van Landbouw, Natuurbeheer en Visserij, 19 March 2002.

107 C-236/98, Jamstalldhetsombudsmannen v. Orebro lans landsting, 30 March 2000.

108 C-222/14, Konstantinos Maistrellis v. Ypourgos Dikaiosisynis, Diafaneias kai Anthropinon Dikaionaton, 16 July 2015.

109 In the case of I.B. v. Greece, the applicant had been dismissed from his job, following complaints by staff members that he was HIV-positive. The ECtHR found that issues concerning employment and situations involving persons with HIV came within the scope of private life, and held that the applicant's dismissal had been in breach of Article 14 of the Convention taken in conjunction with Article 8. The ECtHR based its conclusion on the fact that the Court of Cassation had failed to adequately explain how the employer's interests in maintaining a harmonious working environment had prevailed over those of the applicant. In other words, it had failed to balance the competing interests of the applicant and the employer in a manner required by the Convention

a trade union, in which the right to form trade unions is guaranteed as a stand-alone right in the Convention.¹¹¹ The same approach is aimed at EU law, where the guidelines require the prohibition of discrimination not only in the terms of membership, but also in relation to the benefits deriving from these organizations.¹¹²

The analysis of court decisions aimed to identify the trend that appears in terms of the riskiest stages of discrimination in an employment relationship, the interpretive approaches of the courts on the claims of discrimination and their harmonization with international jurisprudence.

The research showed that the addressed cases of discrimination are fewer in number in the recruitment phase, while they constitute the majority of cases during the continuation of employment relationships or at the end of these relationships. Less favorable behavior of the employer is more often found in elements such as: *pay reductions, working and rest hours, paid holidays, protection during pregnancy and after childbirth, job security, assignment to lower positions, performance appraisal and promotion, training opportunities, and employment termination.*

The attitude of the employers has been both negative and opposing, even refusing in terms of the execution of the decision of the CPD, requesting in some cases the suspension of the temporary execution of the court decision, in cases when the court has confirmed the discriminatory situation and has set fine. Employers have objected to the discriminatory behavior by trying to justify the different treatment by the lack of formal criteria required for the position at the recruitment stage, or by the needs of organizational restructuring or collective redundancies. However, during the administrative and the judicial review, the opposite has been proven: that the positions that have been claimed as suppressed have in fact been filled by other persons of the same or opposite gender, with the same criteria of education, professional qualification, seniority at work just like the discriminated party, or that the new organizational restructuring has been the same as the old one, without any change in the number of employees, their titles or even their duties. Especially in cases related to the protected grounds of political belief, which constitute the majority of the decisions analyzed, employers limit themselves to the argument that they do not have any data on the political membership of the employees or their political activity and if they would have such data, it would affect the protection of personal data.

110 Demir and Baykara v. Turkey [GC], No. 34503/97, 12 November 2008

111 Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (1999) 566 final, 25.11.1999..

The number of administrative lawsuits initiated by the employer with the claim of the absolute invalidity of the CPD decision are the highest in number. The illegality of the decision of the CPD is opposed in whole or in part, especially in the part that provides for the measure of return to work, without thus opposing discriminatory behavior in itself.

The object of review in court appears as follows: (i) the finding of discrimination as a sole claim, (ii) the finding of discrimination accompanied by the request for reinstatement in the workplace, (property and existential) damage compensation as a result of unreasonably termination of the employment relationships, (iii) damage compensation.

The characteristics of lawsuits, whose object is finding discrimination in employment, are clearly analyzed in a few decisions. Their position is as follows: "The scope of action of this institute extends not only to the termination of employment relationships in an irregular manner, or even to those that formally seem based on law from a legal point of view, but also to the different treatment of the employee during the occupation, specifically related to transfers, reduction of salary, lack of re-employment despite the decision given for the recovery of the state of illegality given by the CPD." (See decisions No. 911, dated 1 11 2018 and No. 116, dated 26.02.2019 of the Court of Appeal of Vlora).

The legal analysis of the courts is mainly based on the argumentation of the legality and regularity of the actions performed to terminate the employment contract, as well as the set of facts and circumstances that have led to its termination due to (un)reasonable reasons. ***Claims of the existence of discrimination are analyzed separately, creating the impression that they are separately researched from the substance of the case, or without an organic link to it.***

Some courts consider ***that as long as the dispute between the litigants is resolved by the civil jurisdiction, it is inappropriate to have another decision by the administrative jurisdiction, as it is impossible for the employee to benefit from both the compensation recognized by the civil court and the reinstatement as a measure imposed by the CPD.***

In one of the decisions selected for this analysis, the court states that "... the termination of the employment relationship has come due to the expiry of the term expressly provided in the fixed term employment contract. No court decision was presented during the trial, which ruled that the termination of the employment relationship was illegal according to the Labor Code. Even if the termination of the employment relationship results to be illegal on the basis of a court decision, this does not automatically constitute a circumstance that leads to the conclusion that the third person has been discriminated against because of the pregnancy."

(See Decision No. 378, dated 07.02.2020, of the Administrative Court of First Instance of Tirana.)

In another decision, the claimant (employer) challenged the decision of the CPD, which found discrimination due to the political beliefs of the employee. The court draws the attention of the litigants, reasoning that: "... the object of verification in this trial is the decision-making of the respondent (CPD) in relation to the legal framework applicable to this decision. **In any case, the legal assessment of the termination of the employment relationship by the claimant against the third party is not subject to verification and assessment in this trial.** The legal assessment of the termination of the employment relationship by the claimant against the third party is not subject to adjudication and verification of this trial. This lawsuit essentially addresses the claimant's claim and the verification by the court whether the termination of the employment relationship is legal or not is neither the object nor the purpose of this trial. This moment, despite being interfered by the parties, is not taken into account by the court ... " *In fact, the decision further makes an analysis of the circumstances and facts that led to the termination of the employment contract, based on which the court reasoned that:* "... the practice applied by the claimant in terminating the employment contract of the person third is a practice that identifies employment relationship termination upon expiry of the notice period. At this moment the court distances itself from the fact whether this decision was made in accordance with the Law ... However, based on the evidence presented in trial it is proven that the procedure followed by the claimant is not that of immediate termination of the employment contract or a disciplinary procedure **"An employment contract, although it may be illegal within the meaning of the LC, does not mean that it is discriminatory."** (See decision No. 2596, dated 26.10.2020, of the Administrative Court of First Instance of Tirana).

The claim of discrimination in employment has been analyzed by a number of courts in relation to the provisions of Article 9 of the Labor Code, a provision which is characterized by harmonization with the provisions of Article 12 of the Law "On Protection from Discrimination".¹¹³ However, in the court decisions of the last years 2018-2020, there is a division of views regarding the jurisdiction of the court in addressing the dispute whether it is related to claims of discrimination in employment relationships or not. In some cases the courts, based on a strict formalist approach, analyze only the formal terms of the contract termination.

112 The Employment Discrimination Directive prohibits discrimination mainly in the context of employment (access to employment, self-employment and occupations; guidance and vocational training; conditions of employment and employment, including dismissal and pay; membership in organizations), in the other part of the categories of Article 13 EC (disability, age, sexual orientation, religion and belief)..

There are few courts that hold that despite the fact that the employer has followed the procedure for the contract termination and the notice period, this regularity has no effect on concluding whether the employee has been discriminated against or not, as termination can be found discriminatory in those cases where the guarantees of protection from discrimination have not been respected, despite the fact that the procedures provided by the Labor Code have been respected. (See Decision No. 4403, dated 04.12.2018, of the Administrative Court of First Instance Tirana).

The following analysis aims to identify the structural and substantive standard followed by the ECtHR/ ECJ and then to provide an exhaustive picture of the structural models and concrete interpretive positions of the analyzed decisions. This method aims to guide judges towards the best models that take into account the behavior of the parties, their placement in a certain context, the type and elements of legal analysis, the shift of the burden of proof, the types of evidence to be administered, being thus providing alternatives to resolving the legal challenges and dilemmas encountered in resolving these issues.

The Law "On Protection against Discrimination" contains the same regulation as Article 14 of the ECHR by not prohibiting differences in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Constitution and the Convention.¹¹⁴

Differences based on the skills required for a job position are allowed; just as special protection or support measures relating to health and pregnancy are allowed. "Differences based on skills or efforts are legitimate, wage inequalities that reflect changes in seniority at work or working hours are also acceptable." ¹¹⁵ Otherwise, a difference in treatment will be discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized ¹¹⁶ *Therefore, the ECtHR bases its analysis on a so-called "discrimination test", which is divided in two steps: firstly, it will examine the existence of a legitimate aim and, secondly, it will check the proportionality stricto sensu of the difference in treatment.* Best judicial practices which analyze and decide whether the claim of discrimination is grounded or not, take into account the above test, which is based on the presumption

113 G.M.B and K.M v. Switzerland (December), 2001; Zarb Adami v. Malta, 2006, § 73.

114 https://www.ilo.org/wcmsp5/groups/public/-ed_emp/-emp_ent/-multi/documents/publication/wcms_116342.pdf

115 Molla Sali v. Greece [DHM], 2018, § 135; Fabian v. Hungary [DHM], 2017, § 113; Abdulaziz, Cabales and Balkandali versus The United Kingdom, 1985, § 72; The Belgian Language Case, 1968, § 10 part "Right").

that not all differences in treatment – or failure to treat differently persons in relevantly different situations – constitute discrimination, but only those devoid of “an objective and reasonable justification”¹¹⁷.

Claimants in discriminatory litigation never agree that there has been different treatment, unjustified for objective and reasonable reasons. The party claiming discrimination, who according to the case is a single person or a group of persons, has to show that he or she has been treated differently from another person or group of persons placed in a relevantly similar situation, or equally to a group of persons placed in a relevantly different situation. The other person or group of persons to which the applicant claims discrimination is called the “*comparator*”.¹¹⁸ A complaint about a “low” salary is not a claim of discrimination unless it is demonstrated that the salary is lower than the salary of someone hired to perform a similar task by the same employer. Therefore, a “comparator” is needed: i.e., a person in materially similar circumstances, with the existence of the main difference between two persons being the “protected ground”.¹¹⁹

The claim submitted by the applicant claiming discrimination has to demonstrate an analogous position does not require that the comparator groups be identical.¹²⁰ Elements which characterize different situations, and determine their comparability, must be assessed in light of the subject-matter and purpose of the measure which makes the distinction in question¹²¹. In other words, the analysis of the question of whether or not two persons or groups are in a comparable situation for the purposes of an analysis of differential treatment and discrimination is both specific and contextual.¹²²

The court should begin the analysis with a detailed treatment of the claim “less favorable treatment”, seeking evidence that the protected ground is the ground of this treatment, regardless of whether it is direct or indirect.

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- 116 Molla Sali v. Greece, § 135; Fabris v. France [GC], 2013, § 56; D.H. and Others v. Czech Republic [GC], 2007, § 175; Hoogendijk v. The Netherlands (December), 2005
 - 117 Carson and Others v. The United Kingdom [GC], 2010, Varnas v. Lithuania, 2013, Kusan and Fazzo v. Italy, 2014, Fabris v. France [GC] 2013
 - 118 Handbook p.18
 - 119 Fabian v. Hungary [GC], 2017, § 113; Clift v. United Kingdom 2010, § 66
 - 120 Fabian v. Hungary, § 121
 - 121 The Court has found that remand prisoners were in a comparable position to convicted prisoners as regards conjugal visits (Varnas v. Lithuania, 2013) and long-term visits (Chaldayev v. Russia, 2019), and that men and women were in a comparable situation as regards parental leave (Konstantin Markin v. Russia [GC], 2012), prison sentencing policy (Khamtokhu and Aksenchik v. Russia [GC], 2017) and deferral of prison sentences (Alexandru Enache v. Romania, 2017).

The decision must contain an **analytical scheme** where the conclusion on the presence or absence of discrimination is reached through the following questions:

Has there been different treatment regarding the substantive right in question between the complainant on the one hand and other persons presented for comparison (selected comparator) on the other?



If so, is this difference—or lack of difference—objectively justified?

*a. Does it pursue a **legitimate purpose**??*

*b. Are the means used **proportionally reasonable** to the goal pursued?*

Judicial decisions that analyze the essence of the principle of non-discrimination are few and even fewer are decisions where claims of discrimination are based on the test of discrimination. Most of the decisions analyzed are characterized by a lack of arguments regarding the different treatment justified by an objective and reasonable justification. In some cases the courts base the presumption of discrimination on highly synthesized arguments such as: "... the claimant failed to prove an objective and reasonable justification regarding the non-examination of the request for discriminatory treatment, thus creating the conviction that the position of [the employer] was biased, and on the other hand, the complainant proves and documents that he carries one of the protected grounds." (See Decision No. 552, dated 18.02.2020, of the Administrative Court of First Instance of Tirana)

In another decision, the court, after considering the employer's appeal for the repeal of the CPD decision that found discrimination in the form of victimization of a third party due to the initiation of a lawsuit, it concludes that: "During the trial the claimant did not prove that its actions against the third person (claiming the discrimination) did not occur after his appeal to the court, or that they had a reasonable and objective justification, in other words, that these actions had to pursue a legitimate aim and the measures to achieve that aim were proportionate, justified and objective. Thus, the negative consequences for the complaining subject caused by the respondent have come immediately after his appeal in court and the expression of the latter with a decision ." (See Decision No. 3131, dated 01.12.2020, of the Administrative Court of First Instance Tirana)

Few decisions analyze the cumulative conditions that must exist in order to prove a discriminatory action by an employer. The following analytical scheme is initially found in a decision of 2015, in which the court, after listing and analyzing very briefly Articles 1, 3, 7, 12, 34, 36, 38 of Law No. 10 221/2010, reasons that: ***"Based on the provisions cited above, the court considers that in order to be subject to discriminatory treatment within the meaning of this law, the following conditions must be met simultaneously:***

- *The existence of differential treatment of persons in analogous, or relevantly similar situations;*
- *Difference in treatment occurred based on one of the grounds of Article 1;*
- *Differential treatment has brought difficulties or inability of this person to exercise the fundamental rights and freedoms provided by the Constitution, international acts or other applicable laws.*

This reasoning approach of the court, being the same as that followed by the ECtHR, must be acknowledged as constituting an important and necessary element in the analysis of discriminatory conduct. If the court is limited during the legal analysis only to this criterion this is sufficient, as the standard in this regard requires that the court must take into account the principle of shifting the burden of proof, as well as the comparator, which allows comparison with other persons in the same or similar conditions, depending on the concrete situation. The court did not continue the reasoning in the above-mentioned requirements, as the burden of proof, referring to the fact that the trial finds regulation in the provisions of the CCP, including those on the burden of proof, was left to the employee to prove that his political conviction was not the reason for the termination of the employment contract, while the court had sufficient clues on the existence of an abusive ground, as the immediate termination based on unreasonable grounds were found in another court proceedings. (See Decision No. 1599, dated 02.12.2015 of the Judicial District Court of Fier).

This "habit" of the above reasoning on the burden of proof is also confirmed by the Court of Appeals, which states that: "... the orientation of the burden of proof in the civil adjudication has not been applied by the court of first instance, which has not considered the decision of the CPD as evidence. The wrong orientation of the burden of proof has focused the judicial investigation only on the evidence presented by the claimant, although contrary to the reasoning of the court of first instance. Their analysis leads to the conclusion as the CPD did, an act that is in force even after the exhaustion of the appeal in court, that there is a strong presumption of discriminatory behavior of the respondent party in the manner of termination of the employment contract by the respondent

In cases when there is a decision of the CPD that has found direct discrimination of the claimant by the employer in relation to the treatment during the employment relationship and the termination of the employment contract, such a disposition can not be performed by the court. The latter would hold such a fact, on the condition that no administrative proceedings had been followed before..."(See Decision No. 152, dated 08.03.2018 of the Court of Appeal of Vlora).

Regarding the probating power of the CPD decision, another part of the court decisions, through their interpretive approaches, take for granted the situation of discrimination based on the argument that it has been proven by the CPD, reasoning that: *"The decision of the commissioner constitutes full and indisputable evidence that the dismissal of the claimant by the respondent was carried out in conditions of discrimination on grounds of association, civil status and political convictions of the spouse."* (See Decision No. 2247, dated 07.10.2020 of the Administrative Court of First Instance of Tirana). This approach gives probative authority to the CPD decision, however there are some other decisions, which create a wrong perception among future complainants or their defense counsels regarding the "ease" by which the court concludes on the presence of discrimination. In this category of decisions, the reasoning is limited to an *"artificial confrontation"* between the findings of the CPD and the finding that *"the employer did not present evidence to prove discriminatory treatment"* and there is no independent analysis for the court, referring to the standards, to prove the presence or absence of discrimination. (See Decision No. 3607, dated 03.10.2017, of the Administrative Court of First Instance of Tirana)

There are also decisions where the legal reasoning regarding discrimination is limited to the findings that "the administrative investigation conducted is insufficient to prove discriminatory behavior." In a decision, where the object of the trial was the request to repeal the decision of the CPD that has found discrimination due to belonging to a particular group and educational status, the court limits the reasoning on the absence of discrimination to the findings that: "... The court finds the claimant's claim to be fair regarding the fact that she proposes disciplinary measures, while their issuance is subject to another body. The claimant claimed and proved that she did not discriminate the third person in the trial with her actions, as her functional duties are different from those imposing a disciplinary measure. The respondent objected, but did not prove with his decision that the actions of the claimant have led to discrimination and unequal treatment due to work." (See Decision No. 2170, dated 02.10.2020, of the Administrative Court of First Instance of Tirana)

Another case where the CPD has not found discrimination based on educational status or any other ground, discrimination has been found by the court, which concludes otherwise, considering that: *"there has been discrimination on the ground of education, based on*

the fact that the CPD had not conducted a full investigation under Article 80 et seq. of the CAP." (See Decision No. 2186, dated 02.10.2020, of the Administrative Court of First Instance of Tirana).

There are also decisions where the content of the arguments or the analysis of the CPD, presented in writing during the trial is not reflected in the content of the decision, but the court brings to attention only the fact that *"the third party brought written claims"* raising doubts about the contradiction in trial or even the standard of reasoning of the decision, especially in conditions when the lawsuit filed by the complainant has been dismissed as unfounded. (See Decision No. 4648, dated 28.10.2020, of the Administrative Court of First Instance of Tirana).

Some courts during the legal analysis refer to the standard used by the ECtHR **on the need of a special characteristics as a reason for different treatment compared to persons in the same or similar conditions**. The cumulative conditions evidenced in the decision are listed as follows:

- *An individual has been treated in a less favourable manner*
- *Comparing how others who are in a similar situation have been treated or will be treated;*
- *And the reason for this is a special feature they have, which is included in the protected / prohibited grounds of discrimination.*

The research also identified another analytical scheme used in the following reasoning, which significantly facilitates the ability of the parties or any other court user to understand how the court has reached the conclusion of the case, thus becoming an element that increases citizens' trust in the court. Specifically, the decision raises the following issues:

- *The ground of occupation termination;*
- *Treatment of the complainant in relation to other employees;*
- *Whether this treatment had a specific ground such as the political conviction alleged by the claimant (See Decision No. 816, dated 06.03.2020, of the Administrative Court of First Instance of Tirana).*

The above reasoning is followed by several other decisions, but based on a somewhat different style, listing as cumulative conditions:

1. *There should be a differentiated treatment of the person in relation to others who are in the same or similar circumstances.*
1. *Differentiated treatment occurred for one of the protected grounds set out in Article 1 of Law No. 10 221/2010.*
2. *Differential treatment has brought about the difficulty or inability of this person to exercise the rights and freedoms recognized by the constitution, ratified international acts or other applicable laws. (See Decision No. 116, dated 26.02.2019 of the Court of Appeal of Vlora, No. 1034, dated 11 07 2019 and No. 974, dated*

Some courts follow another analytical scheme, in the interpretation of Article 3/1 of Law No. 10221/2010, identifying 4 forms of illegal behavior:

- "1- any difference, 2- any exception, 3- any restriction, 4- any preference. Illegal actions according to these forms, has been related by the law to the illegal purpose of these forms:*
1. *creating an obstacle to the exercise of a legal right on*
 2. *equal footing with the others*
 3. *makes it impossible to exercise a legal right on equal footing with the others.*

It is sufficient to admit that there has been a consequence deriving from the obstacle or impossibility of equal exercise of rights by the claimant (alleging discrimination, then the actions of the employer would qualify as discriminatory." (See Decision No. 1133, 10.12.2019 of the Judicial District Court of Berat)

Regarding the **comparator**, although small in number, there are decisions where international standards are reflected in terms of the meaning of this concept. Although the methods of interpreting the Law and the styles of legal reasoning vary, some decisions need to be brought to the attention in relation to the high standard of protection they impose, making them good reference practices.

In the case of a complainant disqualified from the competition procedure at a public university, the CPD found discrimination on the grounds of educational status. During the case adjudication, the court states that: Discrimination is characterized by differentiated treatment, therefore it must be demonstrated that the complainant is treated less favorably because of a characteristic that is included in the "protected ground". The less favorable treatment is determined by comparing the complaining subject and another person in a similar situation, who does not possess the protected characteristic, or in relation to the legal provisions in case when the comparator is absent. "(See Decision No. 2060, dated 25.09.2020 of the Administrative Court of First Instance of Tirana). In the same line of reasoning, the Court of Appeals, during the analysis of the complainant's allegation of discrimination and victimization in the employment relationship, reasons that: "... individuals, who are in the same or similar situations, must have the same treatment. The first element of discrimination is proving unfavorable treatment, which is considered as such in cases where it is less favorable as a result of comparing one person with another one who is in a similar situation. So we need a comparator, a person with similar material circumstances, with the existence of the main difference between two people, which is the protected ground."(See Decision No. 80, dated 11.02.2020 of the Court of Appeal of Vlora).

This position is confirmed by another court, which reasons that: "Less favorable treatment is determined through comparison between the subject alleging discrimination and another person in a similar situation who does not enjoy the characteristic of protected ground, or compared to legal provisions, when the comparator is absent." (See Decision No. 3835, dated 07.11.2019 of the Administrative Court of First Instance of Tirana). The position is reinforced during the review by the court of the complainant's allegation of discrimination in the termination of the employment contract due to political convictions, in which the court states that: "... the respondent (employer) has terminated the employment contract with the claimant without giving the latter the opportunity to compete with her equals for the same job position. The trial proved the fact that an objective process of skills assessment was not carried out on the basis of previously announced conditions and criteria." (See Decision No. 594, dated 01.07.2019 of the Judicial District Court of Fier). In a simple legal language, in clearly structured decision, another court states that:

"The claimant has been treated differently from other female-headed household employees who are excluded from the collective leave and at the same time did not prove at trial any objective ground for this differentiated treatment of the complaint." (See Decision No. 1034, dated 11.07.2019 of the the Judicial District Court of Fier)

**THE CLAIMANT HAS
BEEN TREATED
DIFFERENTLY**

In some other cases the court has concluded that for some public officials functional comparability is impossible due to their specific position, concluding that "... the order to dismiss the complaint not only does not have found unfair for the reason analyzed above (2 criteria - unfair and unequal treatment), but did not result in unequal treatment between the complaint and other employees who are in similar circumstances ... she could not be compared to other employees who do not hold the same position with her, that of the Deputy Mayor." (See Decision No. 140, dated 22.01.2020 of the Administrative Court of First Instance of Tirana). The same line of reasoning as above, is followed in another decision, in which the court states that; "The Deputy Mayor, due to the competencies provided in Article 64, of Law No. 139/2015 "On local self-government" represents the Mayor and the institution due to absences or delegations, inability or physical disability to act or due to a legal obstacle that appears during his/her activity as an individual body. Due to these specific competencies and characteristics, the deputy mayor is not in the same or similar circumstances as other employees of the Municipality." (See Decision No. 344, dated 05.02.2020, of the Administrative Court of First Instance of Tirana)

It is worth noting that in a few cases the courts have managed to fulfill their role as legal educators, conveying through their decisions the importance of prohibiting discrimination, reasoning that: "... the prohibition of discrimination is a legal principle that guarantees the equality of citizens, as a special right recognized by the Constitution and by law. It is one of the basic principles of the Convention that governs the interpretation and application of other rights protected by it. The prohibition of discrimination extends to every field of activity, including employment and specifically employment in public administration. Public administration bodies are obliged to take all positive measures, that in respect of Article 15, point 2 of the Constitution, in fulfillment of their duties, must respect fundamental human rights and freedoms and contribute to their realization."(See Decision No. 1991, dated 22.09.2020, of the Administrative Court of First Instance of Tirana.) Although such good practices are found only in recent years, which is considered a positive signal on the role of the courts, still in statistical terms they are almost inconsiderable in number to be the prevailing approach. (See Decision No. 2984, dated 17.11.2020, of the Administrative Court of First Instance of Tirana)

PROTECTED GROUNDS

Protected grounds are not defined by Law No. 10 221/2010 "On protection from discrimination", as amended, an approach which is also encountered in the legislations of some other countries. Another model is the one in which the law defines some of the protected grounds, while it is the judicial practice that plays an essential role in clarifying and developing these concepts.¹²³

Direct or indirect discrimination has occurred most often as a result of obvious differences, preferences or exceptions made based on one or several protected reasons such as: ***political belief, religion, pregnancy, age, gender, marital status, health status, disability, belonging to a particular group, education, companionship, victimization, or even any other grounds such as motherhood.***

Under the ECHR, "*political or other opinion*" is expressly listed as a protected ground. In practice, however, when a complainant feels that he or she has been treated differently because of this, the ECtHR is more likely to consider the claim under Articles 10 "Freedom of expression" and Article 11 "The right to

122 Croatia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Northern Macedonia, Poland, Romania, Serbia, Slovakia and Slovenia. The legislation of some other countries such as Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Iceland, Ireland, Montenegro and the Netherlands, Portugal, Sweden and the United Kingdom define only some of the protected grounds, while court decisions are the ones that have further developed the concepts. <https://www.equalitylaw.eu/downloads/5118-a-comparative-analysis-of-non-discrimination-law-in-europe-2019-1-72-mb>

freedom of peaceful assembly”.¹²⁴ However, under EU law this criterion is not included among the grounds protected by the EU non-discrimination directives.¹²⁵

The ECtHR has repeatedly emphasized political parties are a form of organization that is essential to the proper functioning of democracy.¹²⁶ Free elections and freedom of expression, particularly freedom of political debate, constitute “*the foundation of any democratic system*”, while political opinion has been given a privileged status. Accordingly, the powers of states to put restrictions on political expression or debate on questions of public interest are very limited. On the other hand, freedom of expression protects not only “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the state or any sector of the population.¹²⁷

Judicial decisions, in which the alleged and proven ground of discrimination was political conviction, constitute the highest number of decisions analyzed. *Prima facie* it seems that the statistics confirm the concern raised in the Progress Report of the European Commission of 2019, concluding that there were over 896 dismissed civil servants, a significant increase from the previous year in which there were 596 dismissals of public administration employees who enjoy this status. Another concern is the financial costs accompanying this phenomenon.



123 In the case of *Handyside v. United Kingdom*, the ECtHR established that the right to freedom of expression will protect not only “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the state or any sector of the population”.

124 Handbook, 2018.

125 *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 25.

126 *Kurski v. Poland*, No. 26115/10, 5 July 2016, par. 47.

The analysis showed that political conviction is initially found as a ground of discrimination in the case law of 2014, marking an increasing trend in the following years, which culminates in the years 2019 - 2020. A small number of the decisions represent a complete analysis in accordance with international standards, based on the reasoning in the discrimination test, including the cumulative conditions, the principle of shifting the burden of proof, as well as the "comparative" concept. In some limited cases it was the court that decided the discrimination, in contrast to the decision of the CPD.

The positions of the courts over the years are outlined towards two opposing approaches and different perspectives from which the courts have analyzed discriminatory practices.

From a broader evaluation perspective, in a few decisions, courts *analyze the consequences of discriminatory behavior in the exercise of other constitutional rights such as freedom of expression or participation in political parties as an expression of pluralism in a democratic society.*"(See Decision No. 573, dated 25.04.2018 of the Judicial District Court of Fier). Some of the courts assess political conviction from a narrower perspective, defining it as *"a personal characteristic, which is inseparable from the employee's personality, but has no legitimate connection to employment relationships."* This line of reasoning is in accordance with the provisions of Article 146/1 / c of the Labor Code, however, it resulted in differences between the solutions of cases.

Although it should be the prevailing approach, there are few decisions where the courts base their reasoning on the presumption of discrimination, stating that: "On the other hand, the exposure of the employee with different political convictions from those of the head of the employer institution, in trade union organizations, gives indications for the presumption of the existence of the discriminatory ground for being dismissed on political conviction ground. In this case, the employer institution must justify the reasons that impose the dismissal of the complainant, without the possibility of systematizing him."(See Decision No. 1696, dated 30.05.2019 of the Administrative Court of Appeal of Tirana).

Most court decisions hold a different view, according to which: "the mere fact that the claimant is a member of a political party is completely insufficient to conclude that he/she has been discriminated against. The trial did not yield any data on the political convictions of the employees who were included in the list and benefited from or were excluded from the list. The comparative report of all employees of the company can be done only if there is complete data in this regard, given that the claimant claimed his political beliefs as the ground for being removed from

the list. Only such data can give an accurate conclusion, in the conditions when the respondent (the employer) denied that he/she had influenced the political convictions of the claimant in the concrete case." (See *Decision No. 1599, dated 02.12.2015 of the Judicial District Court of Fier*)

*The above position is a continuation of an earlier position of the Administrative Court of Appeal, which dismissed the complainant's claim reasoning that: The court finds the claimant's claim, that the contract would not have been terminated if he had not been a member of a political party, unproven, because the part in question, at the time the talks on termination of employment relationships began, was in opposition. Accepting this claim would confirm the reasoning of the claimant, according to which whenever the political forces that come to power change, those persons who have different political convictions are punished with dismissal - a reasoning that was objected by the panel of this court." (See *Decision No. 2426, dated 16.11.2015 of the Administrative Court of Appeal of Tirana*)*

*Another prevailing position is that expressed in several decisions, where the courts recognize that: "... the employee's political convictions are his/her right, free to exercise as long as they do not affect the regularity of fulfillment of contractual obligations in function of the work performed. The mere fact that an employed citizen proves to have political affiliation and/ or commitments of this nature, in the exercise of his constitutional right, is not an argument that would prove the presence of a discriminatory motive for his dismissal. If this were to happen, then the employing subjects would be deterred from employing these citizens, due to the impossibility of terminating the contract without being affected by the effects of Article 146 of the Labor Code. (See *Decision No. 970, dated 13.03.2017 (No. 1499, dated 12.04.2017 (No. 1805, dated 02.05.2017 (No. 3646, dated 16.10.2018 (No. 404, dated 10.02.2020, No.1882, dated 15.09.2020, No. 2228, dated 06.10.2020, No. 3047, dated 23.11.2020, No. 2228, dated 06.02.2020, of the Administrative Court of First Instance Tirana. 1696, dated 30.05.2029 of the Administrative Court of Appeal of Tirana).**

The above reasoning is reinforced in several other decisions where the object of the trial was the allegation of discriminatory treatment of advisors as political officials, who have a special legal status. The courts have held that "The claimant was appointed to office by the former minister, who herself was appointed in the context of a political agreement reached by the ruling and opposition political forces, but this fact alone can not prove the claimant's claim that he is discriminated against on political grounds. It was a known fact that the minister whom he worked with as an advisor belonged to a political force that was in opposition, but this fact alone could not be a sufficient explanation on basis of which the claimant was treated unfavorably and that this unfavorable treatment came as a

result of his political beliefs." (See Decision No. 3662, dated 23.04.2018 of the Judicial District Court of Tirana)

The courts rule out political conviction as a ground for terminating the contract, without shifting the burden of proof to the employer, but in the meantime choose to make a separate analysis of Article 144 of the Labor Code, concluding that *"The contract was terminated without reasonable grounds"*. This finding is sufficient for the court, that in reference to Article 155, to recognize to the complainant, inter alia, a compensation of 6 monthly salaries for immediate termination of the employment contract and having no justified reasons. The same position is found in another similar case, where the court reasoned that: *"the claimant did not present any evidence to prove the fact that he was discriminated against in relation to political beliefs and therefore he was not paid for a 4 month period."* The court considered unfounded the claim for compensation of damage according to Article 625 of the CC, and decided that the claimant must be paid only the unpaid salary of 4 months, a period during which he had worked in the position of advisor. (See Decision No. 7519, dated 21.09.2018 of the Judicial District Court of Tirana)

In some other decisions, the courts have taken a different decision from the CPD, finding discrimination based on political convictions.

In the case selected for this analysis, the complainant was dismissed on the grounds that she did not meet the employment criteria required for internal audit staff of the public sector. The CPD has not found discrimination due to political convictions, a decision which has been challenged in court. The court carried out a comparative analysis of the situation of three other audit employees, reasoning that: *"... the employer in this case did not maintain the same legal and factual standard in the treatment of three employees who were not equipped with an audit certificate. The complainant was removed from duty, while another employee stayed until he was provided with a certificate, while the other employee remained unequipped with a certificate until her retirement."* The court concluded that these findings, which were found during the administrative investigation, must serve as a ground for the CPD to find discrimination. The CPD decision was repealed and the court found that the claimant had been discriminated against on the ground of her political convictions. (See Decision No. 4730, dated 24.12.2018, of the Administrative Court of First Instance of Tirana)

The conclusions of the CPD administrative investigation have been called into question even when discrimination on the grounds of political conviction has been established. *The courts did not focus the case on a reasonable suspicion of the presence of discrimination, but only found the inadequacy of the CPD investigation, reasoning that: "... the investigation conducted by the CPD and finalized by decision failed to prove that the employing*

subject was aware of the political conviction of Mr.B. During the trial it was not proved that the complainant 's political conviction influenced the exercise or termination of her duty, as well as it was not proved that the claimant was aware of them. The CPD did not verify whether the acts, being available by the Post Office, as part of the documentation belonging to the complainant, included her party membership card." (See Decisions No. 2268, dated 22.05.2017 and No. 4770, dated 07.12.2017 of the Administrative Court of First Instance of Tirana).

*The same position is found in another decision where the court considers the discrimination unproven based on political conviction, analyzing that: The factual basis on which the CPD based the discriminatory ground of political conviction in the termination of employment relationships is first related to the fact that the public body has failed to prove during the administrative investigation an objective and reasonable justification of its actions related to with the transfer and final termination of the employment relationship and secondly, shifting the burden of proof to prove the absence of discriminatory grounds. The Court reminds that the only link between the termination of employment relationships is the complainant's membership card of the political party. **The administrative investigation failed to prove that the employing entity was aware of the complainant's political conviction. The CPD did not verify whether in the acts made available to the Municipality, as part of the documentation belonging to the complainant, there was also her membership card.**"(See Decision No. 228, dated 06.10.2020, of the Administrative Court of First Instance of Tirana)*

*In contrast to the above approach where the collection of personal documentation is required, another court decided to dismiss the complainant's lawsuit, taking into account the obligation arising for employers from Article 33 "Data Protection" of the Labor Code, which provides that: **"The employer during the employment relationships must not collect information about employees, except when this information relates to their professional skills and is necessary for the implementation of the contract."** Based on this legal obligation, the court finds that: "Taking into account the disclosure of personal data (regarding their political conviction), the third party (claiming discrimination) and the CPD, have failed to protect this category. Based on the administrative investigation performed, it resulted that the employees were exposed by the employer before a treatment contrary to Article 33 of the Labor Code". (See Decision No. 816, dated 06.03.2020, of the Administrative Court of First Instance of Tirana).*

The following analysis highlights the different positions in the case law regarding the evidence on which the courts base the presence or absence of discriminatory treatment due to political conviction.

Political conviction has been proven based on the administration of evidence such as a party membership card, being a member in the polling station commission in local elections, election results or even the behavior and actions of the employers. Some courts held that *"the negative consequences in employment relationships came after the change of administration of the company in relation to the local government, specifically the Municipality, which after the local elections was headed by a representative of the political entity."* Some other courts found that the employer's behavior and actions have been defined as unfair and "biased" and the simultaneous change of two elements of the employment contract such as (i) the position (from director to specialist) as well as (ii) the salary were the grounds on which the court considered the employer's lawsuit unfounded, leaving in force the decision of the CPD. (See decision No. 2744, dated 13.07.2018 of the Administrative Court of First Instance of Tirana)

One of the most interesting and difficult approaches to be proved, even from the ECtHR's perspective, is the use of statistical data in proving discriminatory behavior. Some courts have shown courage and have dared to follow this proven path, showing that it is possible and achievable. Based on this approach, the Court, after analyzing the factual situation from which it is proven that the employer has terminated the employment relationships even with several other employees, who had membership cards in the same political subject as the complainant, it concluded that: *"All these citizens have sued the employer for the immediate and unjustified termination of the employment contract and the Judicial District Court has decided to accept the lawsuits filed by them. The mentioned facts create the conditions to prove the presumption that the claimant's dismissal has occurred because of his political convictions. The claimant has been replaced by an employee who is a member of another political force. And this replacement happened at the same time as the dismissal of some other employees, which took place when the political party switched to opposition.* On the other hand, the respondent did not present any evidence to prove otherwise. (See Decision No. 1615, dated 19.10.2018 of the Judicial District Court of Fier)

REMINDER:

- ***The ECtHR reminder that in the absence of judicial safeguards, a legal system which allows dismissal from employment solely on account of the employee's membership of a political***

party carries with it the potential for abuse. ¹²⁸

- ***In certain circumstances an employer may legally impose restrictions on the freedom of association of employees where deemed necessary in a democratic society, for example to protect the rights of others or to maintain the political neutrality of civil servants.*** ¹²⁹

GENDER

Sex discrimination is relatively self-explanatory, in that it refers to discrimination that is based on the fact that an individual is either a woman or a man. Under EU law, this is the most highly developed aspect of the EU social policy and has long been considered a core right. The development of the protection on this ground served a dual purpose: *first*, it served an economic purpose in that it helped to eliminate competitive distortions in a market that had grown evermore integrated; and *second*, on a political level, it provided the Community with a facet aimed at social progress and the improvement of living and working conditions. The acceptance of the social and economic importance of ensuring equality of treatment was further crystallized by the central position it was given in the EU Charter of Fundamental Rights.¹³¹ A number of issues related to gender differences in treatment related to retirement age show that the ECJ allows the state a wide scope of action on the issue of social and fiscal policies. Protection against discrimination helps to advance these objectives of the EU social and economic dimension.¹³²

¹²⁷ See Redfearn v. United Kingdom.

¹²⁸ See Ahmed and Others. v. The United Kingdom, 2 September 1998, § 63, Reports of Judgements and Decisions 1998-VI.

¹²⁹ The concept of "gender" has been interpreted to include situations where discriminatory treatment relates to the applicant's "gender" in a more abstract sense, allowing for some limited protection of gender identity. Gender identity refers to "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms". See also, "Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity", March 2007, available at: http://www.yogyakartaprinciples.org/principles_en.htm

¹³⁰ Handbook p.69 and p.73.

¹³¹ In the case of Defrenne v. Sabena, the applicant complained that she was paid less than her male counterparts, despite undertaking identical employment duties. The ECJ held that this was clearly a case of sex discrimination. The ECJ offered an in-depth explanation of the idea of objective justification in Bilka - Kaufhaus GmbH v. Weber Von Hartz. Here, part-time employees, who were excluded from the occupational pension scheme of Bilka (a department store), complained that this constituted indirect discrimination against women, since they made up the vast majority of part-time workers. The ECJ found that this would amount to indirect discrimination, unless the difference in enjoyment could be justified. In order to be justified, it would need to be shown that: "the [...] measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued, and are necessary to that end". Bilka

With regard to the ground of gender-based discrimination, the ECtHR has consistently stated that the promotion of gender equality is nowadays a major goal of the EC Member States and in principle, there must be "very "strong grounds" before a different treatment could be considered in conformity with the Convention.¹³³ References to traditions, general assumptions or prevailing social attitudes in a particular country were considered to be insufficient justification for a difference in treatment on grounds of sex.¹³⁴ For example, States were prevented from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family.¹³⁵ The reference to the traditional distribution of gender roles in society could not justify, for example, the exclusion of men from the entitlement to parental leave. Gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes.¹³⁶

Diskriminimi me bazë gjinore në vendin e punës ekziston. Mes të anketuarve online, 18% e grave dhe 6% e burrave gjykojnë se kanë përjetuar diskriminim me bazë gjinore në punë. Probabiliteti që të përjetosh diskriminim me bazë gjinore në punë është 3 herë më i lartë për gratë sesa për burrat. Mundësitë që të përjetosh diskriminim me bazë gjinore janë katër herë më të larta nëse punon në sektorin publik (krahasuar me sektorin privat). Ndërkohë, ekzistojnë evidenca se diskriminimi ka ndodhur edhe në sektorin privat. Probabiliteti i përjetimit të diskriminimit me bazë gjinore është tri herë më i lartë te personat me pagë mujore neto nga 40,000 deri 55,000 lekë, krahasuar me të tjerët. Për sa i përket shtrirjes gjeografike, mundësitë që të përjetosh ngacim seksual në vendin e punës janë tri herë më të larta për personat që jetojnë në Tiranë sesa ata që jetojnë në qytete të tjera të Shqipërisë. (Hulumtimet e QAGJZ) -së në vitin 2019)

argued that the aim behind the difference in treatment was to discourage part-time work and incentivize full-time work, since part-time workers tended to be reluctant to work in evenings or on Saturdays, making it more difficult to maintain adequate staffing. The ECJ found that this could constitute a legitimate aim. However, it did not answer the question of whether excluding part-time workers from the pension scheme was proportionate to achieving this aim. The requirement that the measures taken be 'necessary' implies that it must be shown that no reasonable alternative means exists which would cause less of an interference with the principle of equal treatment. It was for the national court to apply the law to the facts of the case.

132 Abdulaziz, Abdulaziz, Cabales and Balkandali v. The United Kingdom, 1985, § 78; Burghartz v. Switzerland, 1994, § 27; Schuler-Zraggen v. Switzerland, 1993, § 67; Konstantin Markin v. Russia [GC] 2012, § 127; J.D. and A. v. the United

Kingdom, 2019, § 89.

134 Konstantin Markin v. Russia [GC], 2012, § 127.

135 Unal Tekeli v. Turkey, 2004, § 63; Konstantin Markin v. Russia [GC], 2012

Factors that contribute to the very low reporting of discrimination against women by institutions are fears of society stigmatization, concerns about anonymity, fear of dismissal, lengthy bureaucratic procedures, difficulties in the case documentation and low trust in institutions.¹³⁷



The analysis of court decisions seems to confirm this finding, as only 3% or 8 decisions address allegations of discrimination based on the protected ground of gender. Paradoxically, it is stated that in recent years there has been an increase in cases of discrimination on this protected ground.

Gender often becomes a discriminatory factor in employment relationships. Judicial decisions fail in most of them to reason the criterion that the measures taken must be "necessary", or in other words to demonstrate that there is no alternative means, which would cause less interference with the principle of equal treatment.

The research identified flagrant cases of termination of the employment contract of female employees, who were treated unequally compared with other male colleagues. Dismissals are reasoned with restructuring or reduction of the number of employees, while the cases taken into analysis have highlighted a tendency to appoint male employees to the same job positions. Some of the decisions consider the allegation of discrimination unfounded referring to the fact that the claimant, who is charged with the burden of proof, did not present evidence of less favorable treatment based on gender ground. (See Decision No. 4648, dated 28.10.2020 of the Judicial District Court of Tirana)

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136 Study QAGJZH, p.35.

Although cases of discrimination based on gender ground are usually presumed to involve women being treated less favorably than men, practice has shown the opposite. Albanian society is evolving in terms of creating a new mentality of changing gender stereotypes, a dynamic which is mainly helped by the drafting of legislation with an approach to gender equality, where the courts are expected to become the strongest ally. If previously it was considered unimaginable that the father of a newborn child had the right to parental leave, now this is a concrete legal right, but it has not yet achieved proper effectiveness. Restoration in infringement cases has been made possible only through legal proceedings.

The court considered indirect discrimination based on gender, the refusal of a private company to give one of its employees, the father of a newborn child, the maternity leave, according to the provisions of Law No. 9377 "On social security". The court, after analyzing the legality of the CPD decision, which found discrimination on the grounds of gender, decided to leave this decision in force, reasoning that: *"The finding of the CPD, that the applicant in relation to female employees employed by the claimant, has been treated unfavorably and unequally in terms of the duration of maternity leave, is based on law and evidence."* (See Decision No. 2379, dated 03.07.2019, of the Administrative Court of First Instance of Tirana).

The decision falls into the category of good practice and presents special reference values from other courts also for the fact that it has based its reasoning in the ECtHR jurisprudence, namely the decision *Weller v. Hungary*. In this case the ECtHR, analyzing Article 14 along with Article 8 of the ECHR, has found violations based on the finding that: *"Maternity leave is separated from the biological fact of breastfeeding, so it can be considered as time devoted entirely to the baby, and as a measure linking family life to work that comes after maternity leave. This leave is granted to employees with their status as parents of the child. Providing an appropriate childcare provision serves as an essential step towards equal employment opportunities between women and men."*¹³⁸ *The court has considered unfounded the claim of the employer that "the child is provided with parental care with the care of the other parent, and therefore justifies the shorter duration of the maternity leave in relation to other female employees of the company."* *The court continues the argument by stating that "the fact that the mother is not employed cannot infringe on the rights of the child's father to obtain maternity leave on an equal footing with female employees. Law No. 9377/1993 "On social security" does not link the duration of the maternity leave with the fact whether the child can be cared for or not by the mother, and moreover, one of the reasons for the benefit of maternity leave by*

137 See decision of the ECtHR *Weller v. Hungary*, No.44399/05, dated 31.03.2009 and ECJ decision C-7/12, *Nadezda Riezniece v. ZemkopTbas ministrija and Lauku atbalsta dienests*, 20 June 2013.

the father is exactly it is precisely the fact that this right can not be enjoyed by the mother, because she is not employed."

In another case, the employee was fired on the grounds that he had not followed the procedure in obtaining parental leave from the employer. The CPD assessed the situation as discrimination on the grounds of parental responsibility and gender, ordering the reinstatement of the employee. The termination of the contract for unreasonable reasons was ascertained in another trial initiated by the complainant, who also received compensation. Meanwhile, the employer has filed a complaint for the repeal of the CPD decision, specifically regarding the measure for reinstatement of the complainant. Although the court considers only this aspect of the decision, at the end of the trial it decided to repeal the CPD decision. (See Decision No. 3342, dated 21.09.2018 of First Instance Administrative Court of Tirana).

In the case of a female employee who was fired, the CPD found discrimination on the grounds of gender and belonging to a particular group. The employer challenged the decision of the CPD in the administrative court requesting its repeal as issued in violation of the Law. The Court, referring to the 'comparative' concept, has analyzed the situation of other dismissed employees, as well as whether they carry any particular characteristics like the complainant. Based on the provability approach on statistical data, the court states that: *"Based on the information provided, it results that the total number of employees of the administration is 66, out of which 42 employees are women and 24 are men. Therefore, about 64% are women employees and 36% male employees. Out of these employees, the contract was terminated immediately for justified reasons during 2017 for 5 employees, 4 of whom are female employees and 1 male employee. Regarding the above, the Commissioner has concluded that the number of female employees is larger, a fact that demonstrates that the Rector has taken measures to terminate the contract mainly against this gender. In this context, it is worth noting the fact that in the complainant's job position, the Rector hired a male employee based on a 3-month employment contract, a fact that reinforces the allegation of discrimination on the grounds of gender."* The court assessed as grounded the CPD decision in the part that finds discrimination, while it repealed the part in which is decided the reinstatement of the complainant, based on the fact that it had exceeded its powers. (see Decision No. 4406, dated 04.12, of the Administrative Court of First Instance Tirana)

In another case, the complainant was hospitalized in the Obstetric Gynecological Hospital with a diagnosis of 30-31 weeks of pregnancy in severe condition for premature birth in the 7th month. Despite the situation, the employer's representative informed her that she had been replaced by a male employee and that she could no longer return to work as a financier. The termination of the employment contract was considered unjustified by the district court, while the CPD found discrimination on the grounds of "gender" and "temporary incapacity".

Based on this decision, the claimant addressed the civil court for recognition of non-property damage, requesting an expert assessment by a psychologist. The court has taken the discriminatory situation for granted and does not submit any legal analysis to explain the causal link between the unequal treatment and compensation. Legal analysis focuses entirely on the concept of damages and the elements that justify it. (See Decision No. 152, dated 10.04.2018 of the Judicial District Court of Kruja)

In another case, both the CPD and the court re-assessed the fact that the claimant was dismissed immediately and unjustifiably as illegal, while 5 staff members were added and all other male employees were transferred from the position of chief of finance to another one. The respondent did not prove the criteria followed regarding the transfer of 6 employees from the Chief of Finance to another position, as well as the employment of 5 procurement employees.

Moreover, the court has taken into consideration the employer obligations deriving from Article 148/7 of the Labor Code, which determines the priority in the reinstatement of dismissed employees for reasons unrelated to them, when he employs a comparable qualified employee. Based on this argument, the court confirms the discriminatory behavior and recognizes the property and non-property damage to the complainant. (See Decision No. 313, dated 08.03.2018 of the Judicial District Court of Fier).

II WOMEN ARE NOT DISCRIMINATED AGAINST SOLELY FOR ECONOMIC REASONS

II

Women are not discriminated against solely for economic reasons, they are mainly discriminated against due to stereotyping and misguided preconceptions of women's roles and skills, commitment and leadership style. These stereotypes lead to situation when women are often offered precarious, poorly paid jobs, without any possibility of career advancement and not gratifying, as it does not allow for the full development of their abilities. Women are often excluded from informal networks and communication channels. In addition, some of them suffer from an unfriendly workplace culture and can become victims of moral and sexual harassment as well as bullying. Finally, family responsibilities (housework, childcare, looking after elderly relatives) are not shared equally between women and men, leading to additional barriers that prevent women from entering and staying in the workforce and having a career. Women's low participation in labor force and higher unemployment contribute to economic loss and inequality, which forms the basis for a broader inequality between women and men and can translate into economic dependence and poverty (especially in old age) for affected women. However, it is not only women who suffer when discriminated against. Discrimination against women in the workforce and the workplace contributes to lower economic growth, diminishing tax incomes, and higher outlays in unemployment and social security benefits. The

elimination of this discrimination is thus also a sound goal of economic policy and improves social cohesion.¹³⁹ Gender equality is a condition for a just, sustainable and socio-economically developed society. Sensitivity and equal treatment of the special needs of both sexes are required. Diversity must be recognized, valued and respected. Zero tolerance addressing violence against women and domestic violence. Inter-institutional coordination and cooperation remains of paramount importance.¹⁴⁰

REMINDER:

- *The Law “On Gender Equality” is intertwined with the Law “On Protection from Discrimination”.*
- *Courts need to reverse the general perception that gender-based discrimination, mainly against women, is not only present but tolerated and taken for granted, based on perceptions of women's roles in society.*
- *Pregnant women, women with children and young parents enjoy special protection from the law “On gender equality”, which provides concrete measures to ensure their comfort at work as well as social and health security.*
- *Gender-based discrimination in employment includes discrimination in recruitment, promotion, contracts, salary, working conditions, equal treatment, maternity leave, maternity leave for fathers, and sexual harassment at work*¹⁴¹
- *Gender equality is also protected by the ECJ jurisprudence*¹⁴²
- *The ECtHR found that the different treatment based on gender violated Article 14 in areas such as:*
 - *equality in marriage*¹⁴³
 - *access to employment*¹⁴⁴
 - *parental leave and allowances*¹⁴⁵
 - *survivor's pensions*¹⁴⁶
 - *civic obligations*¹⁴⁷
 - *family reunification*¹⁴⁸
 - *children's surnames*¹⁴⁹
 - *domestic violence.*¹⁵⁰

138 See Report of the Committee on Equal Opportunities for Women and Men, adopted by the EC Parliamentary Assembly, 27 April 2005 (meeting 13).

139 National Strategy on Gender Equality 2016-2020.

140 GADC study, p. 4

141 See Case C-222/14 Konstantinos Maistrellis v. Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton, 2015

142 Unal Tekeli v. Turkey, 2004; Burghartz v. Switzerland, 1994.

143 Emel Boyraz v. Turkey, 2014

144 Konstantin Markin v. Russia [GC], 2012.

145 Willis v. The United Kingdom, 2002..

146 Zarb Adami v. Malta, 2006 & Karlheinz Schmidt v. Germany, 1994.

147 Abdulaziz, Cabales and Balkandali v. United Kingdom, 1985.

148 Cusan and Fazzo v. Italy, 2014.

149 Opuz v. Turkey, 2009; Volodina v. Russia, 2019.

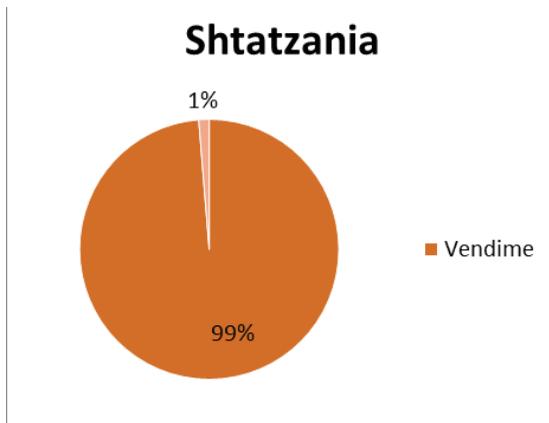
The Law on Protection from Discrimination lists pregnancy as one of the protected ground sets forth in Article 1.

In EU law, discrimination on the grounds of pregnancy and maternity differs from discrimination on the grounds of sex. The protection enjoyed by pregnancy is a consequence of the gradual development of complex array of primary and secondary legislation.¹⁵¹ This legal basis includes arrangements for the adoption of measures in the field of gender equality, including equality and anti-discrimination due to pregnancy or maternity within the workplace, or even the obligation for equal pay between men and women.¹⁵² Moreover, Article 33 (2) of the EU Charter states that *“To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity, and the right to paid maternity leave and to parental leave following the birth or adoption of a child.”* Besides the recast Gender Equality Directive, among others, the Pregnant Workers Directive is primarily aimed at improving health and safety at work for pregnant workers, workers who have recently given birth and workers who are breastfeeding. It is supplemented by the Parental Leave Directive, which sets minimum standards designed to facilitate the reconciliation of work with family life.¹⁵³ In addition to the above, the ECJ has also greatly contributed to the development of the protection for this characteristic, by further clarifying and applying the principles expressed in legislation and providing broad interpretations of relevant rights. According to the ECJ, protection of pregnancy and maternity rights not only translates into promoting substantive gender equality, but it also promotes the health of the mother following the birth and the bond between the mother and her new-born child.¹⁵⁴ One of the current controversial issues at European level has to do with the fact that the existing legal framework fails to regulate non-traditional ways of becoming a mother/parent. In particular, the practice of surrogacy is increasing across Europe and this creates a gap between social reality and legislation.¹⁵⁵

On the other hand, referring to the jurisprudence of the ECtHR, it is reminded that this protected characteristic is no longer treated separately, but it enjoys a special status in the context of protection assigned to gender.

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- 150 For further details, see European Commission, European Network of Legal Experts in the Field of Gender Equality, 2012, "Fighting Discrimination on the grounds of Pregnancy, Maternity and Parenthood. Enforcement of EU law and national law in practice in 33 European countries."
- 151 Article 157 of the Treaty on the Functioning of the EU
- 152 Directive 92/85 / EC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant women and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992. Directive 2010/18 / EC, 8 March 2010 implementing the Framework Agreement on parental leave concluded between BUSINESSEUROPE, UEAPME, CEEP and ETUC Directive 96/34 / EC, OJ L 68, 18 March 2010.
- 153 Handbook 2018, p. 164.
- 154 See ECJ, Cases C-167/12, C. D. v. S. T. [GC], 18 March 2014 and C-363/12, Z. A government department and the board of management of a school community.

Differential treatment between men and women for the protection of pregnancy and maternity has been assessed as acceptable by the ECtHR, as it is a form of positive measures aimed at correcting factual inequalities between the two sexes.¹⁵⁶



The analysis of court decisions shows that pregnancy has been found in very few cases as a result of unequal treatment in employment relationships. This characteristic, although listed as a protected ground in Article 1 of the LPD, in most cases is claimed to be violated along with other grounds such as health status, gender or even motherhood.

The prevailing positions of the courts are those that provide the highest level of legal protection, bringing the practice to the level of the international standard. Meanwhile, there are also other decisions which, although in the structural aspect refer to the analytical scheme of the conditions of discrimination, do not assess as grounded the discriminatory situation in content.

During the research, it was found a case where the discrimination of an employee fired on the day of return to work after the maternity leave, was assessed by the CPD as discriminatory, seen from the point of view of the three distinctive characteristics it carried: *pregnancy, motherhood and sex*. The peculiarity of the case in question lies in the novelty brought by the CPD and by the court, in the inclusion of the "motherhood" characteristic under the category of "any other ground", establishing a first position in this regard through the broad interpretation of the protected grounds in harmony with each-other and based on the specifics of the case.¹⁵⁷

156 See ECtHR, *Khamtokhu and Aksenchik v. Russia* [GC], 2017, § 82 where in relation to the exclusion of women sentenced to life imprisonment, the Court reminded the protection of women from gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood.

157 The protected ground of "motherhood" is analyzed under the category of "any other ground".

Such values of the court decision give it the status of good practice. Apart from the fact that it is the first in this regard, through a structural and substantive approach according to the standard, the decision brings to attention a set of international instruments that guarantee the protection of women in the field of employment, especially during pregnancy, during maternity leave and after maternity leave. The decision establishes a complete picture of the protection of women, starting from Articles 18 and 54 of the Constitution, the special protection provided by Article 14 of the ECHR, and the European Social Charter, Council Directive 2000/78 / EC and 27.11.2000 "Establishing a general framework for equal treatment in employment and occupation", followed by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention No. 183 "Protection of motherhood", as well as the guarantees provided by the Albanian legal framework in laws such as the Labor Code, the Law "On social security", Law No. 9970/2008 "On gender equality in society", and Law No. 10 221 / 2010 "On protection against discrimination".

Another special element of the decision lies in the interpretation of the entirety of the above guarantees in the light of the principle of shifting the burden of proof, provided by Article 82 of the CAP. The Court reasons that: "The party who filed the complaint has the burden of proof to prove that differentiated treatment is not discriminatory." This can be accomplished in one of the following two ways: (1) Proving that there is no causal link between the protected ground and the unfavorable or unequal treatment: (2) Demonstrating that although this treatment is related to the said ground, there is a reasonable and objective justification. If the subject of the complaint is not able to prove one of the two, then he will be liable for discrimination."

Another case selected for this analysis is related to an employee employed on a temporary contract, who at the end of maternity leave has submitted a request to continue the employment relationships, but the employer, on the grounds that the term of the employment contract had finished, dismissed her. The CPD has found discrimination due to pregnancy, and required the employer to take measures to restore the employee to her previous condition. The decision was challenged in court by the employer reasoning that the CPD had exceeded its powers. The court bases its reasoning on the two essential requirements of Article 1 of the LPD: (i) the treatment is unfair and (ii) the treatment is unequal, stating that: *"The following argument of the court focuses on the characteristics of the temporary employment contract, reasoning that: "... the termination of the employment relationship has come due to the expiry of the term explicitly provided in the fixed term employment contract."* The following

argument of the court focuses on the characteristics of the temporary employment contract, reasoning that: "... the termination of the employment relationships has come due to the expiry of the term explicitly provided in the fixed term employment contract. *No court decision was presented during the trial, which ruled that the termination of the employment relationships was illegal according to the Labor Code. "Even in cases that the termination of the employment relationships results to be illegal based on a court decision, this does not automatically constitute a circumstance that leads to the conclusion that the third person has been discriminated against because of the pregnancy." (See Decision No. 378, dated 07.02.2020, of the Administrative Court of First Instance of Tirana)*

In resolving the above cases, the courts must take into account the complex EU law and the jurisprudence of the ECJ, according to which in the field of employment there is an apparent exception as regards the requirement to find an appropriate "comparator", when the discrimination suffered comes as a result of the person's pregnancy. When the detriment suffered by a woman is due to pregnancy, then it constitutes direct discrimination based on sex, there being no need for a comparator.¹⁵⁸

In another case, the complainant, who was pregnant, was dismissed in the framework of the collective dismissal measure of over 450 other employees. The CPD conducted an administrative investigation on the complaint of discrimination on the ground of the complainant's pregnancy and health status, but it concluded that the employer's actions were illegal, but not discriminatory. The court's legal analysis is based on a brief review of the applicable articles of the Law "On Protection from Discrimination", bringing into attention the guarantees of Article 14 of the ECHR, and referring to the position of the ECtHR - without reference to any concrete case stating

- *that*: "differences which are based on or due to a personal characteristic that distinguishes a person from other persons, are related to Article 14 of the Convention, and based on this interpretation it has defined other statuses which are not defined by Article 14." *The Court also referred to the cumulative conditions that must exist to prove discrimination, as well as to the explanation of the protected ground of "pregnancy", reasoning that "With regard to the protected ground of pregnancy, the Court considers that pregnancy is a protected ground. It is provided for in the legal basis mentioned above and there is sufficient evidence to prove such a situation."* The court analyzed the procedures applied during the collective dismissal, the criteria set for the scoring of employees, as well as the unique positions that were excluded from the evaluation, being automatically abolished.

158
ECJ, *Decker v. Central Youth Training Association (VJV-Centrum)*, Case C-177/88 [1990], ECJ I-3941, 8 November 1990 (ECJ, *Web v. EMO Air Cargo (UK) Ltd*, Case C-32/93 [1994] ECJ I-3567, 14 July 1994).

Referring to these criteria, the Court concludes that the complainant's position was an exceptional case and the dismissal was not based on the protected ground of the pregnancy and health status. The court decided to uphold the decision of the CPD, without finding discrimination. (See Decision No. 372, dated 07.02.2020, of the Administrative Court of First Instance of Tirana.)

Sexual orientation describes a stable pattern of emotional, affectional, and sexual attraction or a combination of these to the individuals of opposite sex, of the same sex, both sexes, or none of the sexes and genders that accompany them. Gender identity is the way a person identifies with a gender category, such as being female or male, or in some cases none of them, which may be distinct from biological sex. To understand the concept of gender identity it is important to distinguish between the concepts of "sex" and "gender". While the concept of "sex" refers to the biological difference between a woman and a man, the concept of "gender" also includes the social aspect of the difference between the sexes, beyond the biological one.¹⁵⁹

Cases relating to sexual orientation discrimination typically involve individuals receiving less favorable treatment because they are gay, lesbian or bisexual, but the ground also prohibits discrimination on the basis of being heterosexual. Under the ECHR, Article 14 does not explicitly list "sexual orientation" as a protected ground. In a series of cases, the ECtHR has stated, however, that sexual orientation is included among the 'other' grounds protected by Article 14.¹⁶⁰ The ECtHR also protects from government interference with sexual orientation under Article 8 of the ECHR, which provides for the right to privacy. Thus, even if discriminatory treatment based on this ground has occurred, it may be possible simply to claim a violation of Article 8 without needing to argue the existence of discriminatory treatment.¹⁶¹ The ECtHR has also found that gender identity and sexual orientation in life constitute part of an individual's private life sphere, and consequently there should be no government interference in them.

In addition to the above, the jurisprudence of the ECJ provides the dynamics of developments and challenges related to these protected grounds.¹⁶²

Harassment and instruction for discrimination can be seen as separate manifestations of direct discrimination. The ECtHR found a violation of Article 14 in matters of harassment and instruction to discriminate in relation to Article 11 regarding the right to peaceful assembly. In this case, the mayor of Warsaw made

159 Report CPD special report "On the protection and respect of the rights of the LGBTI community in Albania", 2014 (Available at <https://www.kmd.al/wp-content/uploads/2018/05/1508500386-Report-special-for-protection-and-respect-rights-of-the-LGBTI-community-in-Albania.pdf>)

160 ECtHR, Frette v. France, No. 36515/97, 26 February 2002, paragraph 32.

161 Handbook, p. 76.

162 <https://www.sexualorientationlaw.eu/documents>

he would refuse permission to hold a march to raise awareness about sexual orientation discrimination. When the decision came before the relevant administrative body, permission was refused based on other reasons, such as the need to prevent clashes between demonstrators. The ECtHR found that *“The mayor’s statements could have influenced the decision of the relevant authorities, and that the decision was based on the ground of sexual orientation and so constituted a violation of Article 14 of the ECHR in conjunction with Article 11”*.¹⁶³

Issues of sexual orientation and gender identity are still a taboo for Albanian society, despite the role of civil society in creating a diverse and contemporary mentality that human rights are universal and as such must be enjoyed without interference. The LGBTI community faces many difficulties and challenges in the field of education, health care, employment, the provision of goods and services, including hate speech, or the treatment of homosexuality as a disease and the dissemination of misinformation through textbooks or associating homosexuality with deviant and criminal behavior.¹⁶⁴

Discrimination against the LGBTI community has been observed in a few cases starting from 2015.

The CPD found discrimination on the grounds of sexual orientation and gender identity by the Red and Black Alliance through Facebook posts and publication in April 2014. The decision ordered a representative of the Alliance to apologize publicly and to avoid in the future the use of language that produced the effect of dissemination and incitement of hatred or other forms of discrimination. The CPD has imposed a fine in the amount of 60,000 ALL for failure to provide information according to legal provisions.

The CPD's decision was challenged in court, alleging that the posts were of a political nature and were addressed to the ruling political force and not to the LGTB community. The decision brings an in-depth analysis of freedom of expression and its limits in cases where it constitutes hate speech, which today constitutes a form of discrimination. The court states that: "Posts in question inevitably create feelings of misunderstanding, even rejection and hatred in some others, especially among those members of the public who are not well informed. Using this language inevitably leads to incitement to hatred. It creates erroneous standards, which are then serve as the basis for creating hatred, violation of the dignity of the individual and his rights and freedoms, as well as direct discrimination on the ground of sexual orientation and gender identity. The Court finds unfounded the claim that these posts were aimed at the

163 Bączkowski and Others v. Poland, 2007.

164 Special CPD Report, 2014, p. 23-24.

protection of the traditional Albanian family, as the latter can not be defended by inciting hatred and violating the dignity and rights of persons." (See Decision No. 3127, dated 09.06.2015, of the Administrative Court of First Instance of Tirana).

*In another case, a well-known person in the world of showbiz, during an interview on a television, compared members of the LGBTI community with people who have sex with minors, saying that he would not like lesbian girls to participate in Miss Albania or Miss Globe. The CPD launched an ex officio investigation, concluding that: "The language used is a flagrant case of violation of the dignity, rights and fundamental freedoms of the individual enshrined in the Constitution of the Republic of Albania and the impunity of such discriminatory behavior openly would seriously undermine the very existence of the Law "On Protection from Discrimination". Irresponsibility of freedom of speech prejudices the dignity and violates the safety of persons on the ground of gender identity and sexual orientation. "These expressions produce the effect of prejudice, incitement, dissemination and promotion of hatred and other forms of discrimination ..., and **have placed persons belonging to the LGBTI community in discriminatory positions on the ground of sexual orientation and gender identity in the form of harassment**".*

Judgment is an expression of good practices in interpreting the limits of freedom of expression, and the consequences of overcoming them in a democratic society. The court has decided to dismiss the lawsuit, establishing a practice which must be continued and consolidated in order to guarantee and enjoy fundamental rights and freedoms without discrimination. (See Decision No. 4319, dated 18.12.2019, of the Administrative Court of First Instance of Tirana)

Differential treatment can be essential for achieving substantive equality for certain minorities in particular. Positive obligations of states to protect and fulfil human rights may necessitate reasonable accommodation to enable individuals to live in dignity and enjoy human rights on an equal basis with others. In such situations, identical treatment for everybody would result in the blindness of formal equality to recognize people's actual diversity.¹⁶⁵

REMINDER:

The Constitution promotes equality without discrimination.¹⁶⁶

- ***The protection of LGBTI persons does not require the establishment of new or special rights for them, but clearly requires the application of universal principles of non-discrimination.***
- ***Discrimination in employment, as well as sexual and***

¹⁶⁵ <https://www.corteidh.or.cr/tablas/r27134.pdf>

¹⁶⁶ For further information see https://www.echr.coe.int/Documents/FS_Gender_identity_eng.pdf and <https://www.refworld.org/pdfid/4a54bbb5d.pdf>

moral harassment and denigrating comments against an employee on the basis of sexual orientation and gender identity, are prohibited by the Labor Code and the Law on Pre-University Education.¹⁶⁷

- Scientific and social developments impose the need to take positive action and ensure reasonable adaptation.

The protected ground of age relates to differential treatment or enjoyment based on an complainant's age. Under the ECHR, although age discrimination per se does not fall within the ambit of a particular right (unlike religion or sexual orientation), issues of age discrimination may arise in the context of various rights. The ECtHR has found that "age" is included among "other status"¹⁶⁸

Under EU law, Article 21 of the Charter of Fundamental Rights sets a prohibition of discrimination based on the ground of age. The ECJ jurisprudence has defined non-discrimination on grounds of age as one of the principles of EU law. Referring to the European Social Charter, there are also provisions relating to the issue of age discrimination. It is worth noting Article 23 which provides for the right of elderly persons to social protection, Articles 1 (2) and 24 which regulate the issue of discrimination on the grounds of age in employment relationships.¹⁶⁹

Social policies and employment are the main justifications regarding the permissibility of discrimination on grounds of age in certain circumstances. There is a specific set of protections under the anti-discrimination directives which allows the justification of different treatment in a limited set of circumstances.

167 https://www.gadc.org.al/media/files/upload/GBD%20Labour%20Albania_AL.pdf, fq.27

168 See ECtHR *Schwizgebel v. Switzerland*, No. 25762/07, 10 June 2010; *T. v. The United Kingdom* [GC], No. 24724/94, 16 December 1999 and *K. v. The United Kingdom* [GC], No. 24888/94, 16 december 1999.

169 See *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Complaint No.

170 See ECJ decision in case C-416/13, *Mario Vital Perez v. Ayuntamiento de Oviedo*, 13 November 2014. The ECJ was asked if an age limit of 30 years for the recruitment of a local police officer constitutes prohibited discrimination. The ECJ reaffirmed that "the possession of particular physical capacities is one characteristic relating to age". The aim to ensure the operational capacity and proper functioning of the police service constitutes a legitimate objective within the meaning of the Directive. However, the ECJ rejected the Member State's arguments that in this case the age limit was necessary to achieve its aim. The eliminatory physical tests would be a sufficient measure to assess whether the candidates possess the particular level of physical fitness required for the performance of their professional duties. CJEU also argued that neither the training requirements of the post nor the need to ensure a reasonable period of employment before retirement could justify the age limit." The ECJ's position was different in case C-258/15, *Gorka Salaberria Sorondo v. Academia Vasca de Polida y Emergencias* [GC], 15 November 2016.

“The genuine occupational requirement” exception is present in each of the directives (except the Gender Goods and Services Directive, since it does not relate to employment); this requirement allows employers to differentiate against individuals on the basis of a protected ground where this ground has an inherent link with the capacity to perform or the qualifications required for a particular job. Article 6 of Employment Equality Directive provides two separate justifications of differences of treatment on grounds of age. Article 6 (1) allows age discrimination that pursues “legitimate employment policy, labor market and vocational training objectives”, provided that this meets the proportionality test. Article 6 (1) (b) allows for the “fixing of minimum conditions of age, professional experience or seniority in service for access to employment”. However, this list is not intended to be exhaustive and so could be expanded on a case-by-case basis. Article 6 (2) permits age discrimination with regard to access to benefits under occupational social security schemes, without the need to satisfy a test of proportionality.¹⁷²

The ECJ, through its strict approach to the interpretation of protections to different treatment, suggests that any exceptions will be narrowly interpreted, emphasizing the importance of the rights established for individuals under EU law.¹⁷³

During the analysis of court decisions, age results to have been the ground claimed by the complainant for their disqualification from competition processes or termination of employment relationships immediately and unreasonably.

In some cases, the discrimination was direct, while in some other cases it was indirect due to the criteria provided and applicable in these recruitment procedures. Allegations of discrimination have always been strongly opposed by participants in evaluation commissions or by employers. The positions of the courts are limited mainly to the analysis of the damage caused, rather than to more detailed and in-depth treatments of the concepts.

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Article 14 (2), Gender Equality Directive (revised); Article 4, Directive on Racial Equality; Article 4 (1) Equality in Employment Directive.

172 https://fra.europa.eu/sites/default/files/fra-case-law-handbook_sq.pdf, fq. 39-40.

173 ECJ, Johnston v. Chief of the Royal Gendarmerie of Ulster, Case 222/84 [1986] ECR 1651, 15 May 1986, paragraph 36.

Mosha



■ Vendime ■ Mosha

In one of the investigated cases, the complainant applied for the position of internal lecturer in a Public Faculty, but she was disqualified on the grounds of lack of some documents or submission of some others not in the form required by law, as well as presentation of facts in terms of fraud. The conflict has become the object of judicial review, where the CPD, in its capacity as a third party, has concluded that "... *the age criterion, in principle, constituted an obstacle to exercising in the same way with other candidates (who are under 40 years old)) of the right to employment and profession for this vacancy. The age criterion was set by the Ad Hoc Commission. The faculty can set special criteria and higher or lower limits depending on their specificity case by case. **The imposition of this criterion in this act makes it indirectly discriminatory as a criterion.***" The CPD points out that it has also considered the complaint of another candidate in this process and has recommended the removal of the "age" criterion from SHU Regulation.

The court has analyzed the case in the light of constitutional obligations, conventions, as well as case law in relation to issues of equality and non-discrimination, which is the distinguishing characteristic of this decision as a good practice. However, the decision does not analyze the allegation of discrimination referring to the criteria of the discrimination test nor that of the comparators, other competitors, but it provides a reasoning, which consistently combines arguments on the merits of seeking recognition of property and non-property damage caused and less favorable treatment. Although arguments of victimization are found in the content of the decision, the ordering part does not identify neither this form of discrimination nor the protected ground of "age" identified by the CPD. (See Decision No. 641, dated 06.04.2018 of the Judicial District Court of Shkodra)

In another case, the complainant was 60 years old at the time the employer terminated her employment relationships, even though it had lasted uninterruptedly for several years. The employment contract was terminated after the approval of the restructuring in 2017, arguing that the complainant's higher education criterion

did not meet the position she held. The situation has been reviewed by the CPD, where discrimination has been found on grounds of age. *The administrative investigation* has revealed facts, which in terms of Law do not objectively and reasonably treat the complainant differently compared to other employees. The CPD, based on the comparison of the structures, has concluded that they have no change in terms of the number of employees and the titles of the positions. The court, referring to the findings of the CPD, has decided to dismiss the lawsuit of the employer with the argument that: *"The complainant is currently is 60 years old and in 2 years reaches her retirement age, while her replacement was born in 1993, currently 26 years old. Based on the evidence administered during the administrative review of the claim, it results that the complainant is subject to a unfair treatment in terms of her dismissal."* (See Decision No. 2690, dated 22.07.2019 at First Instance Administrative Court of Tirana)

In another decision, the court rejected the allegation of discrimination in employment on grounds of age and decided to repeal the decision of the CPD by taking a decision that is clearly different from the requirements of international standards, reasoning as follows: "The respondent (CPD) has not proved that the third person (complainant) was treated less favorably than another person or group of persons by presenting written evidence for this ... on the contrary from the written evidence presented by the claimant it is ascertained that this party, in the capacity of the employer, has continued the legal relationship with other (sanitary) persons older than the complainant, such as: R.Z., A.R., SH.C., E.P., F.J., which means that the third person has not been treated less favorably than another person or group of persons." (See Decision No. 1016, dated 20.03.2018 of the Administrative Court of First Instance of Tirana)

Discriminatory situations on grounds of age are also found outside the field of employment. Although the cases are few, they highlight the concerns of treatment of different social groups and the need for a more humane approach to the criminal legislation that deals with the escort of juveniles to police stations.

The citizen N.N had arrears to Albanian Power Distribution Operator, and therefore his power supply was cut off. Due to the health condition of the minor girl, N.N. reconnected the energy, a fact that led to the escort of the citizen and her daughter by police officers to the Commissariat, where she was held for 8 hours, refusing medical assistance, a psychologist and food. Under these circumstances, N.N. addressed the CPD, who described the situation as *indirect discrimination* by the Ministry of Internal Affairs on grounds of age in the form of material goods and services of the minor girl.

The judicial analysis did not reveal any more elaborate position of the courts regarding the issue of indirect discrimination, due to the fact that the decision was challenged only in the part of the fine imposed by the CPD in the amount of 100,000 ALL for the fact that, within the legal deadlines, the MIA did not make available the required information regarding the conditions, criteria or procedures in escorting juveniles who are not under investigation. The courts of administrative jurisdiction of both instances did not accept the lawsuit. (See Decision No. 2277, dated 23.05.2017, of the Administrative Court of First Instance of Tirana and No. 2652, dated 22.07.2019 of the Administrative Court of Appeal of Tirana).

REMINDER:

- ***Discrimination on grounds of age is prohibited.***
- ***This principle enjoys special protection in the system of the Convention and EU Law and continues to be enriched by the interpretation of the jurisprudence of the ECtHR and the ECJ.***
- ***Discrimination on grounds of age is also prohibited by the Employment Equality Directive (2000/78 / EC), which gives life to both the principle of equal treatment provided for in Article 20 of the EU Charter and the non-discrimination sanctioned in Article 21 of the Charter.***
- ***Age discrimination is the only protected EU ground where direct discrimination can be objectively justified.***

Article 14 of the ECHR and Protocol No. 12 list language as a protected ground, but without defining its meaning. The jurisprudence of the ECtHR has confirmed that the Convention does not guarantee language freedom as such, and in particular the right to use the language chosen in the individual's relationships with public institutions and to receive a response in that language.¹⁷⁴

Even EU law, the Equality Directives do not provide for language as a protected ground. However, these grounds enjoys protection under the Racial Equality Directive as far as it may be related to race and ethnicity, and referring to the jurisprudence of the ECJ, protection is provided by assessing it also related to the ground of citizenship in the context of the movement of free of people.¹⁷⁵

Cases where the complainant has alleged discrimination on the grounds of language are very few. The CPD has found indirect discrimination in the case of the citizen D.D., due to the refusal by

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See ECtHR decisions of *Igors Dmitrijevs v. Latvia*, 2006, § 85; *Pahor v. Italy*, 1994, Commission Decision; *Andecha Astur v. Spain*, 1997, Commission Decision; *Fryske National Party and Others v. The Netherlands*, 1985, Commission Decision; *Isop v. Austria*, 1962.

175 Handbook, 2018, p.218.

the State Advocacy to make available in Albanian the document "Action Plan on the execution of the Manushaqe Puto pilot decision of the ECtHR". The State Advocacy has argued that when the documentation is prepared in English, in compliance with the obligations that the Albanian state has as a member of international organizations, and therefore it is not translated into Albanian, but is made available in the existing language. The CPD, upon the completion of a long investigative process and based on the evidence administered on the institutional practices in making available the official information they have, found indirect discrimination of the complainant, and recommended the State Advocacy to provide to the applicant the information in Albanian language, whenever there are similar requests.

The court accepted the lawsuit filed by the State Advocacy, repealing the decision of the CPD only on the grounds that: The State Advocacy has no legal obligation to make available to interested persons the requested information and any other information or archival documents from the current language to another language simply because "translation" does not fall into the activities provided by law for State Advocacy. *Pursuant to the provisions of Article 5 of Law No. 10 018, dated 13.11.2008 "On the State Advocacy" translation from English into Albanian of acts/ communications with/ for the Committee of Ministers of the Council of Europe for Mr. D.D or any Albanian or foreign citizen is not " provided by law to be made by the Advocacy.(See Decision No. 1702, dated 25.04.2017, of the Administrative Court of First Instance of Tirana).*

II THE COURT COULD SHIFT THE BURDEN OF PROOF II

Without questioning the legality of case resolution given by the court, which has the authority to resolve judicial disputes, the analysis of indirect discrimination would be an added value of the decision for the simple fact that case law lacks the treatment of this discrimination form. As we pointed out at the beginning of this study, the court could shift the burden of proof, which, especially in situations of indirect discrimination, is considered very helpful in proving that applicable rules or practice have (or do not have) a disproportionate impact over a certain group, which in the present case were the former owners. Regarding the complainant's approach, in addition to the presumption of discrimination, statistical data are also important in this process. Even in this case, the number of subjects (former owners) interested in the document in question could serve as evidence in trial to reveal and prove a persistent and relatively constant inequality that has existed for a long time in the provision of services and failure to provide available information in Albanian language.

EU law contains some limited protection against discrimination on the

grounds of religion or belief. Not forgetting the protection guaranteed by Article 14 of the ECHR, the scope of the ECtHR is much broader, because Article 9 contains a self-contained right to freedom of conscience, religion, and belief. ECtHR has made clear that the state cannot attempt to prescribe what constitutes a religion or belief, and that these notions protect “atheists, agnostics, sceptics and the unconcerned”, thus protecting those who choose “to hold or not to hold religious beliefs and to practice or not to practice a religion”. Religion or belief is essentially personal and subjective, and need not necessarily relate to a faith arranged around institutions.¹⁷⁶ Newer religions, such as Scientology, have also been found to qualify for protection of the jurisprudence of the ECtHR.¹⁷⁷

The ECtHR has elaborated on the idea of ‘belief’ in the context of the right to education under Article 2 of Protocol 1 to the ECHR, which provides that the state must respect the right of parents to ensure that their child’s education is “in conformity with their own religious and philosophical convictions”. “In its ordinary meaning the word “convictions”, taken on its own, is not synonymous with the words “opinions” and “ideas”, such as are utilized in Article 10 [...] of the Convention, which guarantees freedom of expression; it is more akin to the term “beliefs” (in the French text: “convictions”) appearing in Article 9 [...] - and dereminders views that attain a certain level of cogency, seriousness, cohesion and importance.”¹⁷⁸

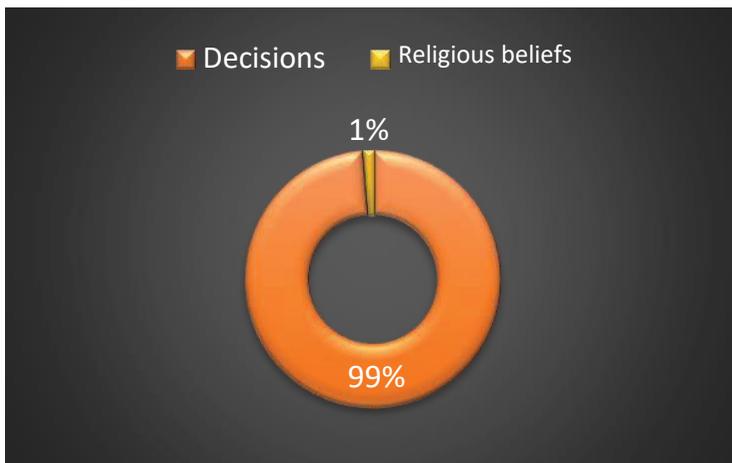
Recently, the ECtHR has been faced with cases related to religious freedom in the context of states wishing to maintain secularism and minimize the potentially fragmentary effect of religious belief in their societies. Here it has placed particular weight on the state’s stated aim of preventing disorder and protecting the rights and freedoms of others. The prevailing position is that *“In exercising their regulatory powers in this field and in relation to different religions, values and beliefs, the State has the duty to remain neutral and impartial.”¹⁷⁹*

176 ECtHR, *Moscow Branch of the Salvation Army v. Russia* (No. 72881/01), 5 October 2006, paragraphs 57-58; *Bessarabia Metropolitan Church v. Moldova* (No. 45701/99), 14 December 2001 paragraph 114; *Hasan and Chaush v. Bulgaria* [GC] (No. 30985/96), October 26, 2000, paragraphs 62 and 78, S.A.S. v. France [GC], 2014 § 124; *Izzettin Dogan and Others v. Turkey* [GC], 2016, § 103.

177 ECtHR, *Moscow Church of Scientology v. Russia* (No. 18147/02), 5 April 2007.

178 ECtHR, *Campbell and Cosans v. The United Kingdom* (No. 7511/76 and 7743/76), 25 February 1982, paragraph 36.

179 *Members of the Gldani Congregation of Other Jehovah’s Witnesses v. Georgia*, 2007, § 131; *Manoussakis and Others versus Greece*, 1996, § 47; *Metropolitan Church of Bessarabia and Others v. Moldova*, 2001, § 123..



The analysis of the court decisions revealed that even the cases in which the complainant's claim that he was discriminated against on the grounds of his religious conviction are few. However, they remain indicators of negative attitudes and a forced tolerance of the Albanian society towards diversity.

One of the cases reviewed by the court concerns a high school student, a religious girl of the Muslim religion, who was banned from entering the school premises and attending classes normally because she was wearing the Islamic headscarf. The CPD found that this behavior of the authorities of the education system constitutes discrimination due to religious belief, a decision which was challenged in court by the Ministry of Education and Sports and a third party, the Directorate of Education, arguing that: *"limiting the manifestation of elements of a certain religious belief, in this case the Muslim one, in the premises of a school it is permissible by law."* The CPD has recommended the amendment of the Law "On pre-university education" as well as other bylaws in its implementation.

Reflecting on international standards and best practices, the court analyzed the case in the context of the obligations arising from the ECHR, in particular Article 9 which guarantees the right to thought, conscience and religion, the constitutional framework and more specifically Articles 10, 24, 18 and 17 of the Constitution, constitutional jurisprudence on the principle of equality and non-discrimination, as well as the legal framework applicable in this case. He states that: "By asking the student who was attending pre-university education to remove the headscarf, an element of the manifestation of the Muslim belief, so she could be able to attend this academic cycle, she has been violated in her right to exercise her freedom of religion. Allowing of discrimination can be established only by law when required by a public interest or for the protection of the interests of others ...without violating the essence of the rights and without exceeding the limitations of the

ECHR. Based on the analysis of the Law on Pre-University Education, it does not result any provision that legislates the restriction of the public manifestation of the elements of the religion that it practices." See Decision No. 2665, dated 18.05.2015 of the Administrative Court of first instance Tirane.

In some cases, the views of the CPD and the court on the absence of discrimination on the grounds of protected religious belief have been the same. The CPD and the court have followed the same approach in terms of provability, i.e the evidence collected and the weight of each of them to reach the conclusion that: "... referring to the employer's staff, personal files of employees holding the same position, recruitment procedure, the type of contract they have signed, performance evaluation (which for the claimant was lower compared to those of her comparators) ... it did not result that the employer had treated her unequally when it decided not to renew the contract, because at the end of the 1-year term of the employment contract, the renewal of the contract was related to the performance evaluations of each employee, case by case. Performance evaluation is the responsibility of the employer and in this case seems to be objective and impartial. The claim of the claimant that she was dismissed on the grounds of her religious belief does not stand, as she has had these convictions exposed since she was hired, during the probationary period and onwards. ... The employer also makes available special facilities for the practice of religious rituals within the premises of the center ... Moreover, the employee who replaced the claimant has a 1-year-old child and parental responsibility is not a ground for unequal treatment of the complainant compared to the new employee." (See Decision No. 1361, dated 19.04.2019, of the Administrative Court of First Instance of Tirana)

In another case the complainant alleged that the employment relationship had ended on the grounds of discrimination based on religious belief and political convictions. The decision briefly reflects the arguments of the litigants, where the claimant states that: "Staff members constantly made inappropriate and prejudicial comments about my religion. Considering the opinion of the executive director that she could not understand the people who pray during working hours and realizing that she did not like this thing, I did not go to pray even on Fridays. I did this in order to adapt and not cause dissatisfaction to my co-workers, but such a thing was not taken into account by the respondent, who terminated the employment contract." On the other hand, the respondent rejects by stating that: "The claimant was unable to fulfill the obligations, the conduct was not at all professional and cooperative".

The court has significantly deviated in structuring a decision according to the discrimination test, by not analyzing the presumption of discrimination, or by not referring to the concept of "comparator". Through a strict formalist interpretive approach, without reference to the concept of discrimination, its forms or the concrete implications of the presumption of discrimination, the court decided to dismiss the lawsuit, considering the contract terminated naturally after the requirements of Articles 141 143, 144 and 145 of the Labor Code were respected (See decision no. 1112, dated 12.02.2018 of the Judicial District Court of Tirana)

REMINDER:

The ECtHR found that the different treatment due to religious belief was not justified, and consequently violated Article 14 of the ECHR in the following cases:

- *discriminatory violence based on victims' trust;¹⁸⁰
the inability of some churches to provide religious education in schools and to terminate officially recognized religious marriages,¹⁸¹*
- *refusal to recognize parental rights due to a parent's religious beliefs;¹⁸²*
- *ban on employees of a private company wearing religious symbols even though they did not cause any health or safety concerns;¹⁸³*
- *requirement to obtain a certificate of approval for immigrants wishing to marry in church, with the exception of the Church of England;¹⁸⁴
non-uniform application of qualifying periods for the right to register as a religious association;¹⁸⁵*
- *failure to provide a student justified by religious instruction, ethics classes, and accompanying grades;¹⁸⁶*
- *failure to recognize Alevi faith-related services as a public religious service.¹⁸⁷*

Ethnicity and race are related and overlapping concepts. The term "race" is defined in the Convention on the Elimination of All Forms of Racial Discrimination. While the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin color or facial features, ethnicity has its origins in the idea of social groups characterized by common nationality, tribal affiliation, religious belief, common language, traditional origin and cultural background.¹⁸⁸

Racial discrimination, like racial violence, is particularly rampant and, because of its dangerous consequences, requires special vigilance and a strong response from the authorities, who must use all available means to combat racism, by thus reinforcing the vision of democracy for a society in which diversity is not perceived as a threat, but as a source of enrichment.¹⁸⁹

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Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia, 2007; Milanovic v. Serbia, 2010.

181 Savez crkava "Rijec zivota" and others against Croatia, 2010.

182 Hoffmann v. Austria, 1993; Vojnity v. Hungary, 2013.

183 Eweida et al. v. The United Kingdom, 2013; see, a contrario, Ebrahimian v. France, 2015, which was considered only from the point of view of Article 9.

184 O'Donoghue and Others v. The United Kingdom, 2010.

185 Religionsgemeinschaft der Zeugen Jehovah and Others v. Austria, 2008.

186 Grzelak v. Poland, 2010.

187 Izzettin Dogan and others v. Turkey [GC], 2016.

188 Timishev v. Russia, no. 55762/00 and 55974/00, 13 December 2005, paragraph 55.

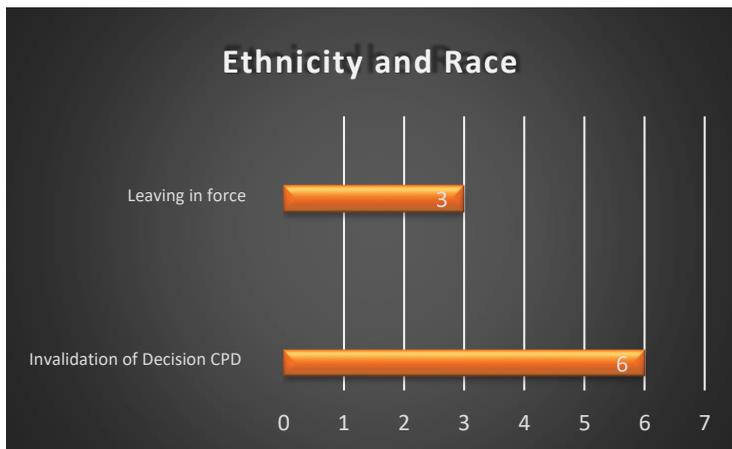
189 Sejdic and Finci v. Bosnia and Herzegovina [GC], 2009, § 43; Nachova and Others v. Bulgaria [GC], 2005, § 145; Timishev v. Russia, 2005, § 56; Soare and others v. Romania, 2011, § 201; Stoica v. Romania, 2008, § 117.

In international law, the term "racial discrimination" means any distinction, exclusion, restriction or preference based on race, color, origin or nationality or ethnic origin, which has the purpose or effect of annulling or impairing recognition, enjoyment or exercise, on equal grounds, of human rights and fundamental freedoms in the political, economic, social, cultural or other spheres of public life.¹⁹⁰

The Racial Equality Directive (2000/43 / EC) does not contain a definition of "racial and ethnic origin" nor does it list as protected grounds "color" or "membership in a national minority", concepts which are listed as separate grounds protected by the ECHR.

*The ECtHR and the ECJ have taken an extremely strict stance on the objective and reasonable justification of discrimination based on race or ethnicity, holding that "No difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures."*¹⁹¹

Judicial decisions dealing with discrimination on the grounds of ethnicity or race are few, yet they contain a sufficient information base to identify the need for special attention by all authorities to ensure fundamental equality for minorities, whether national or not, which are vulnerable to the conduct of the authorities.



190 Manual, fq. 201.

191 See *Sejdic and Finci v. Bosnia and Herzegovina* [GC], no. 27996/06 and 34836/06, 22 December 2009 and *Timishev v. Russia*, paragraph 58. ECJ, in Case C-83/14, "CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia [GC], 16 July 2015, para. 46, has interpreted ethnicity with reference to the meaning of Article 14 of the ECHR.

The research showed that less favorable and unequal attitudes towards national and cultural minorities are present in the field of education, employment or even the provision of social goods.

The analysis shows that these issues have not been addressed in the light of international standards for the protection of minorities, which would have turned them into examples of good practice in this regard. As it results from the available statistical data, courts are generally inclined to accept lawsuits filed mainly by state institutions and to invalidate the decision of the CPD.

Tensions with national minorities have usually emerged during election periods, where certain political entities, sometimes with pronounced aggressive nationalist approaches, have exceeded the limits of lawful conduct, causing discrimination against national minorities. The national minorities in the Republic of Albania are the Greek, Macedonian, Aromanian, Roma, Egyptian, Montenegrin, Bosnian, Serbian and Bulgarian minorities. They enjoy special constitutional and legal protection. A national minority is a group of Albanian citizens residing in the territory of the Republic of Albania, have early and stable ties with the Albanian state, display distinctive cultural, ethnic, linguistic, religious or traditional characteristics and who are willing to express, preserve and develop together their distinct cultural, ethnic, linguistic, religious or traditional identity.¹⁹²

The case analyzed is that of discriminatory behaviors and attitudes of the political entity Red and Black Alliance against the national minority in the Municipality of Liqenas, expressed by destruction of road signs, or other damages and disturbance of public order. The CPD has ordered the party that caused the discrimination to apologize and not repeat it in the future, imposing a fine in the amount of 60,000 ALL. This decision was challenged in court, in the part of the imposition of the fine, which has in some way limited the arguments of the court only to the issue of the merits of the sanction imposed on the claimant. Reasoning has a minimal approach to protection standards, while lacking extended treatment of discrimination due to ethnicity. The court dismissed the lawsuit on the grounds that: *"From all the evidence presented by the respondent it is proven that the representatives of the claimant Red and Black Alliance with their attitudes and statements in the municipality of Liqenas, Korça, have incited discrimination in the enjoyment of rights guaranteed by domestic and international legislation on national minorities. The CPD has rightly found these actions as discriminatory behavior and has asked them to apologize and avoid their use in the future in order to avoid violence ... In conditions when these actions have not been committed, the court finds right and grounded the decision of the CPD to,*

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192 Law No.97 / 2017 "On protection of national minorities in the RA"

fine the claimant. "(See decision no. 2337, dated 13.05.2014 of the Administrative Court of First Instance of Tirana).

In addition to the above, the case law brings examples of situations which are related to the problems faced by the Roma population, which as a result of turbulent history and constant eradication, has become a special kind of a disadvantaged and vulnerable minority. Therefore, special attention should be paid to their needs and their different lifestyles both in the relevant regulatory framework and in decision-making in particular.¹⁹³

The issue of Roma children dropping out of school, the difficulties faced by families in educating them, the segregation of Roma students and their placement in segregated schools remain a problem today, which requires immediate solutions through a comprehensive approach, including taking measures of a positive nature to prevent discrimination, in compliance with constitutional provisions, international conventions and the provisions of Law no. 10 221/2010 "On protection against discrimination".

In 2016, the CPD found discrimination due to the race of Roma students by the Ministry of Education and Sports and the Directorate of Education due to their segregation in a school far from the center of their place of residence. The CPD has ordered immediate measures to stop segregation and ensure free transportation. The fine provided in the decision was 60,000 ALL. In the litigation initiated by the MES and RED, with the object of repealing the decision of the CPD, the court focuses the analysis on the entirety of the bylaws, which provide and condition the use of public funds for the transportation of teachers and students studying far from their residential region, with the distance of over 2 km.

The court decision does not contain an analysis of the essence of the problem identified by the CPD, however it has abrogated the decision of the CPD without arguing about the protected ground or specific forms of discrimination. The court reasoned that: "... *the claimant RED did not implement the measure imposed by the CPD, as this party complied with DCM no. 682, dated 29.07.2015 "On the use of public funds for the transport of working education workers and students studying outside the residential region" as amended, which does not allow negotiations...*". (See decision no. 485, dated 06.04.2016 of the Administrative Court of First Instance, Vlora) Referring to the reasoning of the decision, the question naturally arises whether the court had the opportunity to assess from another perspective those situations which are obviously problematic of the Albanian reality. The court, in addition to the obligation to respect the constitutional standard of reasoning of court decisions, must guarantee the proper protection of the right to education, which is

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193 See decision of ECtHR in *D.H and the others v. Czech Republic* [GC] 2007, 2 para. 181 &182.

both constitutional and conventional. Article 2 of Protocol no. 1 of the ECHR provides for the right to education as a separate right. Meanwhile, the jurisprudence of the ECtHR has maintained that claims of discrimination in the field of education fall within the protection provided by Article 14 of the ECHR, with an ongoing emphasis on **prohibiting discrimination against Roma minorities, including their education**. In all cases cited as examples for ease of referral in the future, the ECtHR found different treatment of Roma students, **which although unintentional, constituted a form of indirect discrimination**.¹⁹⁴ The following cases are consolidated practices of the ECtHR which should be considered by the courts in the future.

The case of *D.H. and others v. Czech Republic* dealt with complaints from Roma applicants that their children had been excluded from the mainstream education system and placed in "special" schools that were for those with learning difficulties due to their Roma ethnicity. The assignment of Roma children to "special" schools was carried out on the basis of tests to determine intellectual capacity. Despite this seemingly "neutral" practice, the nature of the test made it more difficult for Roma children to achieve a satisfactory result and enter the mainstream education system. **The ECtHR found that this was proven by referring to statistical evidence showing a fairly high percentage of Roma students enrolled in "special" schools**. The data presented by the researchers in relation to their particular geographical region suggested that 50 to 56 percent of the students in these special schools were Roma, while they represented only about 2% of the entire population in education. Data obtained from intergovernmental sources showed that about 50 to 90 percent of Roma children attended special schools across the country. The ECtHR found that although the data were inaccurate, they showed that the number of Roma children affected was "disproportionately high" compared to their overall population composition.

In the case of *Orsus and others v. Croatia* some schools had set up classes that had reduced curricula compared to normal classes. It was claimed that these classes contained a disproportionately high number of Roma students and, consequently, constituted indirect discrimination on the basis of ethnicity. The government objected that these classes were established on the basis of competence in Croatia, and that when a student attained an appropriate language proficiency, he was transferred to the regular classes. The ECtHR found that unlike the *D.H.* case, statistics alone did not convey the presumption of

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D.H. and Others v. Czech Republic [GC], 2007; Horvath and Kiss v. Hungary, 2013, Orsus and Others v. Croatia [GC], 2010, Lavida and other v. Greece, Sampanis and Others v. Greece, 2008.

195 ECtHR, *D.H. and others v. Czech Republic* [GC] ((No. 57325/00), 13 November 2007)

discrimination. In one school 44% of students were Roma and 73% attended a class with only Roma students. In another school 10% were Roma students and 36% of them attended a class with only Roma students. This confirmed that there was no general policy to automatically place Roma in separate classes. However, the ECtHR stated that it was possible to raise an claim of indirect discrimination without relying on statistical data. The fact that the measure of placing children in special classes due to insufficient proficiency in the Croatian language applied only to Roma students. Consequently, this gave rise to the presumption of differentiated treatment.¹⁹⁶

Another issue addressed by the court is that focusing on the indirect discrimination of the Roma and Egyptian communities during the administrative procedures followed during the implementation of the road infrastructure project Unaza e Re, segment Kavaja Street - Komuna e Parisit. The decision of the CPD that found indirect discrimination was judicially challenged by the Ministry of Urban Development, whose lawsuit was accepted based on the following arguments of the court: "Decision No. 114/2016 provides general references regarding the possibility or access of members of these communities but not for concrete cases, who nevertheless have the legal mechanisms to benefit from free services. The respondent party also considered discrimination for the fact that the families affected by the construction of the new ring road are not given a housing solution permanently, but only through a rent payment for two years. The Court considers that this has not been claimed as a final solution by the claimant, which has stated that it has the opportunity and commitment to provide housing solutions to the affected members according to the legal provisions for the homeless. The Court also considers the limited economic opportunities of our country and the growing needs not only of the representatives of the minority communities." (See decision no. 4940, dated 21.10.2016 of the Administrative Court of First Instance Tirana).

The above decision in terms of time coincides with a decision of the Constitutional Court on the unconstitutionality of the norms of Law no. 9780/2007 "On construction inspection". The decision did not examine the merits of the claims, as it was assessed that the applicant - the Ombudsman - failed to argue at the constitutional level that the content of the opposed legal provision caused, in the absence of a reasonable and objective justification, a legal inequality between the subjects belonging to the Roma and Egyptian communities and other entities to which the provision addresses¹⁹⁷ The situation highlights the need for more initiative to submit requests for incidental control in

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¹⁹⁶ ECtHR, *Orsus and Others v. Croatia* [GC] (No. 15766/03), 16 March 2010, para.152-153.

¹⁹⁷ See decision No. 10, dated 29.02.2016 of the Constitutional Court, which examines the claim of the Ombudsman that the lack of a legal remedy to ensure the suspension of an eviction decision, in order to prevent a violation of Article 8 of the Convention,

order to guarantee the standard of non-discrimination, for issues which have high social sensitivity.

The situation of Roma and Egyptians continues to be problematic in the field of employment and labor, characterized by high levels of unemployment and/or activities in the informal labor sector, which rarely provide an opportunity to earn a decent income. Roma are still often self-employed, mainly in low-profile occupations such as scrap metal collection or second hand small-scale trade. Egyptians are most often involved in the service sector, home care and construction work.¹⁹⁸

The research highlighted the ongoing confrontations of the Roma or Egyptian community with state authorities. Some representatives of the Roma community, collectors of recyclable waste, have claimed that the Municipal Police employees have taken repeated and continuous actions to stop the collection of recyclable waste. The applicants claimed that during these actions they and their family members were offended with severe insulting and denigrating words especially for female dignity, and as a result of the seizure of the collected waste they were unable to feed the children. This situation has been investigated by the CPD concluding that the applicants have been discriminated against in the form of **'harassment' and 'indirect discrimination'**.

The court decision contains a detailed analysis of the burden of proof recognizing the principle of shifting. Regarding the analysis of the two forms of discrimination, the legal analysis is limited only to the reflection of the legal formulation of the concepts, without bringing any specific analysis of their meaning or the difficulties encountered in practice in proving these forms of discrimination. Especially regarding the probative value of the information presented at the trial by the CPD, the People's Advocate, the Albanian Helsinki Committee, the court states that: *'... these documents identify in principle problems identified and advertised against each other over the years ... These conclusions identify subjective and institutional moments in relation to a given situation. But in no case can they identify a piece of evidence as evidence to identify the facts underlying the lawsuit.'*

is in itself a violation of the right to a fair legal process, as Roma/Egyptian families face a particularly acute threat of eviction due to the continued failure of the Albanian authorities' efforts to respect and protect their right to housing. In the assessment of the Court "law no. 9780/2007 "On construction inspection" aims to ensure compliance with norms, standards and legislation in the field of construction, urban planning and water reserves throughout the country, in a decentralized manner and in accordance with the principle of subsidiarity, based on the administrative division (article 1) and its object is the determination of the bodies for construction and urban inspection, organization, rules of operation and their responsibilities (article 2). In this sense, this law applies throughout the territory and applies to all citizens who are subject to it."

198 The sixth Report of ECRI for Albania, p. 21 (Available at <https://rm.coe.int/report-on-albania-6th-monitoring-cycle-translation-in-albanian-/16809e8240>)

Even notarial statements absolutely do not prove the claimed facts. The Court reiterates that the facts to be proved in this trial should have highlighted discriminatory practices by referring to concrete situations against claimants, and not analogous or general situations. " Regarding the actions of the Municipal Police, the subject to whom the court has charged the burden of proof, the decision justifies that: "The actions are in accordance with the laws and bylaws in force. As part of its better management plan, the municipality has made a reassessment of all policies related to the city cleaning service. Part of this assessment is also the monitoring and guarantee of the withdrawal of urban waste that is currently deposited in their landfill determined by the Municipality."

The court after a detailed analysis of Law no. 8094/1996 "On public disposal of waste", Law no. 9010/2003 "On the environmental management of solid waste" and the Internal Regulation of the Municipality "On the management of urban waste and cleaning of the city" approved in 2017, concludes that: *"In no case is there a breakdown of this legal and normative framework in a concrete situation that occurred against the claimants, and moreover we do not see any situation verified by the court and proven by evidence where the implementation of this legal framework, or practices claimed to be prosecuted by public bodies summoned as respondents in the trial to be discriminatory against the claimants because of their racial affiliation."* The court decided to accept the lawsuit, revoking the decision of the CPD. (See decision no. 2270, dated 12.06.2018 of the Administrative Court of First Instance of Tirana)

In another case, the court considered the lawsuit filed by the Municipality of Fier against the decision of the CPD that found discrimination due to race of residents of the Roma community due to lack of investment by the municipality in the area where they lived. The lawsuit was accepted by the court revoking the decision of the CPD on the grounds that: "... for punitive administrative acts issued not at the request of the interested person, the administrative body that issued the act, has the obligation to prove the legality of the opposed administrative act. In compliance with the principle of burden of proof provided by the above legal provisions, the respondent (CPD) did not present any evidence to prove whether the lack of investment in the neighborhood "1 Maji" occurred due to discrimination, because members of the Roma community live there or it happened due to financial impossibility,

as claimed by the claimant, the municipality "(See decision no. 1025, dated 21.03.2018 of the Administrative Court of First Instance Tirana).

Claims of discrimination on the grounds of ethnicity and social status were also raised during the employment relationship, where employees were fired with the excuse of the establishment of educational criteria or due to the finding of some materials missing during the control.

In the case of the firing of a sanitary worker, representative of the Roma community, the employer argued that *"All sanitary workers were fired, regardless of the different social conditions they may have"*, a position which has been assessed by the CPD as discrimination on the grounds of race, as the employer has treated persons in different situations equally. At the end of the administrative judicial review of the legality of the decision of the CPD, the court assessed it as an act issued in accordance with the Law, leaving it in force, but without providing any specific analysis different from the decision of the CPD. The value of the court decision would be even greater if it were accompanied by an analysis of the substance of the CPD's decision-making on racial discrimination. The consolidated practice of the CPD and the limits of the administrative investigation, without questioning the authority given by law, take on even more binding and referential value when they are confirmed by the courts through court decisions, as only in this way do they become standards of consolidated and binding value. (See decision no. 1534, dated 24.04.2018 of the Administrative Court of First Instance of Tirana)

The following case offers a contrary position of the court, which argues that the respondent party did not claim in the trial conducted by another court that the employment contract was terminated for abusive reasons. Moreover, the court states that "the conflict created due to the termination of the employment contract has been resolved by a court decision that has also recognized compensation." The court bases its conclusion on the absence of discrimination on the argument that: "The claimant has terminated the employment contract with the third person and has appointed another citizen in his place. "Based on Article 9 of the Labor Code, the exclusion of a third person from the job position, and the appointment of another person does not constitute discrimination." (See decision no. 419, dated 16.07.2018 of the Administrative Court of First Instance of Tirana)

The above practice needs to be consolidated taking into account the view that access to social housing, substandard quality housing, lack of access to basic services, housing allocation of the Roma community and other systemic violations of the right to housing constitute violations of some protected rights

from the revised European Social Charter, namely Article E "Non-Discrimination", in conjunction with Article 31/1 "Failure to promote housing of an adequate standard", Article 16 "Family right to social, legal and economic protection" and Article 30 "The right to protection against poverty and social exclusion".¹⁹⁹

Diversity in the society we live in contributes to the enrichment of values and cultural heritage and beyond. Societies are increasingly made up of diverse minorities, which enjoy special international protection. Members belonging to minorities have the right to enjoy their culture, to practice their religion and to use their language equally and without discrimination. Protecting their existence, promoting and protecting their identity and the right to participate effectively contribute to political and social stability and the maintenance of world peace.²⁰⁰

REMINDER:

- ***EU Council Framework Decision on combating racism and xenophobia under the Criminal Code stipulates that racism and xenophobia include violence or hatred directed against groups referring to 'race, color, religion, national origin or ethnicity'.***
- ***The European Commission against Racism and Intolerance (ECRI) has also adopted a broad approach to defining racial discrimination 'which includes the grounds of' race, color, language, religion, nationality or national or ethnic origin'.***
- ***Article 1 of the UN Convention on the Elimination of Racial Discrimination 1966 (which includes all Member States of the European Union and the Council of Europe) defines racial discrimination as involving the grounds of 'race, color, descent or nationality or ethnic origin.***
The Committee on the Elimination of Racial Discrimination, responsible for interpreting and monitoring compliance with the treaty, has stated that if there is no justification to the contrary, deciding whether an individual is a member of a particular racial or ethnic group "...] is based on self-identification by the individual in question."
- ***Other instruments that prohibit racial discrimination are:***
 - ***International Convention on the Elimination of All Forms of Racial Discrimination.***
 - ***International Covenant on Civil and Political Rights (Articles 2, 4 and 26);***
 - ***International Covenant on Economic, Social and Cultural Rights (Article 2);***
 - ***Convention on the Rights of the Child (Article 2);***
 - ***International Convention for the Protection of the Rights of Persons and Members of Their Families (Articles 1 and 7).***
 - ***Racial discrimination in certain circumstances can result in:***
 - ***"Degrading treatment" within the scope of Article 3 'Prohibition of torture'.²⁰¹***
 - ***Violation of Article 14 in conjunction with Article 8 'The right to private and family***

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life'.²⁰²

199 ERRC kundër Portugalisë, Nr. 61/2010, 30 qershor 2011. Shih gjithashtu KEDC, COHRE kundër Italisë, Nr. 58/2009, vendim themeli, 26 qershor 2010.

200 https://www.ohchr.org/EN/Issues/Discrimination/Pages/discrimination_minorities.aspx

201 Abdu versus Bulgaria, 2014, § 23.

202 Burlya and Others versus Ukraine, 2018.

- ***Violation of Article 14 in conjunction with Article 2 of Protocol 1 'Right to education'. 203***
- ***State authorities should take all reasonable action to determine whether there were racist motives and to find out whether feelings of hatred or prejudice based on a person's ethnicity played a role in the event. This is necessary by the need to continually reaffirm society's guarantee against racism and ethnic hatred and to maintain minority's trust in the authorities' ability to protect them from threats of racial violence. 204***

DISABILITY AND HEALTH STATUS

The Convention on the Rights of Persons with Disabilities (CRPD) sets the highest standard for the protection of the rights of persons with disabilities. Article 1 of the Convention stipulates that: *"People with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers can hinder their full and effective participation in society on an equal basis with others."* The purpose of the special protection provided by the domestic and international legal framework is to guarantee the dignity and physical integrity, excluding any possibility of inhuman or degrading or humiliating treatment of these categories.

Neither the ECHR nor the Employment Equality Directive provide a definition of disability. Due to the nature of the ECJ role, determinations of what disability is are often made by national courts and presented as part of the current background to disputes submitted to the ECJ through prejudicial claims. However, the ECJ has had several opportunities to provide limited guidance on what constitutes a disability in its case law.²⁰⁶

203 D.H. and Others v. Czech Republic [GC], 2007; Horvath and Kis v. Hungary, 2013; Orsus and Others v. Croatia [DHM], 2010; Lavida and Others v. Greece, 2013; Sampanis and Others v. Greece, 2008.

204 Nachova and Others v. Bulgaria [GC], 2005, § 160; Abdu v. Bulgaria, 2014, § 29.

205 See also "Combating disability discrimination and realizing equality. A comparison of UN CRPD and EU equality and non-discrimination law", by Lisa Wadginton and Andrea Boderick, October 2018 (available at https://ec.europa.eu/info/sites/info/files/combating_disability_discrimination.pdf)

206 See Chacon Navas v. Euret Colectividades SA, where the ECJ argued that disability, for the purposes of the Employment Equality Directive, should be understood as "a limitation resulting specifically from physical, mental or psychological damage and that impedes the participation of the person in question in professional life "and must be" likely to last a long time ". In the application of this definition in the case of Ms. Navas it was found that she was not disabled when she filed a lawsuit before the Spanish courts claiming discrimination on the grounds of disability, since she was fired because she was dismissed as a sick person for a period of 8 months. The ECJ made it clear that there was a distinction to be made between illness and disability, where the former was not offered protection.

Disability, although not expressly included in the list of protected grounds of the ECHR, is included by the ECtHR in the interpretation of "other" grounds under Article 14.²⁰⁷ As with other grounds protected under the ECHR It is not uncommon for issues to be dealt with within the framework of other substantive rights, and not a cumulative approach of substantive law and Article 14, which prohibits discrimination.²⁰⁸

The ECJ has stated that "illness in itself does not lead to disability", but in the context of the Employment Framework Directive this concept should be understood as "*A limitation resulting in particular from physical, mental or psychological harm and which prevents the participation of the person concerned in professional life.*"²¹⁰

The analysis of court decisions reveals few cases where disability has been treated as a ground of unequal treatment, without being justified by any objective and reasonable justification. The small number of complaints may indicate a lack of information, the level of awareness of persons with disabilities, or their guardians, or even a lack of trust in the authorities, due to negligence or social indifference shown in certain cases.

Notwithstanding the above, it should be reminded and commended that the court decisions that have the subject of treatment

207 ECtHR, *Glor v. Switzerland* (no. 13444/04), 30 April 2009.

208 In the case *Price v. UK*, the applicant was sentenced to seven days' imprisonment. She was disabled due to the ingestion of thalidomide by her mother during pregnancy, with the result that she had no limbs or had shortened limbs as well as kidneys that were not functioning. Consequently, she had a wheelchair to move around, needed help to go to the toilet and wash, and needed a special sleeping accommodation. During the first night in detention, she was placed in a cell that was not adapted for people with disabilities and consequently, was unable to sleep properly, experiencing significant pain and hypothermia. Upon transfer to prison she was placed in the hospital ward where an adjustment was made, but still had similar problems. She was also not allowed to recharge her wheelchair, which had lost power. Although discrimination based on one of the substantive rights of the ECHR under Article 14 was not raised in this case, the ECtHR found that the applicant had been subjected to degrading treatment in violation of Article 3.

209 Case C-13/05 *Chacón Navas*.

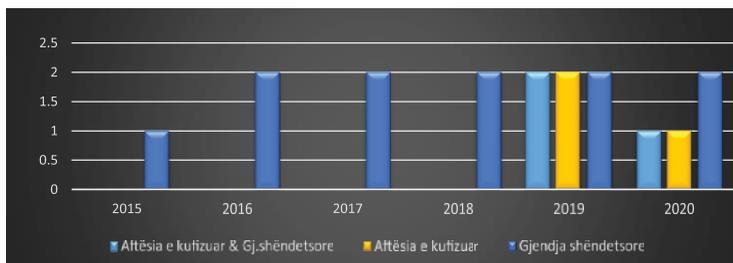
210 In the most recent case C-16/19, *VL v. Szpital Kliniczny im. dra J. Babinskiego, Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 2021, the ECJ considered a claim for a preliminary opinion to assess whether the protection of Article 2 of Directive 2000/78 covered the practice of an employer for exemption from payment of disability of some employees who had submitted reports earlier in time compared to the date set by the employer for other employees. In the Court's assessment the situation in question could be qualified as direct discrimination if the practice in question was linked to a feature such as disability, and it could also be qualified as indirect discrimination if the seemingly neutral practice was not justified by a legitimate aim and by proportionate means, placing at a disadvantage employees with obvious disabilities or who require reasonable adjustment in the workplace.

these cases have set a high standard of interpretation and application of the Law on Protection against Discrimination and specific national laws or international conventions that apply in this area. The decisions bring a comparative analysis of domestic legislation with the protection deriving from the Convention "On the Protection of Persons with Disabilities" ratified by Albania in 2012, as well as the jurisprudence of the ECJ, namely the case Chacon Navas v. Euret Colectividades SA.

Claims of discrimination due to disability in some cases are filed separately for this protected ground, while in some other cases they are accompanied by the claims of simultaneous violation of the protected ground "health condition" or even "victimization". In general, in all cases analyzed, the prevailing approach of the courts is that of accepting discrimination, through the establishment of high standards of protection in terms of guaranteeing equality in practice.

The courts, even respecting the limits of active access they should have during the examination of the case, still have the opportunity to set clear limits on the conduct of employers, which, especially when accompanied by a presumption of discrimination, should be treated in the fullest dimension possible.

In few cases, the courts have a more reserved approach when dealing with the case from the perspective of a harmonized interpretation of Article 9 of the Labor Code with Article 1 of the Law "On Protection from Discrimination" for each of the protected grounds. This finding is based on the fact that even when the court considered the claim of termination of employment for unreasonable causes unfounded, the fact that this action occurred while the complainant was temporarily incapacitated, was not taken into account in the reasoning of the decision. (See decision No. 170, dated 17.04.2018 of the Judicial District Court of Kavaja).



In all the analyzed cases, a characteristic feature is the negative behavior by the state authorities, which, although they should be promoters of guaranteeing the rights of persons with disabilities, often with their actions or mainly inactions, turn into the biggest obstacles, through negligence or claims of lack of sufficient financial resources. In some cases, the authorities even try to place the complainants' claims in the area of social objectives, which cannot be challenged in court. The role of civil society in the protection of fundamental rights remains a valuable contribution, which must be further supported and strengthened.

In the case of the citizen K.M, who suffers from hemophilia type A in severe form, and is a first category invalid, the CPD has found *discrimination due to disability* as a result of not guaranteeing treatment in the right amount and sufficient coagulant drug factor VIII. The same decision was taken in the case of the citizen B.N, whose legal interests are represented by the association "Together for life". In both cases reviewed, the CPD has instructed the responsible institutions, the Ministry of Health and Social Protection and the University Hospital Center of Tirana to take immediate measures in this regard. It is worth noting that the decisions of the CPD have been judicially challenged by both institutions in two separate court proceedings, in which the opposing approach of the state authorities as claimants is clear, and which in a contradicting manner object that: *"... treatment with a greater amount of medication (factor IX) than that with which the applicant has been treated is impossible and currently cannot be met. The claimant considered this need for medical treatment for hemophilia, at the level of a social objective, in the sense of point 2 of Article 59 of the Constitution, according to which the fulfillment of social objectives should not be sought directly in court."* (See decisions Nr. 395, dated 10.02.2020, no. 2834, dated 05.08.2018 and No. 2117, dated 18.06.2019 of the Administrative Court of First Instance Tirana).

The courts, with a clear legal terminology, in compliance with the constitutional standard of reasoning of court decisions, state that: "The lack of a special protocol or guideline for the treatment of hemophilia has been a factor that has affected the proper medical treatment of the complainant, failure to provide the factor drug in the required amount and non-priority consideration of this disease ... and lack of access of information for the complainant. Such a thing hinders the acceleration of his disability ... The right to health is a right which can not be

conditioned by the limited state budget, especially when it comes to providing appropriate treatment for an individual with disabilities. MoHSP and UHC have had the burden of proof to the CPD that despite budgetary constraints, the funds have been used in the best way to provide factor IX medication for patients with Hemophilia B including secondary intervention B.N. "(See decision no. 2117, dated 18.06.2019 of the Administrative Court of First Instance of Tirana)

In 2 other cases, based on the referral of the association "Together for life", the CPD has found discrimination of hemophiliac patients residing outside Tirana by MoHSP as a result of non-provision of health services and factor medicine at regional hospitals near their residence. The reasoning of the court results that "... the treatment of hemophiliac patients is done at the National Hemophilia Center, where only urgent cases are covered and prophylactic treatment is not provided. The budget available for the purchase of coagulants is not enough and the medicine is also provided by various donations. It has not been proven in the trial that UHC has done a needs planning correctly and in accordance with the concrete needs. " In the assessment of the court, these actions were deemed as contrary to the legal requirements arising from Article 7/1 of the Law "On Protection from Discrimination", which provides that: "Any action or inaction of public authorities or of natural or legal persons participating in the life or public or private sectors, which creates grounds for denial of equality to a person or group of persons, or which exposes them to unfair and unequal treatment when they are in the same or similar circumstances compared to other persons or groups of persons constitutes discrimination."

Judicial decisions reach the same conclusion as the CPD, finding discrimination due to disability and health condition. In terms of guaranteeing the dignity of this vulnerable group, as well as in terms of recognizing and guaranteeing social support, provided by Articles 55/1 and 59/1/c of the Constitution, decisions should be recommended as a model of good practice. (See decisions no. 395, dated 10.02.2020 and No. 269, dated of the Administrative Court of First Instance of Tirana)

In another case, in 2011, the Judicial District Court of Lushnja sentenced the citizen A.N who suffers from schizoaffective disorder,

bipolar type, for the criminal offense 'Disruption of public order and tranquility', imposing on him the measure of compulsory treatment in a medical institution. By 2014, A.N. was treated in the prison hospital, while in 2014-2019 he stayed in the Kruja Penitentiary Institution, being treated as a convict, when in the meantime he had to be treated as a mental health patient in a psychiatric institution. The CPD has ascertained *the direct discrimination of the citizen A.N., due to belonging to a special group and disability*, a decision which was appealed in court by the Ministry of Health and Social Protection.

The Court provides a detailed overview of the domestic and international regulatory legal framework, assessing the constitutional provisions, Article 14 of the ECHR, Protocol no. 12 and the jurisprudence of the ECtHR, the Convention on the Rights of Persons with Disabilities, the EC document "On European Prison Rules", the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment 2012, the Law "On mental health".

The Law "On the Execution of Criminal Decisions", the Criminal Code, the Code of Criminal Procedure and the Law "On Protection from Discrimination". Based on the above, the court reasoned that 'Medical treatment of persons by court decision, with medical measures' compulsory treatment' and 'temporary hospitalization' carried out within the premises of Penitentiary Institutions puts them in unequal positions with other mentally ill persons, in the absence of providing the same medical service as those treated in public health institutions, restricting the rights and freedoms sanctioned in the Constitution, beyond the measure that coincides with the final court decision.

In the absence of special and rehabilitative treatment, the possibility for this citizen to have a health improvement is reduced and this is proven by subsequent court decisions to review the sentence. It is up to the medical authorities to decide based on the known rules of medical science on the therapeutic methods to be used to maintain the physical and mental health of patients. Lack of proper medical treatment may lead to a violation of Article 3 of the ECHR." After a careful legal analysis regarding the obligations arising from the domestic legal framework, enriched with international standards, the court concludes that 'The third person in

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trial was discriminated in relation to other patients being treated in public sector psychiatric hospitals and that he was not provided with the same medical service as those in psychiatric hospitals, moreover restricting the freedom and rights enshrined in the Constitution, beyond the measure that coincides with a final court decision. In order to eliminate the discriminatory situation, the establishment of a Special Medical Institution is required, which is under the responsibility of MoHSP". (See decision no. 3281, dated 08.10.2018 of the Administrative Court of First Instance of Tirana)

Challenges in this area remain numerous, ranging from insufficient efforts to bring legislation in line with the ICMP, lack of a harmonized concept of disability, lack of specific disability services, lack of consultation with organizations of persons with disabilities and the lack of a comprehensive gender equality policy and strategy that addresses the multiple and cross-cutting forms of discrimination faced by women and girls with disabilities.²¹¹

REMINDER:

Recommended acts for consultation:

- **Constitution and constitutional jurisprudence;**
- **Convention on the Rights of Persons with Disabilities, ratified by Law No. 108/2012**
- **'On European prison rules, Council of Europe document;**
- **Reports of the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment, 2012;**
- **Law No. 44/2012 'On Mental Health*';²¹²**
- **Law No. 10 221/2010 'On protection from discrimination, as amended;**
- **Law No. 8331/1998 'On the execution of criminal sentences';**
- **Criminal Code;**

211 See the EU Progress Report which draws attention to the final observations on the report submitted by Albania, approved in September 2019 by the UN Committee on the Rights of Persons with Disabilities; approved expressing concerns in a number of areas, such as:

212 The Committee on the Rights of Persons with Disabilities has repeatedly called on states that have ratified the CRPD to change the terminology they use in their legislation to refer to persons with disabilities and to harmonize their legislation in accordance with the content of the Convention. This measure includes the obligation to eliminate the use of inappropriate terminology and stigmatizing language. In this case, the term "mental or physical disability" used in the legislation is contrary to the CRPD and the recommendations of this Committee.

- *The code of the Penal procedure;*
- *Jurisprudence of the ECtHR / ECJ;*
- *DCM No. 508/2017 'On determining the field of state responsibility of MoHSP'.*

HEALTH CONDITION

The protected ground of "health condition" is also claimed separately by the complainants, who in the majority of cases are employees suffering from chronic or diseases acquired in the workplace, or other diseases of various degrees. Some of them have undergone interventions, are treated with medical reports and are treated continuously. In some decisions, the court has accepted as proven during the administrative investigation the discriminatory situation due to the health condition of employees, referring to the guarantees and special legal protection provided by the Labor Code in Article 147 regarding the non-termination of employment contract by the employer during the time that they are treated with a temporary disability payment by the employer or social security, or while on leave granted by the employee. In general, courts conclude the presence of discriminatory conduct without any in-depth analysis of the meaning of the protected ground, the discrimination test or the comparator, and even less with references to jurisprudential developments. In some decisions it is the court which, contrary to the finding of the CPD that there is no discrimination, has concluded that the conduct of employers meets the features of less favorable treatment.

In a few other cases, the court has deemed it impossible to rule on the claimant's request for a finding of discrimination, as long as the legality of the CPD decision on the employer's complaint has been confirmed by a **founding decision** by another court, but has not become final. (See decision no. 1908, dated 08.05.2017 of the Administrative Court of First Instance of Tirana) In some other decisions, the prevailing arguments are those that justify the merits of the claim for recognition of property and non-property damage. (See decision no. 2791, dated 17.09.2015 of the Administrative Court of First Instance Tirana)

In one of the cases selected for this analysis, the complainant was fired on the grounds of numerous and unjustified absences, which hindered the normal performance of work. She underwent surgery and was subsequently given medical leave. Although she returned to the institution to continue her work, this was impossible as she was asked to submit a written request. Even after the request was submitted, the employment relationship as a storekeeper was terminated after 11 years of work. The situation of illegality has been restored through the

recognition of the property and non-property damage by the court, referring to the 4 cumulative conditions of Article 608 of the CC, while the decision contains very few arguments regarding the protected ground of discrimination, which is taken for granted based on argument that: *"The competent body that proves whether or not there has been discrimination is the Commissioner, who has found direct discrimination due to health condition, recommending to the complainant that she can seek compensation under the provisions of Articles 36/1, 37/1 and 38 of the Law no. 10 221/2010 ..."*. (See decision no. 3716, dated of the Administrative Court of First Instance of Tirana)

In another case, the CPD found discrimination as a result of the health condition of the complainant, who was dismissed during the time he had a disability leave of absence. The fact of aggravated health condition and the diagnosis of 'multiple sclerosis' have been known to the employer since 2014, however in 2016 another contract was concluded between the parties with a fixed term, which was not renewed even though the complainant was still working. The complainant consistently submitted disability leaves of absence, which were interpreted by the employer as repeated non-appearance at work. The employer has declared the complainant incapable of work in the absence of any decision by the MCWCA on the level of disability and has requested his resignation.

The court assessed the discrimination as a result of to the health condition based on an analysis of the actions performed by the employer and decided to dismiss his lawsuit referring to the shift of the burden of proof, arguing that: "There is sufficient evidence presented by the complainant to justify such a thing." Regarding the measures given by the CPD, including that of giving a job position, the court states that: "It is up to the Commissioner to decide on the necessary arrangements and measures to rectify the situation, and to restore the denied right of the subject which came as a result of discrimination." (See decision no. 4602, dated 18.12.2018 of the Administrative Court of First Instance of Tirana) In the same line of reasoning, another court has decided to accept the claim of the complainant, recognizing him and his relatives the property and non-property damage, according to article 608 of CC, on the grounds that: "... the employer has violated the equal treatment of citizens in relation to the selection and retention of employees in office, as well as the manner of their treatment during changing working conditions. The employer has treated the claimant unfavorably, with neglect and with negative consequences, and has not objectively seen the aggravated family situation and the bad health conditions. If the situation was viewed objectively and in accordance with the scoring criteria, he would not be included in the lists of employees who would be subject to collective dismissal." (See decision no. 1567, dated 17.11.2017 of the Judicial District Court of Fier)

In another decision, the court, unlike the decision of the CPD, assessed the complainant's claim of discrimination as grounded, stating that "The employer tries to hide behind the fact that he was not officially aware of the complainant's health condition, precisely because this is the cause of discrimination. Knowing even verbally is enough for the employer to be aware that the claimant was in serious health condition and that treatment related to this type of illness is continuous and periodic. Of course, every employer is interested in the health conditions of employees, not only from a human point of view, but also professionally. An employee with poor health will in principle constitute an uncertain future regarding professional performance. "(See decision no. 1710, dated of the Administrative Court of First Instance of Tirana)

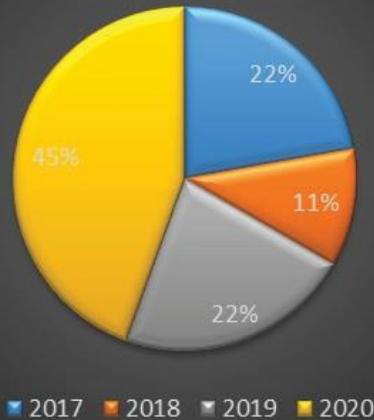
EDUCATIONAL STATUS

Discrimination due to educational status can be presented as setting criteria for the level of education to apply for a certain job, criteria which are not reasonable and justified (for example, seeking higher education for the job position of sanitary workers); or the case when a person has completed 4-year higher education, and is not accepted to apply or is disqualified as the announcement requires 3 + 2 education; or when a particular university diploma is set as an employment criterion, without any objective reason, excluding applicants who have been educated at other universities.²¹³

Situations where educational status is presented as the ground of unequal treatment are not numerous in number (9 decisions or about 3% of the total). However, the problems posed by these issues are indicative of discriminatory practices and illegalities highlighted in determining the selection criteria for recruitment, competition and selection procedures, exclusion from these procedures of certain categories of applicants for different positions in the pre-university or university education system (high schools or universities), or other public or private entities, as well as flagrant termination and without reasonable cause of employment contracts after significant periods of employment mainly with private law entities.

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<https://www.kmd.al/shkaqet-e-diskriminimit/>

Gjendja arsimore



Based on the analysis of court decisions as the main arguments of disqualification from the recruitment procedures in the university system it results the non-fulfillment of the position criteria, especially the weighted average mark of the first two cycles of postgraduate study. (See decisions no. 2660, dated 25.09.2020, no. 2189, dated 02.10.2020 and No. 2420, dated 31.05.2017 of the Administrative Court of First Instance of Tirana).

In the case of termination of employment relations, the ground was the mismatch of the job position with the qualification of the employee. Paradoxically, the latest findings occur after significant periods of employment (even over 20 years), without any disciplinary action, and without any breach of contractual obligations, or as a result of opposing attitudes towards their superiors or denouncing issues in a certain field. (See decision no. 2418, dated 16.10.2020 of the Administrative Court of First Instance of Tirana).

Discrimination manifests itself both directly and indirectly.

The courts clearly base the analysis on the concept of "comparator", turning to good practices, which should be followed in the daily life of judging cases of equality and non-discrimination.

In a few cases the court has taken a different stance from the CPD regarding the probability of discrimination, based on the lack of a "full and comprehensive investigation conducted by the CPD in relation to the complainant's claims, who claimed less favorable treatment than the other candidate due to educational status.

The same approach is observed in connection with the claim of discrimination for "any other ground" - "modest dressing". "The investigation should have taken into account in particular Articles 80-81 et seq. of the APC on the means of seeking proof and evaluating proof." (See decision no. 877, dated 07.03.2017 of the Administrative Court of First Instance of Tirana).

In some other decisions, although discrimination in employment due to the protected ground of the educational status has been ascertained by the CPD, it has been the court which, in disrespect of the principle of shifting the burden of proof, has concluded that *"the complainant does not has managed to prove unequal treatment."* (See decision no. 2418, dated 16.10.2020 of the Administrative Court of First Instance)

Competition procedures as internal lecturers at the Public University, in some cases have resulted in the disqualification of candidates, referring to the defined criteria. The complainants claimed that the real ground of the disqualification was the setting of a certain weighted average mark for the first two cycles of the study, even though they possessed a higher scientific title, which presupposed having knowledge that exceeded the criterion. The courts, referring to the concept of "comparator-other competitor", reason that: "The claimant has not been guaranteed a fair and equal competitive process, which has been objective and the same as her competitors or even analogous to other competing cases in the same academic institution. It turns out that in the competition practice analyzed above, the winner is a competitor with a weighted average mark below eight, while for other analogous cases a weighted average mark above eight is required, with the consequence of not signing a contract (disqualification criterion). Also, in the assessment of the claimant, some qualitative objective elements were not taken into account, such as certificates of excellent student, certificates of foreign language defended in international and national institutions, experience as a teacher for over 25 years, etc. If the winning competitor is analyzed, the court finds that she has a weighted average mark of the first cycle of studies under 8 ... so it is easily concluded that we have a less favorable treatment of the claimant in relation to her competitor or other similar cases treated by the same body." (See decision no. 2420, dated 31.05.2017 of the Administrative Court of First Instance of Tirana)

In another case, the complainant addressed the CPD claiming unequal treatment during the competition procedures as a full-time lecturer, for the fact that the competition criteria provided, inter alia, the exclusion of competitors whose weighted average mark of Bachelor and Master studies was under 8, and had not graduated in at least two cycles in the field of political science.

The CPD did not consider the disqualification of the complainant due to the educational status as discrimination, but concluded *that there was indirect discrimination against candidates who had defended a degree or scientific title (doctor, docent, associate professor), recognized by the MES as a result of the criterion of the weighted average mark of the first two cycles of study.* On the recommendation of the CPD, the Faculty of Social Sciences in the Statute and Internal Regulation has provided criteria differentiated according to the degree of qualification of candidates, and has provided the obligation of the basic units to explain in writing in a reasoned manner the establishment of the proposed criteria.

The court assessed as grounded the reasoning of the CPD on the presence of indirect discrimination, stating that: "The weighted average mark of the I and II cycle of the study can be an evaluation criterion if all the candidates meet all the criteria. Setting the weighted average mark criterion is considered reasonable when it relates to the same level of academic qualification, as it is presumed that in the conditions of disposition of the same degree, the candidate above the threshold of a weighted average mark guarantees satisfactory knowledge assessed by the pedagogical staff who has previously tested it, thus meeting the standard of employment of the qualified personnel. Setting the weighted average mark for lower cycle diplomas invalidates a higher academic degree, which in the case of the claimant in the field required by the Department, has placed him at a disadvantage to candidates who had no in-depth studies in the respective field, as presumed by the achievement of the scientific degree "Doctor". (See decision no. 304, dated 06.02.2017 of the Administrative Court of First Instance of Tirana)

SOCIAL ORIGIN, BIRTH AND PROPERTY

Social origin 'refers to a person's inherited social status'. This characteristic may be related to the position that individuals have acquired due to birth in a particular social class or community (such as those based on ethnicity, religion or ideology), or from a social situation, such as poverty and the homeless. Furthermore, the ground of birth may refer to one's status as born out of wedlock, or adopted.²¹⁴ The protected ground of "property" may be related to one's status in relation to land (such as being a tenant, owner or illegal resident), or in connection with other property.²¹⁵

International jurisprudence has held the view that these three grounds may be seen as interrelated, because they relate to a status attributed to an individual on the basis of

214 See *Wolter and Sarfert v. Germany*, no. 59752/13 and 66277/13, 23 March 2017 and *Fabris v. France* [GC], no. 16574/08, 7 February 2013.

215 See Manual 2018, p.218.

an *inherited biological, economic or social characteristic*. As such, they may also be related to race and ethnicity. Apart from the grounds of "birth", few cases have been brought before the ECtHR regarding these grounds.²¹⁶

The investigation revealed only one case addressed by the court from the point of view of the protected ground of social origin, however it does not indicate any innovation in the case law, as there is a complete lack of treatment according to international developments of protection of this feature or its interaction with other grounds. Unlike the CPD, who did not find discrimination against the complainant, the court concluded that: *The employer could not argue that the situation of the claimant, the employee (family and economic circumstances) were not decisive in terminating the employment contract due to "poor performance" after eight years of employment. The employer failed to convince the court on the basis of evidence that he did not discriminate or exclude the employee due to her condition.*"(See decision no. 493, dated 18.02.2019 of the Administrative Court of First Instance of Tirana).

ASSOCIATION

International jurisprudence has made a broad interpretation of the extent of the protected ground of "association." It may include "*discrimination by association*", where the victim of discrimination is not the person with the protected characteristic. Discrimination by association otherwise means situations where the protected ground relates to another person related in one way or another to the applicant.²¹⁷

In some cases, the courts may be faced with the case where the complainant (claimant) does not claim discriminatory treatment due to any disability, but may claim unfavorable treatment due to the disability of a close person, such as a child, with whom he lives, or whom the complainant takes care of. This makes it necessary for law enforcement authorities to initiate a detailed analysis of the reasoning after less favorable treatment, seeking evidence that the protected ground, although not a characteristic of the complainant but of someone else he is related to, is the ground of this treatment, regardless of whether it is direct or indirect.

216 See ECtHR decisions *Mazurek v. France* (no. 34406/97), 1 February 2000 and *Chassagnou and Others v. France*, No. 25088/94, 29 April 1999.

217 In the case of *Guberina v. Croatia* (2016), local authorities failed to take into account the needs of a child with a disability when determining his or her father's right to tax relief in the purchase of customized property. The court held that discrimination of the father due to the disability of the son was a form of discrimination by association. See also ECtHR decisions in *Molla Sali v. Greece* [GC], 2018; *Skorjanec v. Croatia*, 2017, § 55; *Weller v. Hungary*, 2009, § 37.

The ECtHR has held that: "... in *the present case the question that arises is to what extent the complainant, who although does not belong to a disadvantaged group himself, still suffers less favorable treatment due to the disability of to his child.*"²¹⁸ The same line of interpretation has been followed by the ECJ, which has analyzed cases where an employee is treated unfavorably at work, due to the fact that the child/ren are disabled. The child's disability can lead to delays at work on certain occasions and the employee must seek permission to adjust the schedule to suit the child's needs. In a similar situation the complainant's requests were rejected by the employer and she was threatened with dismissal, while receiving abusive comments about the child's condition. The ECJ accepted as a comparator her colleagues in similar workplaces and with children, concluding that they had been given the flexibility they required from work. The court also acknowledged that this constituted discrimination because of her child's physical disability.²¹⁹

Cases considered by the courts are very few in number. The courts take for granted the presence of discriminatory conduct in employment relations, acknowledging the discriminatory grounds, as proven by a decision of the CPD, not appealed, and as such with the full force of indisputable evidence as to the true ground of dismissal. *Association is claimed due to the complainants' close relations to persons such as the spouse or son in law who have different political convictions from those of the employer or have had a previous relationship with him, but have disrupted them due to the complaints, being also victimized.* Although the courts find discrimination for the same protected reason, their attitude towards the right to compensation is different, thus creating confusion as to whether the damage is calculated under Article 608 of the Civil Code, or Article 146 of the Labor Code.

In one of the selected cases, the complainant was dismissed due to collective dismissal. During the conversation with the representatives of the unions, it was requested that during the collective dismissal some objective criteria be applied such as education, qualification, seniority at work, which aimed at protecting qualified employees and those who met certain specific conditions, by determining a way of scoring for each criterion. The claimant, claiming that the employment contract had been terminated without reasonable cause, addressed the CPD claiming that he had been treated unequally with other employees, *being discriminated against because of his political convictions and association with his groom, who had previously held senior management positions with the employer, but because he opened several legal proceedings against him, he*

218 See *Guberina v. Croatia*, paragraphs 76-77.

219 See ECJ, *Coleman v. Law Firms Attridge and Steve*, Case C-303/06 [2008] I-5603, 17 July 2008.

was ground too, because of political convictions, and in the form of victimization by the same employer.

The court, after analyzing the documentation of other employees with the quality of comparator, has concluded that: "The scoring of the claimant evaluation criteria was done unfairly and unequally compared to other employees. The court found the discrimination due to political convictions unproven, arguing that the claimant did not present any evidence to prove his membership in any political force. The discriminatory situation of the claimant started after the court announced the decision related to the lawsuit filed by his son-in-law. The claimant has been transferred to a lower position, without his consent ... After this moment the discriminatory treatment has deteriorated, being treated unequally and unfavorably during the evaluation procedure in the framework of the application for collective dismissal. "(See decision no. 1131, dated 29.07.2019 of the Judicial District Court of Fier)

In another case the court accepted as grounded the complainant's claim of *discrimination by association to her husband, marital status and political conviction of her husband*. The decision does not contain any detailed analysis of the discriminatory behavior of the employer, as the discrimination is taken for granted due to the decision of the CPD, which has not been appealed by the employer, thus becoming final. (See decision no. 2247, dated of the Administrative Court of First Instance of Tirana)

BELONGING TO A CERTAIN GROUP

This protected ground falls into the category of "other statuses" provided for in Article 14 of the ECHR. As far as protection is concerned it is guaranteed within the framework of freedom of association, provided for as a separate right by Article 11 of the Convention. The ECtHR considers freedom of association in trade unions as a right which is regulated in point 1 of article 11, freedom which may be subject to legal restrictions on employees of the armed forces, police, state administration. Article 11 applies to the employer, both in the case when the employment relationship is regulated by public law, as well as by private law. Article 11 aims to protect individuals from arbitrary interference by public authorities, but also sets out positive obligations of the state to ensure the effective enjoyment of these rights. The ECtHR has consistently recognized that Article 11 protects the professional interests of trade union members and their development. Trade union membership enjoys judicial protection against discrimination.²²⁰

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See *Danilenkov and the other v. Russia* 2009.



The analysis of court decisions highlighted the fact that the complainants belonging to a certain group, mainly a trade union or association, in the capacity of its leader or member, as a politically persecuted person, or even a subject with disabilities (physical or mental), constitute grounds for discriminatory treatment by employers or other public authorities.

The courts of administrative jurisdiction have generally upheld the decisions of the CPD, dismissing as unfounded the claims of public or private authorities. In a few cases, different positions of the courts are found regarding the analysis of the actions of the institutions:

- (i) some courts consider illegal the actions taken during the implementation of new structures or the reappointment of employees after the collective dismissal, their non-selection in certain structures, or even dismissal, as they occur precisely because of the protected characteristic expressed in a particular role, position or even status of employees;
- (ii) in some other cases, the particular characteristic of the complainant was not sufficient for the court to consider discriminatory the actions of the employer for the transfer or dismissal of the Chairperson of the Trade Union. (See decisions No. 1032, dated 03.10.2016 of the Judicial District Court of Fier, No. 2699, dated 19.06.2017 and No. 1712, dated 24.07.2020 of the Administrative Court of First Instance of Tirana).

The claim of discrimination is analyzed referring to the standard of interpretation of discrimination according to the test widely elaborated by the ECtHR by several decisions. The analytical scheme of three cumulative criteria, which we have brought to attention at the beginning of this study, has been the approach referred to by some courts. The research also identified opposing positions of the courts, which although the cumulative criteria of the proportionality test are part of the reasoning, they reach different conclusions.

As in most court decisions, where the elements of the analytical scheme are only mentioned without being analyzed or confronted with the facts and evidence administered, the courts follow the same approach by limiting the burden of proof only on the party claiming discrimination, placing him or her at an unfavorable situation in terms of the objective and reasonable possibility to prove that he/she has been treated less favorably for a distinct characteristic in relation to its peers or equals. The Court reasoned that: *"The mere fact of being a member of the oil union is insufficient to conclude that he has been discriminated against by association... The claimant did not bring any evidence to prove that the actions of the association were committed because of him being the President of the union"*. (See decision no. 1031, dated 03.10.2016 of the Judicial District Court of Fier)

The opposite approach is observed in the analysis of the Court of Appeal, which brings a detailed approach to the interpretive approach to be followed when examining claims of discrimination, as follows:

1- *There should be a differentiated treatment of the person in relation to others, who are in the same or similar circumstances.*

- *Termination of employment contract at the end of probation period, while the other two employees who had started working under the same conditions with him, had normally entered into an employment contract and continued to work even during the trial on appeal of the case. The respondent, who claimed that there were several dismissed employees, did not bring evidence at the hearing, which showed that the claimant was the only dismissed employee, while the other employees continued working normally. Based on this evidence, the first condition of discrimination is proven, according to which the respondent had committed a differentiating behavior in the employment relationship with the claimant in relation to other employees of the company in the same circumstances.*

2- *Differentiated treatment occurred for one of the protected grounds set out in Article 1 of Law no. 10 221/2010.*

- *The respondent before, during and after the employment held the position of Chairman of the Federation of Petroleum Trade Unions and vice-chairman of the Trade Union Confederation in the public and private service in Albania.*

His outstanding activity is proven, as well as the opposition of economic and structural policies in the employment plan, dismissals and the lack of collective contract signing.

3- Differential treatment has brought about the difficulty or inability of this person to exercise the rights and freedoms recognized by the constitution, ratified international acts or other applicable laws.

- *Violation of the claimant's right to employment has led to difficulties in exercising the constitutional rights to participate in and affiliate in trade union in defense of employees' rights. Dismissal is a negative example of violating the activity of trade unions as a whole, which aims to limit their activity due to the freezing effect of dismissal or non-recruitment of representatives or active participants in trade unions in relation to other persons'. (Compare the decision No. 1031, dated 03.06.2016 of the Judicial District Court of Fier, and the decision No. 911, dated 01.11.2018 of the Court of Appeal of Vlora)*

ANY OTHER GROUND

The category "other statuses" has gained meaning thanks to the interpretative jurisprudence of the ECtHR which has developed this concept including several reasons such as *paternity*,²²¹ *marital status*,²²² *membership in an organization*,²²³ *military rank*,²²⁴ *paternity of a child born out of wedlock*,²²⁵ *residence*.²²⁶ Some of them also comply with those developed under EU law, such as *sexual orientation, age, and disability*.²²⁷

As we pointed out at the beginning of this study, the legislative technique of formulating Article 1 and the provision of a non-exhaustive list of protected grounds,

221 ECtHR, *Weller v. Hungary* (no. 44399/05), 31 March 2009.

222 ECtHR, *Petrov v. Bulgaria* (no. 15197/02), 22 May 2008.

223 ECtHR, *Danilenkov and Others v. Russia*, 30 July 2009 (trade union); *Organization Grande Oriente d'Italia di Palazzo Giustiniani v. Italy* (no. 2) (No. 26740/02), 31 May 2007 (freemasons).

224 ECtHR, *Engel and others v. The Netherlands* (no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72), June 8, 1976.

225 ECtHR, *Sommerfeld v. Germany* [GC] (No. 3171/96), 8 July 2003; *Sahin against Germany* [GC] (No. 30943/96), 8 July 2003.

226 ECtHR, *Carson and Others v. The United Kingdom* [GC] (no. 42184/05), 16 March 2010.

227 The ECJ in the case of *Alexandru Enache v. Romania*, 2017, held that national legislation allowing the postponement of a prison sentence for mothers, but not fathers, with young children was justified in order to take into account the special link between a mother and her child during the first year of the child's life (76 §).

which concludes with "any other ground" has enabled the creation of an open-ended norm. This means that the margin of evaluation and interpretation of equality bodies, including the courts, is wide in terms of expanding the list of grounds, taking into account international practices in this regard.

During the research, a case was found where the discrimination of an employee fired on the day of return to work, after the end of maternity leave, was assessed by the CPD as discriminatory from the point of view of the three distinctive characteristics she had: *pregnancy, motherhood and gender*. The peculiarity of the case in question lies in the innovation brought by the CPD and with it the court, with the inclusion of the characteristic "motherhood" in the category "any other ground", creating a first position expressed in this regard through the extended interpretation, and in harmony with the protected grounds, given the specifics of the case.

The values of the court decision, apart from the fact that it is the first in this regard, also lie in its structural and substantive approach, as it brings to attention a set of international instruments that guarantee the protection of women in the field of employment, especially during pregnancy, during maternity leave, as well as after its completion. *The decision provides a comprehensive overview of the protection of women, starting with Articles 18 and 54 of the Constitution, in the special protection provided by Article 14 of the ECHR, continuing with the European Social Charter, Council Directive 2000/78/EC, and 27.11.2000 "On the establishment of a general framework for equal treatment in employment and employment relations", followed by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention no. 183 "Maternity Protection", ending with the Albanian legal framework such as the Labor Code, Law "On social insurance", Law no. 9970/2008 "On gender equality in society", and Law No. 10 221/2010 "On protection from discrimination".*

Another special element of the decision lies in the interpretation of the entirety of the above guarantees in light of the principle of shifting the burden of proof, provided by Article 82 of the APC. Specifically, the court reasoned that: *"The party who filed the complaint has the burden of proof to prove that differential treatment is not discriminatory" This can be done in one of two ways: (1) Proving that there is no causal link between the protected ground and the unfavorable or unequal treatment: (2) Demonstrating that, although this treatment is related to the ground mentioned, there is a reasonable and objective justification. "If the subject of the complaint is not able to prove one of the two, then he will be liable for discrimination."*

Especially with regard to the characteristic "maternity", the court, after analyzing the entirety of the facts and evidence that have resulted from the main trial, concludes that: "The employer in terminating the employment relationship took into account the fact that the complainant was already the mother of a child who has not yet turned 1 year old and, consequently argued that the relevant maternity obligations would not allow her to perform her duties as before, and, consequently, decided to dismiss the complainant, who was on maternity leave and was expected to return to her previous job position, despite having worked for this project for more time Maternity has been the decisive ground for dismissal ". (See decision No. 3525, dated 21.12.2020 of the Administrative Court of First Instance of Tirana)

During the analysis, other cases were found where the court found discrimination of the complainants for grounds which are not listed in Article 1, but which only with an extended interpretation can be included in the category "any other ground".

In the following analyzed case, the complainant claimed discrimination due to failure to consider a claim

by the HCJ for reinstatement in the previous position as a judge after the end of her mandate as a member of the CEC. The case concerned the different application in two identical situations related to the legal obligation to return the CEC member to his previous position as a judge at the end of his term. While in one case the HCJ had accepted the request, in the present case it had rejected it. In the court's assessment: *"In the circumstances when it was proved that due to the Law the situation of the claimant in filing a claim with the respondent HCJ is identical to the situation of A.L., and the respondent did not prove why there was this differentiation in the treatment of claims by the respondent, and that this differentiation had a legal reason, then the court concludes that in the case of the claimant the existence of discrimination is ascertained in the case when her request was not considered by the respondent".* Based on this finding, the court continued the analysis to assess the harm based on Articles 608 and 625 of the CC, without being accompanied by any analysis on the protected ground newly included in the category "any other ground". (See decision no. 7462, dated 17.12.2014 of the Administrative Court of First Instance of Tirana)

The above case was also reviewed by the Court of Appeal, which referring to the protected grounds under Article 1 of the Law "On Protection from Discrimination" has clarified this aspect of decision-making, stating that *"... none of the cases provided in this provision apply in the case of the claimant. Her only claim as a discriminatory circumstance has to do with the fact that in her capacity as a CEC member,*

she has represented a certain political entity, due to which the claimant claims that she has not been treated equally with other subjects under the same or similar conditions. This fact would be the subject of discussion in relation to Article 1 of the Law, only if her request had been considered by the respondent and due to her political representation in the CEC, the respondent would have rejected the request for return to the judiciary system."(See decision no. 1106, dated of the Administrative Court of Appeal)

The CPD has also considered the complaint of an employee, who has been suspended from work due to the initiation of criminal proceedings against her and other persons on charges of passive corruption in cooperation. At the end of the criminal proceedings, the complainant was acquitted and returned to duty in 2012. *After the termination of employment relations in 2015, the complainant addressed the CPD, which found that she was discriminated against due to the criminal sentence, ordering the return of the complainant to work. This decision was appealed by the employer in court, which decided to accept the lawsuit with the argument that: "... in none of the statements received from employees and in any of the documents verified and administered by CPD inspectors there is no statement from third parties to indicate that the ground for her dismissal was her criminal proceedings in the past. Loss of trust by the head of the employer entity for the continuation of the employment relation by the employee and discrimination of the employee in the employment relations are two different legal situations. The mere fact of dismissal is not enough to conclude that we are dealing with discrimination, especially when the employer maintains that the employee has violated contractual obligations through some actions identified against her, clarified in the course of this trial and above in the decision ."* (See decision no. 6404, dated 17.12.2015 of the Administrative Court of First Instance of Tirana)

In another case, the claim of discrimination was filed by an individual in the capacity of a taxpayer, who claimed that the true reason for imposing the tax liability was *financial condition* (unfair favoring of competitors in the pharmacy business). The court has decided to call the CPD in the capacity of a third person, but the decision in fact does not present any argument of the CPD nor does it consider the claimed situation of discrimination, thus raising serious doubts about the observance of the standard of reasoning of the decision. (See decision no. 272, dated 28.02.2019 of the Administrative Court of First Instance of Vlora)

Denial of reasonable accommodation

"Denial of a reasonable accommodation" is that form of discrimination which occurs whenever there is a denial or objection to make necessary and appropriate changes or adjustments, which are necessary in a particular case and do not impose an excessive burden, with the purpose of guaranteeing the enjoyment and exercise on an equal basis of fundamental rights and freedoms, recognized in the national legal framework, for persons with disabilities, or occurring in other conditions referred to in Article 1 of this law.

The term "reasonable accommodation" is one of the few protected grounds that has undergone the constitutionality test in 2013. *The constitutional review brought a detailed analysis of the principle of equality and non-discrimination from the point of view of international standards that guarantee the rights of persons with disabilities, stating that: The obligation for "reasonable accommodation", only to the category of persons with disabilities, is a constitutional differentiation (justified and objective), in order to guarantee the application of the principle of equality to this category.*²²⁸

The concept in question is provided for in Article 2 of the CRPD, according to which, "reasonable accommodation" means a necessary and appropriate modification, or an adjustment which does not impose *a disproportionate or excessive burden* on a specific case, intended to provide the person with disabilities with the enjoyment or exercise of fundamental rights and freedoms on an equal basis with others.

EC Directive 2000/78 "On the establishment of a regulatory framework for equal treatment in employment relations", in Article 5, provides that "... *to ensure the application of the principle of equality, in relation to persons with disabilities, "reasonable accommodation" should be provided, dictating that every employer should take appropriate measures in order to provide a person with a disability with access to, inclusion, and development at work, unless such measures are constituted a disproportionate burden for him (the employer).*

The ECtHR has also ruled on the concept of "reasonable accommodation" in relation to a case where the claim was based on discrimination on grounds of health, explaining that ***differential treatment may be unjustified when no reasonable accommodation is made, so that fundamental rights are less restricted, but also the purpose of the legislator is achieved.***²²⁹

228 See decision No.48, dated 15.11.2013 (www.gjk.gov.al)

229 Ibid, referring to the case *Glor v. Switzerland*, application No. 13444/04, decision dated 6.11.2009.

While the term "excessive burden" is provided in the Law "On Protection from Discrimination" in accordance with the concept provided by the CRPD, in the framework of the principle of proportionality and balancing the cross-cutting interests of persons with disabilities and those public or private entities, who must guarantee reasonable accommodation. Furthermore, the term "excessive burden" has found reasoning in Article 20/3 of the Law, specifically in the field of goods and services and where the meaning of this term is clear, as a burden which should not be disproportionate (*excessive*) for the person providing the goods or services and having the obligation to make appropriate and necessary adjustments.²³⁰ The question that arose during the constitutional trial regarding the term "excessive burden" was that having no provisions in the law to make the excessive burden measurable, persons with disabilities face the risk of having rules and criteria set for them that differentiate them from other citizens. In the Court's assessment, the lack of criteria defined in the law of "excessive burden" does not create incompatibility with the Constitution, as it is the implementing and controlling bodies of compliance with this law, which will be able to interpret the "reasonable accommodation" case by case. This interpretation will be realized by these bodies depending on the nature of the claims as well as the possibility for making reasonable adjustments/changes by the subject, on which the obligation of adjustment falls and on which a disproportionate burden should not be imposed.²³¹

The analysis of court decisions shows that this ground of discrimination is addressed only in one decision, the clarity with which it analyzes the roles and responsibilities of state institutions in relation to the enjoyment of rights recognized by the Constitution and international instruments seems to fulfill the interpretive approach of the Constitutional Court.

The case concerns a minor child with a severe hearing impairment, whose only way of correction is the immediate placement of a cochlear implant, as otherwise he becomes permanently disabled. According to the DCM no. 308, dated 21.05.2015 "For the approval of health service packages to be approved by the Compulsory Health Insurance Fund in the hospital service", the cochlear implant service package (as one of the free packages for patients) is fully funded as a reimbursable service from this Fund and includes the provision of cochlear implant equipment as well as the surgical intervention procedure for placement in the child's ear. From the technical point of

230 Article 20/3 of the Law: "It is prohibited for a natural or legal person, who offers goods and services to the public, not to accept or oppose the realization of necessary and appropriate changes or adjustments, which aim to enable the benefit of these goods and services from a person with a disability, as long as these modifications or adjustments do not impose a disproportionate or unlawful burden on the person providing the goods and services."

231 Decision No. 48/2013 of the CC.

view, the DCM stipulates that the equipment of the cochlear implant, according to EU standards, is provided by the Ministry of Health and Social Protection.

In the circumstances when none of the three responsible authorities has taken measures to ensure this reasonable accommodation, the father of the child and the Albanian Helsinki Committee have addressed the court, which has found *discrimination in the form of denial of reasonable accommodation* recognizing jointly the obligation of the institutions responsible for taking all necessary administrative measures for the provision and installation of the cochlear implant, as well as the compensation of the damage in money due to the damage to health. The Court, referring to Article 13 of the ECHR on the right of every person to have an effective remedy before a national body, notwithstanding that the violation was committed by persons acting in the performance of their official functions, argues that: *"The free guarantee of the cochlear implant service package for minors with severe hearing problems, as is the case of the minor G.L, does not constitute an excessive and disproportionate burden, as long as the Albanian state itself has undertaken the free coverage of this service. Because the respondent Ministry of Health has not taken any measures according to the obligations arising from the DCM in question to identify, register and perform surgical intervention to place the cochlear implant in the child, there has been a consequence which is aggravated due to the passing of time, making it even more difficult to increase the ability to listen and recover hearing."* (See decision no. 1250, dated 12.04.2018 of the Administrative Court of First Instance of Tirana)

VIKTIMIZATION

"Victimization" is unfavorable treatment or negative consequence, which comes as a reaction to a complaint or a proceeding, which aims to apply the principle of equality and non-discrimination, according to the provisions of Article 1 of this law, regarding the claim of discrimination of the complainant.

Claimed cases of victimization, taken into consideration by the CPD and the courts, are few compared to the total number of decisions analyzed. The research shows that the claim of victimization is accompanied by the violation of other protected grounds such as political conviction, union affiliation, or health status, while in the majority of cases it is claimed separately.



Regarding the legal analysis of this ground of discrimination, the case law remains not elaborated, as the courts in assessing the discriminatory situation take for granted the findings and observations of discrimination by the CPD. Some decisions limit the burden of proof to the claimant alone without shifting it, which makes it even more difficult for the complainant to prove the unjustified less favorable treatment for objective and reasonable reasons.

From the researched situations, the ground of victimization turns out to be:

- ***Complaint to the Department of Internal Administrative Control and Anti-Corruption due to the appointment to the position of director of a person who did not meet the legal criteria.*** The denounced fact was found as a violation by the Supreme State Audit, however the complainant was initially demoted and had a reduced salary, being transferred to another position unsuitable for her education and professional profile with the argument of violating the ethical principles of public administration. Actions by the employer are escalated until the immediate termination of the employment contract. The court considered the claim as grounded, arguing that: 'the claimant has been discriminated against by the unjust actions of the superior as a result of her principled attitude regarding the appointments of her superior, who by violating the equal treatment of citizens regarding the recruitment and selection at work, and the treatment of his employees during the establishment or change of working conditions. Discrimination is direct because she has been treated less favorably by the qualification group to which she belongs. The claimant has been victimized **after the employer treated her**

unfavorably and with negative consequences as a reaction to a complaint or proceeding aimed at applying the principle of equality. (See decision no. 280, dated 20.02.2014 of the Court of Appeal of Vlora)

- *Critical attitudes towards illegal activity and incorrect behavior towards employees employed under collective labor contracts and complaints to the CPD. (See decision no. 240, dated 24.02.2016 of the Fier Judicial District Court)*
- ***Complaint in court by the employee about the order issued against the complainant for compensation of the difference found in the warehouse after the audit.*** The employee has also issued another internal order for the transfer of the employee to a lower job position (from the position of Material Manager to that of loading and unloading worker). In these circumstances, the claimant addressed the court requesting the return of the amount withheld for compensation, and not retaining the salary in the future, and the lawsuit was accepted. Upon introduction to the lawsuit, the employer has ordered the termination of employment relations. The court, after considering the employer's appeal for ascertaining the absolute invalidity of the decision of the CPD, has decided to change the decision of the first instance and to reject the appeal, evaluating the decision of the CPD issued in accordance with the legal competencies. Regarding the measure of returning the claimant to work, the court considers that it is a recommendation and not an order. (See decision no. 3241, dated 17.12.2019 of the Administrative Court of First Instance of Tirana).
- ***Appeal in court against the unfair decision for not paying working days.*** The conflict situation had as initial cause the refusal by the claimant to pay from his own bank account in favor of a political entity a monthly amount of 1500 ALL, culminating in his dismissal from work. The Court reasoned that: "These grounds of discrimination, which have been expressed through successive illegal actions and which have culminated in the dismissal of the claimant, are at the same time 'victimization' of the claimant during the employment relationship." The court ruled that there was discrimination and victimization, recognizing the complainant the remuneration in 12 monthly salaries, according to the provisions of Article 146 of the Labor Code, while recognizing the non-property damage to his relatives. (See decision no. 174, dated 09.02.2018 of the Judicial District Court of Shkodra)
- ***The appeal of the disciplinary measure given to the employee, who has complained about the change of office and difficult working conditions.*** From the administrative investigation carried out by the CPD, it has resulted that the environment where the third person works does not meet any criteria to be a "work/office environment", as there are no windows for ventilation or natural light, no heating in contrast to all other facilities of the institution. *The Court, referring to an analysis of the constitutional and international framework on employment standards, argues that "changing his office and moving him to the former warehouse*

The Court, referring to an analysis of the constitutional and international framework on employment standards, argues that "changing his office and moving him to the former warehouse premises is associated only with the claimant, and no other employee, and it is unmotivated by any objective need of the institution. This situation becomes even more evident when this moment occurs only 1-2 weeks after the filing of the lawsuit in court against the institution "(See decision no. 2582, dated 26.10.2020 of the Administrative Court of First Instance of Tirana)

- **Assignment of the personal security measure "arrest in prison" for the criminal offense of passive corruption**, which after being assessed by the court was changed to "house arrest". The employer, due to the initiation of criminal proceedings against the complainant, has decided indefinite suspension, until the end of the trial and a final decision is given. The party claiming victimization has been found guilty by the courts of first two instances, while it has required recourse to the Supreme Court, which has returned the case for retrial, a process that ended with the dismissal of the case with the argument that "... it was not proved that the defendant had committed the criminal offense for which he was charged, with evidence that proves him beyond any reasonable doubt and, consequently, the decision for this defendant should be changed and the case should be dismissed ". The court assessed the claim of discrimination in the form of victimization as grounded, stating that: "The complainant's right to return to his previous job position has been violated as long as it has been proven that the initiation of criminal proceedings against him was unfair and the ground for which it was initiated was dropped. The claimant did not prove that her actions against the third person did not occur after his appeal to the court or that they had a reasonable and objective justification, i.e. that these actions pursued a legitimate aim and that the measures for the achievement of this goal were proportionately justified and objective."(See decision no. 3131, dated 01.12.2020 of the Administrative Court of First Instance of Tirana)

INSTRUCTION TO DISCRIMINATE

Harassment and instruction to discriminate are seen as separate manifestations of direct discrimination.²³² Although the ECHR does not specifically prohibit harassment or instruction to discriminate, it does contain some specific rights related to the same area. Harassment may be included in the right to respect private and family life protected by Article 8 of the ECHR, or the right not to be treated in a degrading or inhumane manner under Article 3, while the instruction to discriminate may be included by other Articles, such as freedom of belief or assembly under Article 9 or 11, depending on the context. In cases where these acts demonstrate discriminatory motives

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232 ECtHR has found a violation of the article 14 in cases of harassment and instruction to discriminate with regard to Article 11 concerning the right of peaceful assembly in the case of *Bączkowski and Others v. Poland*, 2007. Inter alia, the ECtHR stated that: "During the exercise of freedom of expression, they (senior officials, in this case the mayor) may be required to restrict themselves, given that their views may be taken as guidance by civil servants, whose employment or even career depends on the approval of their superiors (senior officials)."

the ECtHR examines claims of violations of relevant articles in conjunction with Article 14, which prohibits discrimination.²³³

Under the Non-Discrimination Directives, harassment will be considered discrimination when: (i) an unwanted conduct occurs in relation to a protected ground; (ii) with the intent or effect of violating the dignity of a person; (iii) and / or creating an intimidating, hostile, degrading, humiliating or offensive environment.²³⁴ Meanwhile, none of the directives contains any definition of instruction to discriminate.

The research shows that this form of discrimination has appeared mainly in employment relations. The analysis revealed the negative consequences that are created for employees if they make public, issues of concern on problems regarding the well-functioning of various work processes or practices in both public administration and the private sector. Employees' opinions are considered 'critical ideas and attitudes', which in practice become a source of

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disciplinary action, non-confirmation of position or dismissal. Although cases of this form of discrimination in this analysis are few, the courts, as the only forums where disputes are resolved and justice is served, have laid the foundations for the prevention of discriminatory practices, drawing the attention of public authorities, *which are obliged to take all positive measures, so that in accordance with Article 15, point 2 of the Constitution, in fulfilling their duties, they respect fundamental human rights and freedoms, as well as contribute to their realization.*

In one of the reviewed cases, the cause of the instruction to discriminate was the opposite attitude of the complainant, at that time head of an Education Directorate, towards the reunification order of the two schools, which were separated due to the high number of students and insufficient facilities available. This situation led to the establishment of a commission, which would assess her disciplinary performance and within the same day the suspension from office was decided. MES has initiated the procedures for reorganization of the Education Directorate, notifying the complainant that she was subject to transfer or removal from the civil service. The CPD, after considering the claim of the complainant, has ascertained *the discrimination in the form of an instruction to*

discriminate and direct discrimination, defining the obligation of

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- 233 See ECtHR judgments *Dordevic v. Croatia*, no. 41526/10, 24 July 2012; *Catan and Others v. The Republic of Moldova and Russia* [GC], 43370/04, 18454/06 and 8252/05, 19 October 2012.
- 234 Racial Equality Directive, Article 2 (3); Employment Equality Directive, Article 2 (3); Goods and Services Directive, Article 2 (c); Gender Equality Directive (revised), Article 2 (1).

responsible institutions to take immediate measures to restore employment relations.

The court, acting on the appeal of the MES, has decided to dismiss the lawsuit as unfounded, arguing that: from the administered evidence it results that the complainant has been subject to an unfair treatment in terms of temporary non-appointment to the position of lawyer and initiation of disciplinary proceedings against her "Unequal treatment has started since the beginning of the disciplinary proceedings for which there was no final decision on the violations for which she was accused, and was concluded in not appointing her as other employees." The legal analysis of the court continues with the elaboration of the meaning of discrimination and especially the comparator concept, but without any specific analysis of the instruction to discriminate, stating that: The CPD in the decision-making has established the causal link between the claimed grounds by the complainant under the Law "On Protection from Discrimination" and her unfavorable treatment. The claimant has not brought any evidence to overturn the conclusion reached by the CPD on the discrimination of the complainant in relation to other employees, who were placed in the respective positions, while the complainant has not been confirmed in the position of lawyer. "(See decision Nr. 1991, dated 22.09.2020 of the Administrative Court of First Instance of Tirana)

HARASSMENT

"Harassment" is the form of discrimination that occurs in the case of an unwanted behavior, when it is related to any of the protected grounds, which has the purpose or effect of violating the dignity of the person and creating an intimidating, hostile, contemptuous, humiliating or offensive environment to that person, as well as the less favorable treatment, committed as a result of opposition or disobedience by the injured person to such conduct.

Cases analyzed from case law where harassment is claimed as a form of discrimination are few. In some cases, this form of discrimination is claimed separately, in some other cases together with protected grounds such as gender identity or sexual orientation. The analyzed decisions do not bring any special treatment of this form of discrimination, as the approach of the courts is that of the reference expressly in the legal definition, without providing any in-depth analysis or comparative view.

In one of the selected cases, the complainant, a senior management employee at a state institution, claimed that the non-payment of salaries and end-of-year bonuses was due to her gender and institutional conflict between managers. She also claimed discrimination by the employer in the form of harassment, as she was constantly under

pressure to terminate the contract, on various accusations that she had committing criminal offenses as well as intimidation and humiliating accusations. The CPD considered as grounded only the claim of harassment, ordering measures to be taken to prevent them, while he considered the claim of the gender protected ground as unfounded, and for this reason the CPD decision was appealed in court. The latter lists some legal provisions of the LPD, without deepening the analysis of the CPD in the concrete context. This approach could be considered admissible as long as the complainant did not file any claims of this finding of the CPD. (See decision no. 413, dated 12.12.2019 of the Administrative Court of First Instance Tirana)

MULTIPLE DISCRIMINATION

It is increasingly accepted that addressing discrimination from the perspective of a single ground fails to capture or adequately address the various manifestations of the unequal treatment that people may face in their daily lives. There is no single established terminology related to "*multiple discrimination*", "*cumulative discrimination*", "*composite discrimination*", "*combined discrimination*" and "*cross-sectoral discrimination*", as they are often used interchangeably, although these terms have slightly different implications.²³⁵

Article 14 of the ECHR and Protocol no. 12 prohibit discrimination based on a large number of protected grounds, which means that it is theoretically possible to file a complaint for more than a few protected grounds. Moreover, the non-exhaustive list of grounds of discrimination allows the ECtHR to expand and include even non-explicitly mentioned grounds. Nevertheless, the Court follows a tactical approach, acknowledging discrimination for a number of reasons, but without explicitly using the terms multiple or cross-sectoral discrimination.²³⁶ EU law, on the other hand, follows a somewhat different approach, as the reasons protected by the Directives are exhaustively listed, with the exception of Article 21 of the EU Charter. The ECJ maintains that no new grounds can be added, excluding the possibility of protection against discrimination in particularly specific situations, such as the protection of women of color. Although the ECJ can combine different grounds without creating new ones, in practice this approach is difficult, as the Equality Directives have a defined scope.²³⁷

During the analysis of court decisions, cases have been consistently ascertained where the complainant's claim of discrimination is based simultaneously on some of the protected grounds, or forms of discrimination, such as:

- disability and health condition;
- education and social status;

²³⁵ Manual, 2018, pg. 62.

²³⁶ ECtHR, N. B. v. Slovakia, no. 29518/10, 12 June 2012 and K.C. against Slovakia, No. 18968/07, 8 November 2011

²³⁷ ECJ C-443/15, David L. Parris v. Trinity College Dublin and Others, 24 November 2016.

- association and political conviction;
- age and gender;
- belonging to a particular group and disability;
- union affiliation, health status and victimization;
- education and health status;
- gender and belonging to a particular group;
- direct discrimination due to political conviction and indirect discrimination.

No references or arguments are found in any of the analyzed decisions as to whether they qualify as *multiple, intermittent, or cumulative discrimination*.

Previous research on the legal situation for multiple discrimination in Albania has concluded that multiple discrimination is not mentioned in any of the special laws governing the field of non-discrimination. This finding was correct, as concepts such as cross-sectoral, multiple discrimination or serious forms of discrimination were included in Law no. 124/2020 "On some additions and amendments to the Law "On protection from discrimination"". This is the reason why to date no institutional practice or judicial jurisprudence has been identified specifically dedicated to this category. Even in the practice of the CPD over the years discrimination for more than one ground is examined spontaneously.²³⁸

Notwithstanding the above, it is of interest to recognize and distinguish these forms of discrimination for complainants and courts, which in the opinion of scholars in the field fear the treatment of multiple discrimination, by the fact that the international courts, the ECJ and the ECtHR, have not expressed themselves on this discrimination.²³⁹

If a person suffers from unequal treatment on multiple grounds for discrimination, and *discrimination occurs at different time intervals for each reason*, then it is a case of multiple discrimination. If the discrimination is presented in several grounds *at the same time*, then it is a matter of cumulative discrimination. If the discrimination was presented with several grounds at the same time, and there was a mutual interconnection and non-separation between the grounds, *then it is a question of continuous discrimination*.²⁴⁰

Naturally, the question arises whether the passive approach comes from not recognizing this form of discrimination or is a defense strategy in the judicial process. In a recent study conducted

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in Albania by

238 https://www.qag-al.org/publikime/diskriminimi_shumefishte.pdf, fq.19.

239 QAG Study, pg.17-18.

240 Guide to Discrimination, OSCE Mission to Skopje Publication, 2009 (Available on <https://www2.osce.org/files/f/documents/4/2/117992.pdf>)

the Center for Civic Legal Initiatives on Multiple Discrimination maintains that "Perhaps, avoiding the treatment of multiple discrimination also reflects the strategy of the litigation of the parties before the national courts. Usually, they choose to rely on only one of the causes of discrimination. This can happen for various reasons, especially for lack of evidence, otherwise there is no way to explain a lack of interest at least by the complainant to seek proof of the most serious form of discrimination."²⁴¹

The courts are inclined to uphold that ground of discrimination which has easier provability referring to the circumstances of the present case. Although the cases are few, there is a tendency of the courts not to assess the political conviction of an employee as a discriminatory ground, while accepting his membership in another union or group as a ground of unequal treatment. Another approach that is found, especially when the CPD has found both direct and indirect discrimination, the court at the end of the legality of the decision of the CPD, has not considered this aspect, as the court is limited only to the analysis of the claimant's request for recognition of property and non-property damage, which, after a detailed analysis of the elements of Article 608 of the CC, was assessed as unfounded arguing that: "*... the action claimed by the claimant in the exercise of the regular performance of duty as a body of state administration by the respondent party in the termination of this employment relationship does not contain any element of guilt which objectively aimed at bringing any consequences against the claimant.*" (See decision no. 1890, dated 17.11.2016 of the Administrative Court of the Court of First Instance of Vlora)

REMINDER:

- ***According to the EU directives on protection against discrimination, the protected grounds are explicitly focused on: gender, ethnicity or race, age, disability, religious belief or belief, and sexual orientation. According to the ECHR, they are open-ended, and can be developed on a case-by-case basis.***
- ***Under EU law, gender can include gender identity to some extent, protecting individuals who intend to undergo or have undergone gender reassignment surgery.***
- ***Elements such as color, origin, nationality, language, or religion are included in the protected ground of race or ethnicity under the ECHR; however, clarification of the current scope of this protected ground under EU law is still pending from ECJ jurisprudence.***
- ***Gender identity has also been examined by the ECtHR.***

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241 https://www.qag-al.org/publikime/diskriminimi_shumefishte.pdf

- ***Discrimination on the grounds of nationality is presented as a protected ground under the ECHR. Discrimination on the grounds of nationality is prohibited only in EU Law in the context of the Law on Free Movement of Persons.***
- ***The term "religious belief" should be interpreted relatively broadly and should not be limited to traditional consolidated and organized religious beliefs.***
- ***Even in cases where discrimination may have occurred, the ECtHR often examines complaints only on the basis of substantive articles of the ECHR. This may alleviate the need to prove differential treatment or find comparators.²⁴²***

USE OF PROOF AND THE BURDEN OF PROOF

The courts have administered a variety of proof, which have been conditioned by the concrete circumstances of the case but also by the inquiries of the parties. In some cases, the courts analyze the actions performed by the employer, which have led to the termination of the employment contract without reasonable ground. Part of the administered evidence has also been the restructuring of staff, acts proving the establishment of organizational restructuring and work force reduction commissions, scoring and evaluation commissions, lists of employees affected by the restructuring, documents that form the basis for comparing employer behavior in relationship with the party claiming discrimination and other persons comparable to it, etc. In cases where discrimination is claimed to have occurred due to political conviction, the courts administered membership cards to a political entity, lists of members of Ballot Counting Teams (BCTs) and CEAZs. In some other cases, among the evidence is the act of forensic examination, psychological condition and assessment of the damage caused to the health of the party claiming discrimination, or of his family.

The purpose of the analysis of this procedural aspect has been to identify the specific probative approach that requires a process with the object of establishing discrimination.

Discrimination does not tend to be demonstrated in an open and easily identifiable way. For this reason, proving direct discrimination is often difficult although, by definition, differential treatment is based "openly" on a victim characteristic. The ground for differential treatment is often either not expressed or is superficially related to another factor (such conditional benefits to a retiring individual, which are age-related as a protected ground). Cases when individuals openly state their reason for differential treatment as one of the protected grounds are relatively rare.

However, the real reason for treating someone less favorably than others is not shown, while the justifications that are found are various, but not convincing if they face the protected ground. A woman may be more easily denied employment and told that she is simply "less qualified" than a male candidate being offered employment for the same position. In this situation the victim may find it difficult to prove that she was more directly discriminated against because of her gender. The same logic applies to other protected grounds. To address the difficulty of proving that differential treatment is based on a protected ground, European anti-discrimination laws allow the burden of proof to be shared. Consequently, once the claimant can present facts from which it can be presumed that discrimination has occurred, the burden of proof falls on the other party to prove otherwise. This shift of the burden of proof is particularly useful in claims of indirect discrimination where it is necessary to prove that certain practices or rules have a disproportionate impact on a particular group. To raise a presumption of indirect discrimination a claimant may need to rely on statistical data proving the general features of differentiated treatment. Some national jurisdictions also accept evidence obtained through "situational testing".²⁴³

THE BURDEN OF PROOF

Affirmanti incumbit probatio is one of the principles usually found during the examination of evidence by the ECtHR. This principle means that the complainant must prove the claims raised. The Court applies the standard of proof "beyond reasonable doubt" as a normal standard for all the rights provided for in the Convention. During the process at the ECtHR there are no procedural obstacles to the admissibility of the evidence or any predetermined formula for its evaluation. The court upholds those conclusions which, in its view, are based on the free assessment of all evidence, including such conclusions that may arise from the facts and submissions of the parties. Referring to the jurisprudence of the ECtHR, the evidence may come from the coexistence of fairly strong, clear and conclusive conclusions or irrefutable presumptions of facts. Moreover, the level of conviction required to reach a particular conclusion and, in this connection, the shifting of the burden of proof are essentially related to the specificity of the facts, the nature of the claims raised and the right at risk. The Court is also aware of the seriousness attached to the implementation of a decision finding a violation of rights by the Contracting States.²⁴⁴

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²⁴³ Manual 2009, p.33 and Manual 2018, p.230-239.

²⁴⁴ *Nachova and Others v. Bulgaria* [GC], 2005, § 147, *Timishev v. Russia*, 2005, § 39, D.H. and *others v. Czech Republic* [GC], 2007, § 178).

SHIFTING THE BURDEN OF PROOF

Referring to the jurisprudence of the ECtHR, it is concluded that the principle *affirmanti incumbit probatio* does not apply in all procedures. For example, when the cases under consideration in a given case are based entirely, or in large part, on the exclusive knowledge of the authorities, the burden of proof may be considered to rest on the authorities to provide a satisfactory and convincing explanation.²⁴⁶ The ECtHR has shifted the burden of proof to other cases where it has assessed that it would be extremely difficult in practice for the applicant to prove discrimination.²⁴⁷

Based on the applicant's claim of discrimination for one of the protected reasons, the Court may *prima facie* admit that a discrimination case has arisen. The burden is then shifted to the respondent to overturn the grounds of the *prima facie* case, or to provide a justification for it. The respondent State must also convincingly demonstrate that the different treatment was not discriminatory, *for example that the applicant's contact (claiming discrimination due to mental illness) with his child was not restricted on discriminatory grounds, moreover his mental health had really impaired his ability to care for the child, or that there were other reasonable grounds for such a limitation.* Regardless of the specifics of the facts and the nature of the claims made in this type of case, it would be extremely difficult in practice for the applicant to prove discrimination without such a change in the burden of proof.²⁴⁸ However, in view of the above considerations, the Court concludes that the respondent State did not present such compelling reasons as to oppose the presumption of discrimination against the complainant because of his mental health, finding a violation of Article 14 of the Convention taken in relation to article 8.

STATISTICAL DATA

Statistical data can play an important role in helping a claimant of discrimination raise a presumption of discrimination. The jurisprudence of the ECtHR and the ECJ remains a valuable guide in this regard as well.

The ECtHR has consistently stated that these data are particularly useful in proving indirect discrimination, because in those cases the situations, rules or practices in question are neutral at first sight. When dealing with such a case, it is necessary to focus

245
Guideline on Article 14 of the ECHR and Article 1 of Protocol No. 12 "Prohibition of Discrimination", updated 31 Aug 2020.

246 *Salman v. Turkey* [GC], 2000, § 100, *Anguelova v. Bulgaria*, § 111, *Makuchyan and Minasyan v. Azerbaijan and Hungary*, 2020, *Cinta v. Romania*, 2020.

247 *Cinta v. Romania*, 2020.

248 See, *mutatis mutandis*, *D.H and others v. Czech Republic*, cited above, § 189.

on the consequences of rules or practices to demonstrate that they are disproportionately unfavorable to certain groups of persons compared to other groups in a similar situation. Statistical data extraction works together with shifting the burden of proof: when data show, for example, that women or men with disabilities are particularly disadvantaged, it is up to the state to provide a convincing alternative explanation of the figures.²⁴⁹

In ECJ estimation, in examining statistical evidence, the courts do not appear to have set any strict criteria for the threshold that needs to be proven to determine that indirect discrimination has occurred.²⁵⁰ It may be possible to prove that a protected group is disproportionately affected even when no statistics are available, but when available sources are reliable and support this analysis.²⁵¹ Statistical data may not always be necessary to prove cases of indirect discrimination. Whether statistics are needed in order to prove a claim will depend on the facts of the case. In particular evidence, as the practices or beliefs of others belonging to the same protected category may be sufficient.²⁵²

In cases of discrimination, the ECtHR has not ruled out that, in some cases where discrimination is claimed, the Government

- 249 The ECtHR, in the case of *Hoogendijk v. The Netherlands* stated that: "[T]he court is of the opinion that when an applicant is able to demonstrate on the basis of irrefutable official statistics the existence of an instruction that a specific rule - albeit formulated "In a neutral way - in fact affects a percentage of women clearly higher than that of men, it's up to the respondent Government to demonstrate that this is the result of objective factors unrelated to any discrimination on the grounds of gender."
- 250 The ECJ states that a substantial figure must be achieved. See decisions *C-4/02 & C-5/02, Hilde Schonheit v. Stadt Frankfurt am Main and Silvia Becker v. Land Hessen*, 2003 (difference in pensions payable to part-time and full-time employees); *C-527/13 Lourdes Cachaldora Fernandez v. Instituto Nacional de la Seguridad Social (INSS) and Tesorerfa General de la Seguridad Social (TGSS)* [GC], 2015 (invalidity pension calculated for a period of 8 years before the start of the disability); *C-167/97 Regina v. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, 1999 (protection against dismissal of employees employed for more than 2 years with a designated employer).
- 251 The *Opuz v. Turkey* case concerned an individual with a history of domestic violence, who had violated his wife and her mother on several occasions, most recently killing her. The ECtHR found that the State had failed to protect the applicant and her mother from degrading and inhuman treatment, as well as the life of the latter. The State had discriminated against the applicants because the failure to provide adequate protection was based on the fact that they were women. The court came to this conclusion in part based on the evidence that the victims of domestic violence were predominantly women, and the figures illustrated the relatively limited use by the courts of powers to issue protection orders to victims of domestic violence. Interestingly in this case there were no statistics presented in the ECtHR to show that the victims of domestic violence were mainly women, and in fact it was reminderd that Amnesty International said that there was no reliable data on this. But the ECtHR was prepared to accept the assessment of Amnesty International, a nationally recognized NGO, and the UN Committee on the Elimination of Discrimination against Women that violence against women was a significant problem in Turkey.
- 252 *Orsus and others against Croatia*.

may be required to dismiss a debatable claim of discrimination and - if it fails to do so - the Court may find a violation of Article 14 of the Convention on that ground.²⁵³ The Court must be satisfied that the only reasonable explanation for differential treatment is the protected characteristic of the victim, e.g. gender or race. The principle applies equally to cases of direct or indirect discrimination.

The jurisprudence of the ECJ, mainly with regard to protection in the field of employment, provides guidance on how the employer can refute the presumption of discrimination. *First*, showing that female and male employees were not concretely in a comparable situation because the work performed was not of equal value. Such would be the case if the tasks performed were to be tasks of substantially different natures. *Second*, showing that objective factors, unrelated to gender, explained the pay gap. Such would be the case if the male employee's income were to be increased by the travel expenses paid to him for long distance travel or hotel stays during the working week.²⁵⁴

The analysis of court decisions shows diametrically different approaches regarding interpretive attitudes regarding the shifting of the burden of proof from the employee to the employer, or from the complainant to other entities that provide services. One of the main reasons remains the lack of harmonization of the legal framework regarding the shifting/distribution of the burden of proof. The provisions of the CPC take precedence in implementation as the codes are at a higher level in the hierarchy of norms than the laws adopted by simple majority, including Law no. 10 221/2010 "On protection against discrimination". The courts are indecisive and sometimes wander between the requirements of the Law on Protection against Discrimination, which provides for the shifting of the burden of proof, in line with EU legislation, and sometimes between the provisions of the CPC, which sanction the general rule, according to which, the party claiming a right has the obligation to prove its claim.

The reasoning approaches of the courts vary from bringing arguments which in a principled, synthesized and clear language give the essence of the burden of proof, to decisions which have significant or confusing shortcomings in the reasoning part. Even in recent years, there have been few decisions where the courts acknowledge the complainant's difficulty in proving claims of discrimination, however reference to international instruments representing good practice in this regard adds value to the orientation of case law. It is also worth mentioning decisions where the courts

253
Nachova and Others v. Bulgaria [DHM], 2005, § 157; Bekos and Koutropoulos against Greece, 2005, § 65.

254 Case C-54/07, ECR I-5187, 10 July 2008.

bring to attention the obligation of public bodies to use their discretion in accordance with the principle of legality. (See decision no. 314, dated 10.02.2020 of the Administrative Court of First Instance of Tirana).

The prevailing attitude, ascertained from the beginning of the case law, further aggravates the burden of proof of the complainant, because, even if there is a presumption of discrimination, the courts do not consider it necessary or appropriate to shift the burden of proof. In the chronological course, different attitudes are ascertained, starting from:

- **questioning the probative value of the CPD decision**, where the court reasoned that: "In the case when the subject claiming discrimination has previously addressed the Commissioner, the decision of the latter, regardless of whether it has accepted or rejected the request, is not binding on the court, in the sense that it is obliged to approve it after simply verifying the formal side." The following analysis of the decision is nothing but a reasoning of the court on the inability of the complainant - the dismissed employee - to prove that: "(i) he was treated differently from the employees who were in the same situation as him, (ii) his removal from the list of employees to be treated under a particular DCM had occurred due to political convictions, and that (iii) his removal from the list had made it impossible for him to exercise any of his fundamental rights provided by the Constitution. (See decision no. 1599, dated 02.12.2015 of the Judicial District Court of Fier)
- **unenforceability of the provisions** of Law no. 10 221/2010, which in the assessment of the court "*do not find application, if the claimant fails to prove with concrete evidence the discriminatory behavior of the respondent*". (See decision no. 1713, dated 08.04.2016 of the Administrative Court of First Instance of Tirana)
- **the essence of the burden of proof, where the courts**, referring to the regulation of Article 82 of Law no. 44/2015, clearly express the position on shifting the burden of proof in a clear legal language, based on the concept of presumption of discrimination, arguing that: "In cases when the party presents evidence on the basis of which it can be presumed that there was discrimination, then it is up to the other party to prove the opposite that there was no discrimination. Referring to the concrete case, it is sufficient for the complainant to present evidence that creates a presumption in relation to discrimination on political convictions, it is up to the other party against whom this presumption is created to prove that her actions were not politically motivated. In the present case, no evidence was presented by the Company to prove the

legality of its actions, in order to refute the claims that these actions were committed for political motives. "(See decisions no. 4450, dated 16.11.2017 and No.4403, dated 14.12.2018 of the Administrative Court of First Instance of Tirana)

- "The right not to be discriminated requires that the treatment of every subject in his rights be the same and equal in law. If the opposite is established, then the obligation arises to prove at trial that the unequal treatment was made conditional on objective, reasonable and legal grounds. So, it is presumed that the expectation of every subject is his equal treatment before the Law in his rights and if the subject is not treated as such by the state itself, he has every reason to think that his treatment is unequal and he is discriminated. ***It is then the obligation of the state to prove this deviation of the application of the Law in the case object of verification and the application of this unequal practice towards the subject***".
- *There are other courts, which follow the line of reasoning presented by the CPD, giving a clear picture of the reasons for shifting the burden of proof, stating that: "The court finds that in cases of discrimination the complainant finds it extremely difficult or impossible to gather evidence. To compensate for this huge disadvantage, the EU and member states have integrated into their legislation the principle of shifting the burden of proof. Whereas normally the burden of proving discrimination should be borne by the claimant, according to EU legislation on discrimination cases, the moment the complainant proves discrimination prima facie, then the other party is required to present evidence that he/she has not discriminated. The perpetrator of discrimination often has control over most of the information needed to prove a discrimination case and moreover who discriminates would never acknowledge the intent to discriminate. Proving an issue of discrimination is difficult, as the authors do not claim that they treat someone less favorably than others regarding a particular ground. Therefore, if the burden of proof is not shared, protection against discrimination will be ineffective in practice "(See decisions no. 1295, dated 16.04.2019 and No. 2063, dated 23.09.2020 of the Administrative Court of First Instance of Tirana)*
- The above position was held by another court during the review of claims of discrimination submitted by an employee, who was transferred from the employer to an unsuitable working environment with the justification of structural and organic reorganization of the institution. This action was filed to the CPD, who found discrimination, a decision that was then appealed in court by the employer. The Court, after an analysis of the domestic and international framework that guarantees the protection of equality and the prohibition of discrimination, using the terminology used by the ECtHR to shift the burden of proof justifies

that "Discrimination is a subjective element and condition and the perception that is created in the subject of law based on a *prima facie* assessment of the state of fact. The measurability of feeling discriminated for the third person and for any subject requires a measurability on objective criteria in relation to this process. When the mechanism of the situation has evolved, it is objectively sufficient for the third person to have a sensitivity of his discrimination because he started a lawsuit against the claimant. As above, the person who claims discrimination creates a presumption of discrimination, the burden then passes to the subject from whom the discrimination is claimed which must show that the change in treatment is not discriminatory."(See decision no. 2582, dated 26.10.2020 of the Administrative Court of First Instance of Tirana).

- In another decision, through a clear and understandable language technique, the court justifies: "The burden of proof should not be misused, as regardless of the specifics of the trial, it belongs to both parties and should not be abused." (See decision no. 1710, dated 24.07.2020 of the Administrative Court of First Instance Tirana) In another decision, the court brings to attention that: *The "Law on Protection against Discrimination" in accordance with the EU Directives on protection against discrimination and the jurisprudence of the ECtHR has decided that in the review of discrimination cases by the court the burden of proof should be shared. Thus, the claimant can show some facts, from which it can be presumed that discrimination has occurred and the burden of proof falls on the respondent to prove otherwise. The principle of sharing the burden of proof is similar to that of assumptions taken as true by the court until*

THE CLAIMANT MAY PRESENT SOME FACTS FROM WHICH SECONDARY DISCRIMINATION CAN BE PRESUMED

the contrary is proved, *praesumpio juris tantam*, and is also based on the simple human logic and practical thought used to establish the connection between the facts that show possible discriminatory treatment and the existence of this fact in reality."(See decision no. 1645, dated 13.05.2019 and No. 816, dated 06.03.2020 of the Administrative Court of First Instance Tirana)

- *Based on the principle of shifting the burden of proof, another court has assessed that: "... based on Article 36/6 of Law no. 10221 from the evidence presented by the claimant, the conduct of the respondent is proved, and the burden of proof falls on the latter to prove that the facts claimed by the claimant do not constitute discrimination. Both in the trial on appeal and in the first instance the respondent did not*

present any evidence to rebut the claimant's claim relying on the fact that he made transfers, and that the termination of the contract was not made due to discrimination. Pursuant to Article 9/10 of the Labor Code and Article 82/2 of the APC in the event that a party presents evidence on the basis of which it can be presumed that there has been discrimination, then it is up to the other party to prove otherwise, that the actions or omissions do not constitute discrimination. (See decision no. 2984, dated 17.11.2020 of the Administrative Court of First Instance of Tirana)

- *The above line is also found in another decision where the court, after considering the employer's appeal for the abrogation of the decision of the CPD that has found discrimination due to political conviction, states that "...The CPD has rightly found that no arguments or evidence had been presented by the employer to refute the complainant's claim that his dismissal did not come as a result of his political conviction. The APC and the Labor Code, in the amendments made, have specified that the burden of proof in cases of claimed discrimination falls on the public body ... which must prove that the complaining subject has not been treated unfairly and unfavorably. "(See decision no. 3785, dated 04.11.2019 of the Administrative Court of First Instance Tirana)*

In some other decisions, the courts take a **completely opposite stance to the above**. The reasoning of the courts is mainly based on the unifying decision no. 19/2007 of the UCSC, and in the repeated request for the presentation of concrete evidence by the party claiming discrimination, not taking into account the shifting of the burden of proof, which aims to mitigate the difficulties or impossibilities of the person who claims to have been discriminated against to prove the claim. For this reason, the complainant raises the presumption of discrimination and the obligation to prove otherwise rests with the respondent, who is claimed to be the source of discrimination.

Some courts state that: "It is not enough to select and reflect in the lawsuit a discriminatory ground, but you must present facts that confirm such a fact. Only in this case the burden of proof passes to the employer, who must prove the opposite of the ground argued by the employee. "(See decision No. 2426, dated 16.11.2015 of the Administrative Court of Appeal of Tirana)

Another position found during the legal analysis is the one where the court takes for granted the fact that the burden of proof belongs exclusively to the respondent, without stating in any paragraph that in discriminatory situations there is a possibility of shifting the burden of proof. Referring to Article 35 of the LPD, the court, in a case where the CPD has found discrimination due to the race of residents of the Roma community due to lack of investment

by the municipality in the area where they lived, reasoned that: *"From the content of this provision, it results that for punitive administrative acts that are issued not at the request of the interested person, the administrative body that issued the act, has the obligation to prove the legality of the challenged administrative act. In compliance with the principle of burden of proof provided by the above legal provisions, the respondent (CPD) did not present any evidence to prove whether the lack of investment in the neighborhood "1 Maji" occurred due to discrimination because members of the Roma community live there, or it happened due to financial impossibility, as claimed by the claimant, the municipality. "(See decision no. 1025, dated 21.03.2018 of the Administrative Court of First Instance Tirana)*

In some other decisions the position is held that: "... the transfer of the burden of proof from one subject to another for the provability of facts showing the presence or absence of discriminatory factors does not presuppose the existence of ipso jure discrimination due to the impossibility of proving facts. Otherwise, any presumption of the existence of discrimination would be presumed as such, in the conditions when the body would not be able to prove the opposite. For this reason, the shifting of the burden of proof to the public body will be conditional on the presence of evidence and/or facts that give minimal indication of discrimination." After the court makes a comparative analysis of the formulations of LPD, APC, LC it concludes that; "So the law establishes a common denominator for shifting the proof to the body, the condition according to which the body which claims discrimination should prove with facts and explanations, convincing evidence which manage to create the conviction that discrimination can be presumed. Membership in a political party may not constitute proof of the existence of a discriminatory ground of "political conviction" for dismissal from office, provided that such membership is not correlated with probative facts to establish the conviction that the subject has been dismissed from office for political reasons, or to create doubts in favor of such a thing. "(See decisions no. 404, dated 10.02.2020, no. 3047, dated 23.11.2020 of the Administrative Court of First Instance Tirana)

Judicial practice also finds decisions that provide a minimalist analysis regarding the provability of the discriminatory situation, based on the burden of proof in Article 12 of the CPC. In the case of an employment dispute, the complainant, a lecturer at a public university, claimed discrimination in the termination of the employment contract immediately and without reasonable ground, as according to her, the ground was not disciplinary measures, but her opposing attitudes towards the concluding of a contract with a fixed term of 1 year. The Court of Appeals limits the analysis of the claim of discrimination to only 2 paragraphs, where one of them

gives the definition of Article 12 of the LPD, and the other provides the reasoning as follows: "Referring to Article 12 of the CPC, according to which the party claiming a right has the obligation in accordance with the Law to prove the facts on which it proves its claim, with the evidence that is subject to judicial review, the claimant has never proved the fact that he has been discriminated against by the employer for the cases provided in this law. " (See decision no. 715, dated 22.02.2018 of the Administrative Court of Appeal in Tirana) Following the same line of reasoning as above, another trial panel of that court, which has examined the complainant's claim of discrimination due to political convictions, argues that: " ... the claimant does not appear to have attached to the lawsuit probative acts to prove the reason for the termination of the employment contract for abusive reasons, in this case of political convictions. Confirmation through the certification issued by the party ... of the fact that the claimant is a sympathizer and activist of this political entity since 2000 constitutes in the assessment of the administrative court of appeal insufficient circumstances to conclude that this fact was the reason for the dismissal ... the employment of other persons, after the dismissal of the claimant confirms the unjustified ground of termination of the contract, but does not prove the existence of the abusive ground. " Based on this argument, the court has assessed as not grounded the claim for compensation under Article 146 of the Labor Code. (See decision No. 253, dated 31.01.2019 of the Administrative Court of Appeal of Tirana) In both of the above cases, this analysis was sufficient to conclude that the claimant was not subjected to any discriminatory behavior or unequal treatment due to the qualities of the subjects defined by article 1 of Law no. 10 221/2010.

Another court confirms the same position by analyzing that: "the claimant (claiming discrimination), who has the obligation to bring evidence to trial, to prove discriminatory behavior, did not present any. The claimant has not submitted the facts from which to presume discrimination referring to the protected ground ... leading to an unfavorable treatment compared to how others have been treated or will be treated in the same or similar situation, or even more an unfavorable treatment or a negative consequence as a result of a complaint, a proceeding aimed at applying the principle of equality ". This attitude is clearly the prevailing approach, when another court, which considered the claim of the claimant, a civil servant, who had to prove that the respondent acted in violation of the Law in rejecting reports of temporary disability in work due to pregnancy and non-suspension of waiting list payment. The court rejected these claims of the claimant as unfounded on the grounds that: "The evidence presented by the claimant before the Administrative Court of First Instance does not constitute a sufficient basis for the court to shift the burden of proof to the respondent, to prove the absence of discriminatory behavior in the sense of Article

36/6 of the Law" On protection against discrimination "(See decision no. 450, dated 26.02.2020 of the Administrative Court of Appeal of Tirana) The Administrative Court of Appeal in another case reasoned that: "... in this case there is not enough evidence to assess that the solution was for abusive discriminatory motives, despite the fact that the suspicion of the existence of this motive was legitimate by the claimant, in the circumstances when the respondent did not provide the motivation regarding the ground of termination of the employment contract. Lack of motivation does not constitute a reason to a priori accept the claim of the existence of a discriminatory ground, because the provisions of the Labor Code at the time of the dispute did not oblige the employer to give the ground of termination of the contract, a situation which has changed with amendments to Article 44 in 2015. "(See decision no. 1189, dated 18.04.2019 of the Administrative Court of Appeal in Tirana) In another decision that follows this line of reasoning, the court states that "claims of discrimination simply raise suspicions, but have not been proven." (See decision no. 5642, dated 02.08.2019 of the Judicial District Court of Tirana))

If we put this line of reasoning in the context of EC Directive 78/2000 "On the establishment of a regulatory framework for equal treatment in employment relations" it is clear that the person / employee claiming discrimination is not obliged to prove discrimination, but only to provide the court with suspicion that there has been a place for discrimination. The court must decide in favor of the employee, if the employer cannot prove the absence of discrimination. After the presumption of discrimination by the employee, it is up to the employer to refute the claim, i.e. to prove the opposite, that he did not discriminate against him/her. According to this Directive, the burden of proof lies with the employer, and the employee only needs to create suspicion in court that there has been discrimination, without being obliged to prove it.

REMINDER:

- ***The motive behind the less favorable treatment does not matter much; what matters is the impact.***
- ***Under EU law there is no need to identify an identifiable victim.***
- ***The initial burden is on the applicant to bring evidence that suggests that discrimination has occurred.***
- ***Statistical evidence can be used to raise the presumption of discrimination.***
- ***The burden then shifts to the claimed perpetrator of discrimination, who must provide evidence demonstrating that less favorable treatment did not come because of one of the protected grounds.***
- ***The presumption of discrimination can be challenged by proving: (i) that the victim is not in a situation comparable to her "comparator"; (ii) that the change in treatment is based on an objective factor, unrelated to the protected ground.***

If the claimed perpetrator of discrimination fails to challenge this presumption, he can still try to justify the differentiated treatment.²⁵⁵

ASSIGNMENT OF COMPENSATION: COMPENSATION

The legal analysis regarding the limits of the powers of the CPD identified different positions of the courts regarding:

- Understanding, clarifying, detailing and developing these competencies in accordance with international standards.
- Understanding the measure for returning to work, if it is recommendatory or has a mandatory character,
- Suspension or termination of administrative proceedings by the CPD when the same claim of discrimination has been filed in court.
- The relationship that must be created between the measures imposed by the court when deciding that there is discrimination and other measures that can be imposed under other laws, referring to the provisions of Article 37 of the LPD.
- Amount and type of compensation: if the damage arises from a contractual relationship and is recognized according to the provisions of Article 146 of the Labor Code, or from an extra-contractual relationship, and is calculated according to Article 608 of the Civil Code.

The research revealed that the case law has significantly created uncertainty regarding whether the court, *when finding discrimination, should exclude or not the imposition of measures under other laws, or in the case of employment relations, the compensation for the discrimination suffered should be independent from the compensation that can be given for the violation of other procedural guarantees deriving from the Labor Code.*

In some cases, the courts have accepted the discriminated party's claim for damages compensation, but attitudes vary between: (i) non-recognition of the damage; (ii) cumulative recognition of property and non-property damage; (iii) recognition only of property damage resulting from the termination of the employment contract for abusive reasons; (iii) recognition only of non-property damage.

Especially regarding the non-recognition of the right to compensation, which turns out to be the most extreme attitude towards legal guarantees, the court, referring to the fact that the party claiming discrimination, has previously addressed the court seeking compensation from the immediate and unjustified termination of employment contract, according to Articles 143, 153 and 155

²⁵⁵ Manuali, pg.102

another lawsuit on the same circumstances of the fact, seeking compensation on the grounds that this contract was terminated for an abusive motive, such as discrimination under Article 146 of the Labor Code. (See decision No. 3141, dated 03.05.2019 of the Judicial District Court of Tirana)

COMPENSATION UNDER ARTICLE 608 OF THE CIVIL CODE

Compensation in any case must meet the requirements for redress of legal violations and their consequences through the return to the previous situation, appropriate compensation for property and non-property damages, or through other appropriate measures, conditions which are provided by Article 38 of LPD.

In its beginnings, the case law has supported the view that, as a result of discrimination in employment relations, compensation should be calculated based on Article 608 of the Civil Code, bringing a detailed analysis of the cumulative criteria required by Articles 608 and 609 of the CC- in relation to the provisions of Articles 37 and 38 of the Law "On Protection from Discrimination". Non-property damage (biological, moral and existential) is calculated based on the provisions of articles 608, 609, 625, 640 and 643 of the CC, the provisions of the unifying decision of the UCHC no. 12/2007, the acts of the expert and the decision of the CPD. (See decisions no. 1100, dated 09.04.2019 of the Administrative Court of Appeal of Tirana, no. 793, dated 31.07.2019 of the Judicial District Court of Berat, no. 116, dated 26.02.2019 of the Court of Appeal).

Few decisions call for psychological experts who have identified the onset of psychiatric symptoms, depressive psychotic disorder, partial loss of ability to work or even the need for referral for psychological counseling. The reports of forensic experts or even damage assessors were administered as evidence to base the calculation of the damage. (See decision no. 793, dated 31.07.2019 of the Judicial District Court of Berat)

This category of decisions contains a very detailed analysis of the existence of extra-contractual damage in the interpretation of Article 608, according to the following cumulative conditions:

- (i) *Existence of damage;*
- (ii) *Illegality of action or inaction;*
- (iii) *Causal link between action or inaction and damage received;*
- (iv) *The guilt of the person who caused the damage.*
(See decisions no. 4352, dated 03.12.2018, no. 793, dated 31.07.2019 of the Judicial District Court of Berat; No. 1340, dated 11.10.2019 of the Judicial District Court of Fier, no. 2247, dated 07.10.2020 of the Administrative Court of First Instance of Tirana)

Some other decisions calculate the moral damage referring to criteria such as:

- *Effective degree of pain and damage caused;*
- *The nature of the illegal fact or its dangerousness;*
- *Degree of realization of guilt;*
- *The behavior of the person causing the damage in relation to the event and the injured person;*
- *The nature of the violated right and the consequences in relation to the illegal fact;*
- *Subjective conditions of the injured party such as age and individual degree of sensitivity to the harm suffered;*
- *Circumstances related to social and economic conditions.*

The decisions contain in-depth analysis of the meaning, purpose and reasons for the implementation of this type of compensation, arguing that: Liability due to discrimination is one of the types of non-contractual liability, addressed in Law 8510, dated 15.07.1999 as amended "On extra-contractual liability of public administration bodies". The sine qua non condition that must exist in order to be injured and consequently the responsibility of the respondent is the illegality of the administrative activity ... the administrative act is legal and fundamental and there are no legal conditions for finding discrimination. "(See decision no. 140, dated 22.01.2020 of the Administrative Court of First Instance of Tirana)

In another case the court reasoned that: *"Referring to the legal ground of the search, the object and the legal basis of the lawsuit, it is clear that the lawsuit stems from the extra-contractual damage. Through compensation, the aim is to fully restore the injured party to the previous situation in which the person would have been if the illegal fact had not occurred. The purpose of civil legal liability is to protect the subject and his property from the consequences of harmful and illegal actions of the persons responsible."* (See no. 1340, dated 11.10.2019 of the Judicial District Court of Fier)²⁵⁶

In a few decisions, the court recognizes to the complainant the right to compensation for property and non-property damage in addition to the right recognized in advance by a decision of the Judicial District Court for compensation for the immediate termination of the employment contract. In addition to this reasoning, the court also lists the criteria on which it bases the calculation of the amount of damage caused, stating that: "The court must take into account a number of elements of the claimant such as: age, the high degree of need for family care of the complainant, being the head of the family, the damage caused and the permanent incapacity of 25% of physical abilities at work, the breakdown of

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In this case the claimants are relatives of the late K.J. They have continued the trial based on the procedural transition according to Article 199 of the CPC, as K.J. died during the process of compensation for property and non-property damage due to termination of employment based on the protected ground of political convictions.

family and social balances, gender proximity to the injured party, the great shock of family relations, the difficulty of adoption in social, social and labor market environments due in part to the age of 62, the violation of the personality of his family, also and having regard to the fact that claimant M.G. through the decision of the Judicial District Court has received compensation for the immediate termination of the employment contract, considers that the compensation for property and non-property damage should be in the amount of 3 665185 ALL ". (See decision no. 240, dated 24.02.2016 of the Judicial District Court of Fier)

In another case law, which had as its object the claim of an employee for unequal treatment by the employer in the process of dismissal not for reasons of restructuring the company, but for reasons such as family, health, financial situation and victimization, the court states that: *"The legal relationship under trial derives from the illegal fact which according to this court is the discrimination against the claimant from the unfair decisions of the employee. He has violated the equal treatment in the selection and retention of employees in office as well as the manner of their treatment during changing working conditions. The employer has treated the claimant unfavorably and with negative consequences, with negligence, and has not objectively seen his aggravated family situation and his poor health, if this situation had been viewed objectively by the employer and in accordance with the scoring criteria, the claimant would not be included in the lists of employees who would be subject to collective dismissal"*. Based on this assessment, the court continued the analysis with the justification of fulfilling the elements of extra-contractual damage by recognizing the claimant and the 3 main interveners (wife and children) property and non-property damage in the amount of 11. 351,864 ALL, with temporary execution. The decision is an added value of that part of the case law that holds this position on extra-contractual damages. However, the values would have been more complete if the court had not limited the reasoning to the above arguments alone but had referred to the proportionality test to prove the claim of discrimination, including victimization. (See decision no. 1567, dated 17.11.2017 of the Judicial District Court of Fier)

The above views have been assessed as supported by the view of the Court of Appeal, based on the argument that: "... although the claimant's right to file a lawsuit for damage compensation as a result of discrimination is specifically provided by a special legal provision (Article 34 of Law No. 10 221), in essence, the dispute subject to trial is a dispute for compensation of extra-contractual damage that is regulated by Articles 608, 609, 625 and 640 of the

Civil Code and the court of first instance has rightly considered it as such in full compliance with Article 16 of the CPC. "(See decision no. 850, dated 18.10.2018 of the Court of Appeal of Vlora)

COMPENSATION UNDER ARTICLE 146 OF THE LABOR CODE

The court decisions of 2015 bring an opposite position of the courts regarding the type of damage. The courts consider "contradictory" the claim of the claimant, who on the one hand claims that the property and non-property damage was caused by the termination of the employment contract, and on the other hand refers to Articles 608 et seq. of the CC, which regulate the liability that arises in extra-contractual relations ". Based on this finding, the courts state that: "Article 608 et seq. of the CC deals with the liability for compensation of damage in extra-contractual relations. The main difference between contractual and non-contractual damage lies in the fact that contractual damage arises due to non-fulfillment of contractual obligations, while extra-contractual damage comes as a result of a behavior prohibited by law. The latter arises in the absence of the contract or has nothing to do with the contract. On the basis of extra-contractual damage lies the fact, which constitutes the ground of property and non-property damage. This fact can be any human behavior, any social event or phenomenon of nature, to which the law imposes a legal consequence. The claimant has won by court decision his right to be compensated for the termination of the employment contract by the respondent. The damage caused to the claimant came as a result of the unfair termination of the employment contract by the respondent, while the latter did not perform any action that is not related to the employment contract and caused the claimant a damage other than contractual ..." (See decisions no. 1599, dated 02.12.2015 of the Judicial District Court of Fier and no. 1890, dated 17.11.2016 of the Administrative Court of First Instance Vlora)

There are other decisions which, although they highlight the fact that discrimination has been proven by a final decision after the contract has been terminated for unreasonable causes, regarding the claim for compensation state that: "Regarding the claimed illegal fact of the 'dismissal order', it is estimated that at the request of the claimant this order was revoked by another court, which forced the employer to compensate the claimant for unfair dismissal. This decision is final and binding on the parties. In this sense, the fact claimed as illegal does not exist after 19.11.2013 when the decision has become final. Unfair dismissal logically causes spiritual suffering and emotional shock, but they are estimated to be of the magnitude of any suffering or shock a normal person experience when faced with an injustice inflicted by

a superior or employer. This is the reason why the Labor Code has provided for compensation for dismissal without reasonable ground in Article 146 ... The Court considers that unfair dismissal is not a reason to seek compensation beyond those of the Labor Code. "(See decision no. 714, dated 10.04.2015 of the Judicial District Court of Vlora)

Another category of decisions, different from the above, have assessed as proven the claim of discrimination during the administrative proceedings conducted by the CPD, while they have determined the amount of compensation by assessing the existence of the ground of discrimination as an illegal fact of termination of the employment contract, and referring to the provisions of Article 146 of the Labor Code, have recognized the right of the discriminated party to compensation for property and non-property damage. The courts reason that *the concept of compensation provided by Article 146 of the Labor Code is presented in a mixed nature (property and non-property). It is about a compensation that is given where the respondent (employer) has terminated the contract for abusive reasons.*" (See decisions no. 254, dated 21.03.2018 of the Court of the Judicial District of Berat, no. 1034, dated 11.07.2019 and No. 154, dated 01.07.2019 No. 1131, dated 29.07.2019 of the Judicial District Court of Fier)

To this attitude in the following years is added the reasoning that "... the legislator, based on the verified situation of dismissal for reasons of discrimination, has presumed the damage, which according to Article 146 of the Labor Code is limited to the extent of benefit of salaries as a compensation from the termination in this way of the contract. The definition in point 3 of article 146 of the Labor Code, reformulated with the changes made to this provision by Law No. 136/2015 is subsequent to Law no. 10 221/2010. The reference in Article 38 of the latter on the compensation from the established situation of discrimination cannot be done in excess of the nature of the damage caused by the contract and the amount of compensation provided for in the Labor Code when the contract is terminated for reasons of discrimination (up to 12 salaries). "(See decision no. 1908, dated 08.05.2017 of the Administrative Court of First Instance Tirana)

In some other decisions where it has been proven that the reason for termination of the employment contract was discrimination for one of the protected grounds, regarding the claim for payment of property and non-property damage, the courts have stated that: The claimant, based the claim on Article 625 and 640 of the Civil Code. There was a legal relationship formalized by the employment contract between the parties. Violation of the contractual obligations provided in the contract or in the Labor Code leads to violation of contractual obligations resulting in compensation of the injured party. If the special law, the

employment contract, which is considered a law for the parties, or the Labor Code do not provide for the manner and amount of compensation of the respondent, then we will be in terms of reference to the general provisions of the Civil Code, for compensation of contractual damages. In the conditions when the existence of discrimination has been proven, then the court assesses as proven the illegal fact for the termination of the contract according to article 146 of the CC. This provision stipulates that in case of termination of the employment contract for one of the reasons provided in it, the employer is obliged to reward the employee with a bonus of up to one year salary". (See decision No. 1696, dated 30.05.2019 of the Administrative Court of Appeal in Tirana). The same position is held by the court in the case when the claimant has based the claim for compensation of property and non-property damage in Article 608 of the CC, stating that: "The damage in this case stems from the termination of the employment contract, therefore the Labor Code is a special law that is applicable." (See decision no. 911, of the Court of Appeal of Vlora and no. 5642, dated 02.08.2019 of the Tirana Judicial District Court)

The above positions seem to be clarified by the interpretative position of the Court of Appeal, which argues that: "Once applied by the court of Article 155 of the Labor Code in relation to the benefits that the claimant has received for unjustified immediate termination do not exhaust the application of Article 146 of the CC through which the claimant is recognized the right to compensation for up to 1 year salary, due to abusive motive (discrimination for political conviction) in terminating the employment relationship. In the case under review, due to the presumption unsubstantiated with evidence by the respondent party, it has been established through an administrative investigative process conducted by the CPD that the respondent party, in addition to the immediate and unjustified termination of the judicially certified employment contract, has terminated this contract also for an abusive motive (political conviction). Therefore, the discrimination that the respondent party has done to the claimant turns out to have violated the principle of equality provided by Article 9 of the CC, illegal behavior that qualifies the termination of the contract as abusive in the sense of Article 146, point c of the Labor Code. "(See decision no. 152, dated 08.03.2018 of the Court of Appeal of Vlora)

Compensation according to Article 146 of the Labor Code is determined in the value of gross monthly wages, as a direct consequence of ascertaining the termination of the contract without reasonable ground.

Criteria: Regarding the criteria on which the courts have calculated the obligation of the employer to compensate the discriminated employee up to the salary of 1 year, they are as follows:

- *The fact of notification of the termination of the employment contract, the duration of the employment relation, the absence of the claimant in employment relations after dismissal, the deterioration of the economic situation after dismissal.*

(See decision no. 1198, dated 02.01.2017 of the Shkodra Judicial District Court)

- *the duration of the employment relationship, the claimant's marital status, her educational and professional qualifications that make her 'attractive' to the labor market, as well as the employer's attitude towards her, where no abusive behavior was identified to deserve severe material punishment. (See decision no. 715, dated 22.02.2018 of the Administrative Court of Appeal Tirana)*
the complainant's claims, the circumstances of the case as a whole, the considerable duration of the employment relation, as well as the actions taken by the employer to terminate the employment relation. (See decision no. 954, dated 01.07.2019 of the Fier Judicial District Court)
age and education of the claimant, relatively short duration of employment (1 year and 2 months, 20 days), lack of disciplinary measures, his conduct and unjustified and discriminatory reason for termination of the contract, as well as the fact of employment while the litigation was taking place. In conclusion, the court determined the amount of compensation consisting of 1 gross salary for non-compliance with the notice period and 6 gross monthly salaries. (See no. 254, dated 21.03.2018 of the Judicial District Court of Berat).²⁵⁷
- *lack of reasonable ground for termination of the contract, the negative effect that the termination of the contract had on the claimant's financial situation, the fact that she was currently unemployed, the head of the family, with a child attending higher education, as well as a loan to pay. In conclusion, the court ordered compensation in 12 gross salaries and temporary execution (See no. 1034, dated 11.07.2019 of the Judicial District Court of Fier)*
- *application as a homeless in the low-cost housing program. In conclusion, the Court ordered compensation with 10 gross monthly salaries. (See decision no. 2699, dated 19.06.2019 of the Administrative Court of First Instance of Tirana)*
the young age of the claimant, having a minor child, education, the reasons for unreasonable dismissal and the consequences brought by the termination of employment relation. The court has decided the compensation in the amount of 3 monthly salaries. (See decision no. 5642, dated 02.08. 2019 of the Judicial District Court of Tirana)
- *the possibility of finding a new job in relation to age and profession, the demands of the labor market, the level of wages received, the negative effect on the mental and social condition. (See decision no. 1131, dated 29.07.2019 of the Judicial District Court of Fier)*

.....
257 The Court of Appeal changed the decision by recognizing the compensation in the amount of 10 monthly salaries.

In terms of the amount of compensation they vary in different values, in some cases even considerably, in terms of the proportionality of the measure in relation to the goal it aims to achieve.

EXECUTION OF THE DECISION

Enforcement of CPD decisions has encountered several problems, which are mainly related to the declaration of territorial incompetence by the courts. There is also an increasing tendency on the part of employers to request the suspension of the execution of the decision, while the positions of the courts regarding this request are different. The orders regarding the return of the decision to an executive title, with reference to Article 510 of the CC are also different. It is worth mentioning in this analysis the role that the Supreme Court has played in clarifying and consolidating case law, especially with regard to matters of territorial jurisdiction.

In one of the cases selected for this analysis, the lack of territorial jurisdiction was declared by the Administrative Court of First Instance Tirana, which was set in motion by the CPD with a request to issue an execution order of the executive title, which provided for a fine in the amount of ALL 200,000 for a Municipality, which had not executed the decision where discrimination was found due to disability and belonging to a special group of members of the Shkodra Association of Paraplegic and Tetraplegic Invalids. The court in question argued that the territorial jurisdiction belonged to the Administrative Court of First Instance Shkodra, while the latter addressed the SC to resolve the dispute of jurisdiction.

The Supreme Court accepted the request arguing that: "The decision-making mainly on the issue of territorial jurisdiction is unfounded in law, and that also the interim decision to declare the lack of territorial jurisdiction is unfounded in the legal provisions on how the territorial jurisdiction of the administrative and civil court is attributed. First, one should read Article 13 of Law No. 49/2012, which the court itself brings to attention when justifying the decision to declare territorial incompetence. Article 13 and Article 62 of the CPC are formulated in such a way as to exclude the possibility for the court to consider primarily territorial jurisdiction. According to the procedural laws, this competence is a procedural rebuttal in the narrow sense and can be exercised only by the litigants and that the courts can consider it only in this way, and never mainly." (See decision no. 327, dated 14.09.2020 of the Administrative College of the Supreme Court)

Judicial decisions, which have decided to accept the request of the employer *to suspend the execution of the decision that has determined the compensation* are few. The research showed that the jurisprudential positions of the Supreme Court are different, and the temporary protection is offered in different ways, sometimes accepting the requests and sometimes rejecting them. Temporary procedural protection of the parties in a lawsuit is guaranteed by the CPC and law no. 49/2012, including requests for temporary execution of the decision, or even suspension of the execution of a final decision. The case law of the Supreme Court states that these remedies for interim procedural protection are functionally related to the main means of access to court, such as the lawsuit and the appeal. (See decision no. 169, dated 15.05.2020 of the Administrative College of the Supreme Court)

Jurisprudential attitudes have evolved, have been enriched with clear arguments regarding the interpretation of the requirements of Article 479 of the CPC and the type of arguments that the applicant must present in order for the search to be successful, as follows:

- *It should not contain the same reasons as those presented in recourse, which are subject to another type of trial in the deliberation room, such as reasons relating only to the fairness, evidence-based and law-based decision of the lower instance court in resolving the issue.*
- *It should not contain generic reasons on the serious financial consequences that the immediate execution of the decision would present for the employer and the impossibility of returning the amount in case of a favorable decision by the Supreme Court.*
- *It must contain concrete explanations and arguments as to what these concrete financial consequences would be and how they would be caused by the immediate execution of the decision.*
- *It must refer to a concrete ground, which must be sufficiently reasoned by the applicant.*
- *It must contain evidence in support of claims for financial loss, as the occurrence of financial consequences is an identifiable fact. To prove the possibility of a serious, irreversible and, above all, immediate damage.*
- *It should not be abusive, as it may activate the personal property liability of the applicant or representative, according to Article 34/1 of the Code.*

((Compare decision no. 3853, dated 07.11.2019 of the Administrative Court of First Instance Tirana with decisions no. 679, dated 13.12.2019, no. 394, dated 18.05.2020 and No. 169, dated 15.05.2020 of the Administrative College of the Supreme Court)

Regarding the 15-day deadline for the execution of the obligation imposed on the employer, some courts have considered it reasonable by choosing not to order in the enacting clause the return of the decision to executive title according to the provisions of Article 510 of the CC. (See decision no. 793, dated 31.07. 2019 of the Judicial District Court of Berat) In some other cases, the courts have disposed for temporary execution of the decision according to the provisions of Article 511, point b paragraph 2 of the CPC, fulfilling the social aspect of the administration of justice. The criteria on which the courts have based this attitude are economic difficulty, subsistence minimum, instability of family relations, economic security, etc. (See decision no. 1340, dated 11.10.2019 of the Judicial District Court of Fier)

CORRECTION OF DISCRIMINATIVE BEHAVIOR

The constitutional and international protection enjoyed by the principle of equality and non-discrimination cannot be real and effective if the legal framework does not define concrete mechanisms for the restoration of violated rights, but also for the identification of individual or collective responsibility. In some cases, the mere finding of discrimination is not a remedy for the damage caused to a discriminated subject, therefore the legal framework has provided the competence of the CPD to impose certain measures against the subject against whom a complaint has been filed.

The measure must meet several characteristics, among which the most important are *to be effective and preventive and in proportion to the situation that caused the imposition of the measure*. The measure can also be a fine, i.e. a monetary obligation of the subject against whom the complaint has been filed. The criteria on which it is determined are determined by the LPD as follows:

1. The nature and scope of the offense and the impact on the victim
2. Personal and financial circumstances of the offender, in particular taking into account:
 - a) All sources of income and if the breach is committed by a private legal entity, take into account balance sheet and profit assets, as well as total salaries paid to employees;
 - b) If the same violation discriminates against several persons, only one fine is imposed.

The fines are determined by recognizing to the CPD an assessment discretion in determining the amount, which proportionally reflects the above elements. The law defines several categories of entities with different obligations in money:

- **The natural person** is punished with a **fine from 10 000 to 60 000 ALL**,

- The legal person is punished with a fine from 60,000 to 600,000 ALL;
- Natural person within a legal entity, who is responsible for violation, is punishable by a fine of 30 000 up to 80,000 ALL;
- The person who exercises a public function and is responsible for violation based on this law, is punished with a fine from 30 000 to 80 000 ALL;
- the natural or legal person who commits one or more from serious forms of discrimination, double the number of fines provided above.

The decision to impose a penalty with a fine also sets a reasonable time limit within which the fine is paid. The sanction with a fine is revoked if the subject against whom the appeal is filed, implements the decision within seven days after the sanction is imposed.

The law has conceived the measures according to an increasing order of severity, which reflects the consequences of the violations committed. In this sense, as a last resort, especially when the natural or legal entity does not adhere to the commissioner's decision or does not pay the fine within three months after the deadline set by the commissioner and the sanction has not been challenged in court, **the commissioner can ask the competent authorities for revocation or suspension of the permit or authorization of the natural or legal entity to exercise its activity.**

From the analysis of court decisions, it is concluded that the reasons for which the decisions of the CPD are found to be absolutely invalid are closely related to the interpretation of the limits of the exercise of powers by the CPD. The case law shows ambiguity regarding the harmonious relationship that should exist between Articles 32 and 37 of the Law, which specifically regulate (1) the competence of the CPD to set concrete regulations and measures, and (2) the competence of the court to determine a compensation through its decision, if it decides that there is a violation of this law, including a time limit for the performance of compensation. The imposition of measures, according to this law, does not exclude the imposition of measures according to other laws.

There are courts which hold that: "Decisions of the CPD are not binding on the court reviewing the dispute, as the court is the competent body that decides whether there has been a violation of the Law" On Protection from Discrimination "" (See decision no. 450, dated 26.02.2020 of the Administrative Court of Appeal in Tirana)

Another attitude is that: "The CPD has no jurisdiction to assess or have discretionary space to assess how the employer has acted to assess the performance of the third person during the time of service in the civil service, but this is only the competence of the Administrative Court, and only in this case when the civil servant, in this case the third person in the trial, files a lawsuit in court.

As long as within the legal deadlines and the manner provided in the special Law (No. 152/2013, as amended) does not appear to have been repealed as illegal by the bodies charged by law, performance appraisals of the civil servant (third person) are legal within the meaning of Article 107 of the APC and no other body may take into account this fact, moreover another public body of state administration. "(See decision no. 2075, dated 28.09.2020 of the Administrative Court of First Instance of Tirana)

Another reason for challenging in court the decisions of the CPD are measures that include: (i) **the return to work** of discriminated entities, or even taking measures by public institutions to adapt bylaws in the case where they have been the source of indirect discrimination and (ii) *finés*, when the subjects against which the complaint is filed have not been cooperative in making information available which would enable an in-depth investigation of the claims of discrimination, or when they have not complied with the decisions of the CPD within the legal deadlines.

RETURN TO WORK

The research showed that the case law consistently shows a lack of uniformity regarding the meaning of the CPD competence to determine the measure of "return to work" for employees for whom it has been proven that the termination of employment occurred as a result of a protected ground. Interpretive attitudes are outlined between two main lines:

1. *Is the measure of return to work exercised within the competencies of the CPD or in excess of them?*
2. *Is the measure of returning to work an "order" or a "recommendation"?*

As you read the court decisions, the legal uncertainty created by the case law regarding the guarantees enjoyed by the discriminated person in the field of employment is obvious, thus reinforcing the continuous finding in the entirety of this analysis that the principle of legal certainty has lost its binding force to ensure uniformity and clarity in the interpretation and comprehensibility of legal provisions.

One of the interpretive attitudes found in the case law is the one that evaluates the measure of return to work as fair and effective and in fulfillment of the competencies of the CPD to guarantee the principle of equality and non-discrimination. In this group of attitudes there are also some who consider this measure as detached from the provisions of Article 146 of the Labor Code.

In the first years after the establishment of the CPD, the courts accepted as grounded the measure of returning the claimant to work, as a way of correcting the negative consequences caused due to her discrimination in employment relations. Decisions of the courts of first instance, assessed as grounded by the court of appeal, state that:

- *" The court deems that the consequences should be corrected by returning the claimant to the previous job position or to an equivalent position according to Law no. 10 221/2010, article 38 "Compensation" which stipulates that "Compensation includes, inter alia, the correction of legal violations and their consequences through the return to the previous state, appropriate compensation for property and non-property damages, or through other appropriate measures "(See decision no. 280, dated 20.02.2014 of the Court of Appeal of Vlora).*
- *The above position is reinforced in the following years where another court has assessed the order of the CPD to restore the employment relationship as a decision within the competences of the CPD, maintaining the position that: "... this measure by The Commissioner was not requested pursuant to Article 146 of the Labor Code, but as a measure to avoid discrimination pursuant to the Law "On Protection from Discrimination." (See decision no. 4450, dated 16.11.2017 and No. 4403, dated 14.12.2018 of the Administrative Court of First Instance Tirana)*
- *The same line of reasoning that respects the competence recognized by the law on the CPD, is expressed in another decision, as follows: "... in accordance with the attributes provided for this public body by the law" On protection from discrimination ", to ensure effective protection against discrimination and any other form of conduct that promotes discrimination, as well as the fulfillment by the CPD of the purpose of Law no. 10 221/2010. it is at the discretion of the Commissioner that, based on article 33 point 10 of this law, to assess in accordance with his duty, and also to decide in his duty the necessary arrangements and measures to be taken to rectify the situation and to restore the denied right of the subject, and all the consequences that came as a result of the ascertained discrimination. To ensure effective protection against discrimination in employment ... measures must be taken to return to work. This measure is found in accordance with the principle of proportionality, Article 12 of the APC. It is necessary, appropriate to achieve the goal set by law, in proportion to the need to remedy discrimination and its consequences "(See decision no. 552, dated 18.02.2020 of the Administrative Court of First Instance Tirana)*
- *The above approach continues to be reinforced by a set of decisions where the courts reason that: "In order to guarantee*

effective protection against discrimination in employment, which includes any difference, restriction or exclusion, based on the reasons protected by law, which, among other things, is related to dismissal or termination of the employment contract, take action to return to work. " (See decision no. 2063, dated 23.09.2020 of the Administrative Court of First Instance Tirana) The guarantee of return to work continues to enjoy support from the courts, which state that: "The decision of the CPD ordering the return of the claimant to work has not been appealed by the public body to the competent court, within 30 days of notification ... even the directorate has refused to execute this decision being administratively fined by the CPD. Consequently, the administrative act of the CPD is in force and produces the legal consequences that are expressed in its enacting clause ... therefore the high school is obliged to implement this decision by returning the claimant to the previous work decision, teacher in this high school. The correction of legal violations committed by the respondent (direct health discrimination) and the consequences to the claimant (termination of employment on the recommendation of ISHA) is fully realized with the return of the claimant to the previous job. This measure is considered appropriate to restore the violated right and sufficient to be considered as compensation for the claimant for the health discrimination suffered by her. "(See decision no. 2311, dated 29.07.2019 of the Administrative Court of Appeal Tirana)

From the research of court decisions, mainly those of the year 2016 it is further reminderd that the prevailing approach is the opposite, i.e. return to work is a measure taken in excess of the powers of the CPD and, therefore, constitutes a reason for the absolute invalidity of the decision in the part that has the measure of return to work. The opposite positions of the courts find application at the same time, as different courts have different dispositions at the same time when it comes to adjudicating claims of discrimination. This feature is found to extend over the years.

A part of the courts, based largely on the dispositions of the unifying decisions no. 31, dated 14.04.2003 and No. 7, dated 01.06.2011 of the UCSC strongly emphasize the argument that: The right to return to work does not enjoy legal protection, while the right to compensation enjoys legal protection according to the unifying decision no. 31, dated 14.04.2003 of the UCSC. The employee can not file a lawsuit for the violation of the administrative act but can file a lawsuit for seeking the consequences arising from the termination of the contract. The placement of two parties in an employment contract can not come if there is no will with both parties "(See decisions no. 1967, dated 25.04.2016, No. 1965, dated 07.04.2016, No. 1156, dated 29.03.2018,

1965, dated 07.04.2016, No. 1156, dated 29.03.2018, No. 434, dated 13.02.2019 and No. 2984, dated 17.11.2020 of the Administrative Court of First Instance Tirana). Some courts articulate the rule that *the right to return to work is enjoyed only by employees who have the status of civil servant*. (See decision no. 573, dated 24.05.2018 of the Judicial District Court of Fier).²⁵⁸

Return to work is assessed as a disposition that is contrary to the principle of contractual freedom (See decision no. 2268, dated 22.05.2017 of the Administrative Court of First Instance Tirana) In some other decisions, the court, assessing as unfounded the measure of return to work has decided to repeal the decision in full, including the part where the CPD had to impose a fine, due to non-implementation of the measure.

In the case of an employee whose employment had ended with the claim of restructuring of a joint stock company, the CPD found discrimination on the grounds of family ties in the form of victimization, ordering the complainant to return to work. The administrative court, after considering the employer's lawsuit for the abrogation as absolutely invalid of the decision of the CPD, especially for the measure of return to work, has considered this order unfounded, reasoning that:

- *"... with the taking of the measure" return to work "in the period of one year after the termination of the employment relationship, we are not before the prevention, but the unilateral ordering and regulation of the employment contract between the two subjects that belong to the private law, therefore it is considered to have acted beyond the legal competencies of the CPD and as such the measure is invalid. The purpose of the Law which defines the competencies of the CPD is to guarantee substantially protection for the individual (in this case the employee) from discrimination by the employer and not to regulate or "interfere" in the very content of the employment relationship, which according to the legislation applicable in the Republic of Albania is regulated according to the compliant will of the contracting parties, within the legal restrictions set by the Labor Code. "(See decisions no. 926, dated 01.03.2016 and No. 4079, dated 26.10.2017 of the Administrative Court of First Instance Tirana).*
- *This line of reasoning is enriched with arguments such as: "The CPD has no competence to influence with its authority the conduct of the claimant during the execution of an employment contract where the contracting parties have all the legal instruments to be protected in this employment relationship and any moment in relation to this employment relationship and any disposition regarding the very premises that the legal framework provides. The CPD can not assess its situation detached from the legal reality in which this body operates and its decision-making comes to life*

²⁵⁸ In the last two years, the Supreme Court has somewhat changed the position held by the UCSC. See decisions no. 4, dated 01.07.2020 and No. 1, dated 11.01.2021 of the Administrative College of the Supreme Court.

and power. " (See decision no. 409, dated 05.02.2016 of the Administrative Court of First Instance Tirana and decision no. 2596, dated 26.10.2020 of the Administrative Court of First Instance Tirana)

- *Stances are added to the above interpretation such as: "No legal provision of the substantive law that regulates the legal relations of the CPD and that of the Labor Code that regulates the employment relationship, and if discrimination is found in the termination of employment, give the commissioner or the court the power to order the return to work of the discriminated person in the previous place of work. " (See decision no. 419, dated 16.07.2018 of the Court of First Instance Gjirokastra).*

In some other decisions, the courts analyze the limits of application of the Law "On Protection from Discrimination" in relation to the dispute under trial. At the end of the review of the employer's lawsuit against the decision of the CPD, which found discrimination of the complainant due to political convictions, the court states that: "CPD in its decision-making for finding discrimination and punishment of the claimant (employer) has not correctly assessed the limits of application of this law in relation to the concrete relationship, the subjects involved in the dispute, two private parties and their behavior which operates in private law. ... it is a right which operates on the basis of freedom of will ... consequently this point of the decision of the CPD is abrogated. " (See decision no. 1645, dated 13.05.2019 of the Administrative Court of First Instance of Tirana)

The same line of reasoning is reinforced by another decision where the court reasoned that: "In case of termination of the employment contract, despite the fact that the public body for public administration cases expresses itself with an act taken by the head of the agency, this does not mean that these are administrative relations, i.e. expressing the will of the agency in terms of administrative relations, but this is the expression of the employer's will to terminate the employment contract. Thus, the employee cannot file a lawsuit for the violation of the administrative act but can file a lawsuit for seeking the consequences arising from the termination of the employment contract. "(See decisions no. 2219, dated 09.05.2016, no. 4406, dated 04.12.2018 and No. 434, dated 13.02.2019 of the Administrative Court of First Instance Tirana)

- *The CPD has the power only to verify whether there is discrimination against a third party but cannot change the qualification of the dispute produced in this termination of employment relations between the litigants. The respondent party (CPD) from the framework of the evidence obtained in the administrative investigation and in the legal framework implemented by it cannot conclude and qualify the practice applied by the claimant as termination of employment relations at the end of the notice period with termination of employment relations in the context of imposing a disciplinary measure. This factual and legal catapult by*

the CPD has no legal basis. Furthermore, the CPD does not have the competence to assess the merits of terminating the employment contract in law, as this is the sole competence of the court that would review a lawsuit filed by a third party for this purpose. The verification of the will to terminate the employment contract by the claimant for the respondent must be investigated within the legal competencies of the CPD. This assessment should be made in order to implement the Law on Protection from Discrimination and not the implementation of the Labor Code ". (See decision no. 2596, dated 26.10.2020 of the Administrative Court of First Instance Tirana)

The competence of the CPD to determine the measure of return to work was also analyzed by the Court of Appeal, which concluded that: *"The measure does not fulfill the features of an effective and preventive measure but constitutes an order for the unilateral re-conclusion of the employment contract between two entities belonging to private law."* (See decision no. 2477, dated 18.09.2019 of the Administrative Court of Appeal) In another decision, the Court of Appeal, considers as fair the exclusion from the court of first instance of the possibility of returning to work through judicial disposition, based on the argument that: *"Termination of the employment contract by the respondent without reasonable ground, specifically due to political conviction, constitutes an abusive ground and the right of the employee to restore through the courts is that of compensation and not that of return to work."* The following arguments of the court return the complainant back to the administrative process and competencies of the CPD, stating that: *"In the framework of the execution of this decision, the CPD has the right to take a series of measures provided by Article 33 of the Law, starting from fines until the revocation or suspension of the activity license of a natural or legal person. It is the obligation of the CPD to take all administrative measures provided by law against the respondent to carry out the orders received from him. In order to exercise the right to return to work, the claimant must apply to the CPD for taking administrative measures against the respondent, and only if these measures do not bring effect, he has the right to ask the court to pay compensation for the consequences."* (See decision no. 116, dated 26.02.2018 of the Court of Appeal of Vlora that has left in force the decision no. 573, dated 25.04.2018 of the Judicial District Court of Fier)

RETURNING TO WORK IS AN 'ORDER' OR 'RECOMMENDATION'?

Another problem encountered in the case law, starting from 2015 onwards is that of different positions regarding the ordering or recommendatory nature of the CPD measure for return to work.

In some decisions it is stated that: "The provision of the CPD with a decision, where it has decided that AlbPetrol as a subject that has consumed discriminatory behavior against z. G should return him to work in the previous job, is a recommendation in support of Law No. 10 221, and not an order ... does not constitute a violation of the powers of the CPD and, consequently, the claimant's request for a finding of absolute invalidity of the decision must be rejected as unfounded in law and evidence. " (See decision no. 5295, dated 22.10.2015 of the Administrative Court of First Instance Tirana)

Meanwhile, the Administrative Court of Appeal has held that: "The decision of the CPD to return to work is not a recommendation, but an order due to the fact that in point 2 it is ordered to take immediate measures to return to work in a job position in accordance with its educational level and appropriate to the situation of his health. Failure to implement this decision will result in a fine ... " (See decision no. 1868, dated 09.05.2018 of the Administrative Court of Appeal Tirana) With a contrary position, another college of the same court reasoned that: "Contrary to what the claimant (employer) has filed in the complaint, the CPD has acted within the scope of its competencies by not exercising or assuming competencies of any other body. The CPD based on Article 32 of the Law has the right to review complaints related to discrimination, to impose sanctions when discrimination is found and to give recommendations ... contrary to the reasoning of the court of first instance, the disposition of the CPD is a recommendation and not an order, therefore it does not exceed the competencies of this body. The decision of the CPD has no mandatory, binding and executive character ... ". (See decisions no. 409, dated 05.02.2016, no. 1967, dated 25.04.2016 of the Administrative Court of First Instance and no. 473, dated 20.02.2019 of the Administrative Court of Appeal Tirana)

This line of reasoning is also found in the 2020 decisions, where the courts reason that: "Based on the unifying practice of the Unified Colleges of the Supreme Court for the implementation of the legal provisions of the Labor Code, a court decision may not order a return to work when the employment relationship is regulated by the Labor Code and its subjects (employer and employee) do not belong to public law ... the measure imposed by the Commissioner must be effective and preventive, while with the measure "order to return to work" is not prevention, but unilaterally ordering and regulating the employment contract between two subjects belonging to private law. " (See decision no. 1989, dated 22.09.2020 of the Administrative Court of First Instance Tirana)

The above interpretative attitudes are reflected in different dispositions of the courts, where some of them *find discrimination*

convictions and order the return of the claimant to a previous working decision. (See decision no. 49, dated 08.03.2019 of the Mat Judicial District Court) Some other courts abrogate the finding of discrimination by the CPD due to the protected ground of educational status and the measure of return to work, while leaving in force the finding of discrimination due to affiliation in a certain group. (See decision no. 2418, dated 16.10.2020 of the Administrative Court of First Instance Tirana)

FINES

The decisions of the CPD have been widely challenged in court also due to the fines imposed on public or private entities, both in the case when they do not apply the measures imposed by the CPD in decisions that find discrimination within the legal deadline, and in the case when the authorities violate the obligation to cooperate with the CPD and to support it in the performance of its duties, in particular by providing the information it needs. The margin of estimation of the court is different in terms of determining the limits of the CPD competence to impose fines, when public authorities are not cooperative, which has led to different interpretative positions regarding the meaning of the criterion "*information that the CPD needs*".

The positions of the court are somewhat stricter and formalist in the case when they analyze the claims of public authorities for the fines imposed on them in the case of non-implementation of the measures of the CPD. In these cases, the courts are mainly based on a literal interpretation of the obligations arising from Article 33, point 10 of Law no. 10 221 "On protection against discrimination". (See decisions and no. 442, dated 08.02.2016 of Administrative Court of First Instance Tirana and no. 32, dated 19.01.2016 of the Administrative Court of First Instance Vlora).

Some courts condition the right of appeal of the subject against whom a fine has been imposed with the value of the latter, arguing that: "*The decision of the CPD contains obligations in money in the total amount of 60,000 ALL, which is less than 20 times the minimum wage nationwide ...*" (See decision no. 7269, dated 11.12.2014 of the Administrative Court of First Instance Tirana and No. 50, dated 28.01.2019 of the Administrative Court of First Instance Gjirokastra)

Vendimet e ekzekutimit të gjobave



some of them are repealed by the courts. In all cases where the courts have assessed the return to work as disposing in excess of the powers of the CPD, the administrative measure of the fine was assessed by the court in the context of the absolute invalidity of the decision, thus repealing it. (See decision no. 4079, dated 26.10.2017 of the Administrative Court of First Instance Tirana)

Another reason is the position taken by the administrative court regarding the nature of the decision of the CPD, when a request for issuance of an execution order is submitted. In relation to this issue, different positions are found on the meaning and interpretation of the provisions of Law no. 10 279/2010 "On administrative offenses". Decisions that do not accept the request for issuance of the execution order of the CPD decision are based on this conclusion on the grounds that: "Law no. 10 221 does not define as an executive title, nor does it charge the bailiff for the execution of the measure determined by the CPD according to point 11 of article 33 of the Law." The Court, taking into account the claim of the CPD regarding the implementation of the provisions of Law no. 10 279/2010 "On administrative offenses" concludes that: "The actions of the CPD are not in any of the cases of the scope of application of Article 20 of this law and, consequently, its Article 22 does not apply, consequently the court rejects the request for issuing an execution order, as the administrative act is not an executive title enforced by the bailiff service." In some decisions, the opposite position is found with the above reasoning. (See decisions No. ska, dated 25.01.2016, No. ska, dated 09.02.2016 and No. ska, dated 14.06.2016 of the Administrative Court of First Instance Tirana)

In some other cases, the analysis of the courts is limited to arguments that: *"The employer has been unable to objectively implement the order to return the employee to work, as in the position she held was appointed another person with higher professional education, but also because this search has been the subject of trial in another process and has been dismissed as unfounded and cannot be tried again."* (See decision no. 5122, dated 25.09.2014 of the Administrative Court of First Instance Tirana)

The research also highlighted decisions that should be included in the category of good practices.

The court has considered the lawsuit of the Ministry of Foreign Affairs with the object of abrogating the decision of the CPD, which imposed a fine in the amount of 60,000 ALL, for not providing the necessary information for the administrative investigation of a complaint of discrimination against Albanian citizens that reside abroad due to different fees applied by different states for obtaining a biometric passport. The information was sent by an Albanian citizen residing in the United Kingdom, who claimed that "The fees they had to pay for obtaining a biometric passport were higher compared to those to be paid by Albanian citizens residing in other countries such as Greece, Italy, etc. " The court considered MFA's claim unfounded with the argument that: *"The purpose of the claims of the respondent party was and is to identify the ground for these differentiations, i.e. the 'justification' for the imposition of these different tariffs, which would lead to resolving the issue if these tariffs are discriminatory, and there is an objective purpose justifiable and justified in their placement. The claimant party responded to the respondent party, but did not provide the requested information, not serving the administrative investigation initiated by the respondent party in order to make a decision on whether or not to find discrimination."*(See decision no. 5546, dated 03.11.2015 of the Administrative Court of First Instance of Tirana).

In the same line of reasoning, another court assessed as non-cooperative the non-submission by the Municipality of Tirana of the documentation requested by the CPD during the *ex officio* investigation of the case of displacement of Roma and Egyptian families from the Artificial Lake area to cities where they had civil status. According to the court, *"... this attitude of the Municipality of Tirana" has directly affected the results of the review of the case, exceeding any legal deadline for making a decision "*. (See decision no. 1569, dated 19.04.2017 of the Administrative Court of First Instance Tirana)

An opposite position is found in the case when the court has reviewed (in)sufficiency of the probative power of the information made available, assessing the fine of the CPD in the amount of

60,000 ALL as unfounded, completely abrogating the decision of the CPD, who had found discrimination in employment because of race. The Court reasoned that: *"Therefore, before coming to a conclusion regarding the procedure followed in the case of z..S., if he was discriminated against by the claimant, the CPD has requested additional information that in itself did not serve the case for which the administrative procedure was initiated."* (See decision no. 1110, dated 07.05.2015 of the Administrative Court of First Instance Tirana).

Different standards of interpretation are also observed in relation to the fact whether the CPD has the obligation to suspend the administrative procedure for assessing the presence or not of a discriminatory ground while a court process is underway, which has as its object the consequences arising from the resolution of employment relationship. The courts base the analysis on a comparative approach to the provisions of Article 15 of the Law on Protection from Discrimination with the provisions of Article 36 of the CPC.

Article 15 contains a special provision, which specifically regulates the right of every employee to complain to (i) the employer, (ii) the Commissioner for Protection against Discrimination, or (iii) in court, if he believes that he has been discriminated against. This provision does not restrict the right to appeal to specific institutions, set up at different employment sectors. The law does not provide for any special regulation regarding the suspension of the administrative investigation, meanwhile the legal amendments of 2020 added a new provision in Article 33, recognizing the right of the CPD when it is informed that the complainant has filed a lawsuit in court with the object of finding discrimination, while he has submitted the same complaint to the Commissioner and the case is under consideration, the Commissioner decides to dismiss the case. On the other hand, Article 36 of the CPC stipulates that *"No other institution may review a civil dispute that is being tried by a court."*

The research shows that the prevailing view is that the boundaries of the administrative investigation are determined depending on the state of the civil dispute trial and that article 36/2 of the CPC prohibits the conduct of any administrative procedure while the case is being considered by the court. This position is encountered from the beginning of the case law, when the courts reason that; "Administrative jurisdiction is separate from judicial jurisdiction and they cannot interfere with each other. Given that during the administrative investigation the third person (claiming discrimination) addressed the judicial jurisdiction for the resolution of the labor dispute, the administrative proceeding should not have continued for the request for return to office, much less making a decision. This is a competence which does not comply with the purpose of the Law,

according to which the boundaries of the decision-making space of the CPD are clearly defined ". (See decisions no. 2219, dated 09.05.2016 and No. 2247, dated 07.10.2020 of the Administrative Court of First Instance of Tirana)

The same position is held by another court, which, expressly referring to paragraph 3 of Article 36, argues that: "Judicial jurisdiction is an obstacle to the initiation or continuation of administrative proceedings by public administration bodies. Thus, any act or unilateral action of the respondent party (CPD) to resolve the consequences related to the employment contract that has existed between the parties, that has become the subject of judicial dispute, but that has not yet been resolved by a final decision, constitutes a violation of the rights granted to him by law and at the same time a violation of the rights that the law recognizes to the claimant, as it is unacceptable for two different decisions to be given for the same dispute. "(See decision no. 2065, dated 12.05.2017 of the Administrative Court of First Instance Tirana)

|| ANY PERSON OR GROUP OF PERSONS WHO CLAIM THAT THEY HAVE SUFFERED DISCRIMINATION CAN FILE A LAWSUIT AT THE COMPETENT COURT ||

In addition to the above position, from the analysis of court decisions it seems as if the courts try to "curb" the tendency of the complainants to prove discrimination through some litigation. Article 34 of the Law **"On Protection from Discrimination"** provides that: **"1. Any person or group of persons claiming that they have been discriminated against for one of the grounds mentioned in Article 1 of this Law, may file a lawsuit before the competent court according to the provisions of the Code of Civil Procedure for compensation under the Law or, as the case may be, file a report before the competent bodies for criminal prosecution. 2. Filing a complaint with the Commissioner is not a condition for filing a lawsuit and does not preclude the injured party from going to court or prosecuting authorities."**

Such an approach has been analyzed as prohibited by the court, which states that "The decision of the CPD has been considered before by the administrative court of first instance, which by decision has decided to dismiss the employer's lawsuit concerning the claimed illegality of the finding of discrimination due to the health condition of the claimant. *Despite the fact that Article 34, point 2 of Law no. 10 221 provides that "Filing a complaint before the commissioner is not*

a condition for filing a lawsuit and does not constitute an obstacle for the person to go to court. " ***The court observes that the issue of finding discrimination through the review of the legality of the finding decision of the CPD has already been addressed by decision on merit***, which, under the circumstances when it has not become final, cannot be considered having executive effects on what has been decided, but on the other hand the court cannot reconsider the same claim by the applicant, in the conditions when the disposition with the decision of the appeal will return the case or not of discrimination according to the decision of the CPD in an adjudicated thing."

In contrast to the above, the Court of Appeal has held that "Receipt by the claimant of compensation for immediate termination of the employment contract under Article 153 of the Labor Code does not impede the right of the claimant to claim payment of appropriate damages for the termination of employment contract in conditions of discrimination according to Law No. 10 221/2010 or Article 146 of the Labor Code. The institute of immediate termination of the employment contract regulated by Article 153 et seq. CC is different from that of termination of the employment contract for unreasonable grounds, which includes the case of discrimination due to political convictions, treated by Article 146 of the CC. Even the law No. 10221/2010 stipulates that the victim must file claims for compensation before the court, as the latter is the competent body for compensation under Article 34. "(See decision no. 116, dated 26.02.2019 of the Court of Appeal of Vlora)

Some decisions are accompanied by arguments which do not seem to clarify but rather confuse the position that the complainant should take if the claim of discrimination has once been examined by the court. This problem is encountered in the case of a conflict in the employment relationship between the employer and an employee, who was initially transferred to a lower position and then fired due to disciplinary action. He claimed that the real reason was the fact that he was the President of the Independent Trade Union of Electricity and a member of the National Assembly of the Union of Independent Trade Unions and, therefore, addressed the court, which in 2016 ruled that the employment contract was terminated without reasonable ground, while assessing the claim of discrimination and victimization as unfounded. This decision was upheld by the Court of Appeal in July 2017. In August of the same year, the complainant addressed a complaint to the CPD, which was assessed as out of time. The complainant addressed the court again claiming the finding of discrimination, return to work and compensation for the damage suffered. Although the decision highlights the fact that this claim has been the subject of review in another trial conducted in both levels of trial where it was assessed as unfounded, again the court treats the claim on the merits by concluding that "the CPD does not has accepted the request as submitted out of time

.... the termination of employment was done in 2015, while the complainant addressed the request to the CPD after 2.5 years. If the claimant were to feel truly discriminated for what he claims, the complaint should have been made immediately and not wait for years to pass. However, although he presented this request in his claim, he failed to prove before the court with written evidence the discrimination made by the employer. "According to several sheets of doctor's recommendations presented as evidence, the doctor has stated that the claimant has been suffering from nervous disorders and blood pressure since 2007 while also receiving periodic medication." The court finally concluded based on Article 451 / a of the CPC, according to which "A dispute that has been resolved by a final decision may not be tried again, unless the law provides otherwise" (See decision no. 337, dated 23.07.2018 of the Tirana Judicial District Court)

The research has found different positions regarding the obligation of the CPD to suspend the investigation and await the conclusion of the court to review the case where the same facts are claimed on the discriminatory situation.

Decisions over the years seem to reinforce the view that: "The court is the only state authority charged by law to finally assess the legality and regularity of administrative action, moreover the claimant in the administrative trial has raised the same claim that the assessment of his performance at work has been discriminatory." (See decision no. 2075, dated 28.09.2020 of the Administrative Court of First Instance Tirana) The arguments that support this line of reasoning clearly return to the prevailing position in the following years, where the court considers that: "As long as the administrative procedure and its findings are challenged by a third party claiming discrimination in court, the CPD cannot investigate it, draw conclusions about its merits and ultimately decide on the basis of the decision-making for finding discrimination because the procedure [dismissal] is irregular and the violations do not stand and moreover to request as a measure the removal of the given administrative measure and the return of the financial amount withheld to the third person ". (See decision no. 636, dated 24.02.2020 of the Administrative Court of First Instance Tirana).

The same position is observed by the courts in the case when the CPD, after a long period of administrative investigation of the case of termination of employment relations due to discrimination, has decided to dismiss the case with the argument that *"The case is being reviewed by court "*. The court assessed this decision of the CPD as unfounded, stating that: *"... the respondent party should have closed the administrative investigation by taking a final decision.*

If the CPD deems that the case which was being tried by the Administrative Court affected the resolution of this case, it should suspend it, but not make a decision on dismissal, especially after a 2-year period of commencement of administrative proceedings. The CPD claim that this case falls within the judicial and not administrative jurisdiction is unfounded in law, as in the present case the complainant had not filed any lawsuit with the administrative court to establish discrimination. The CPD must make a final decision. *"(See decision no. 2341, dated 26.05.2017 of the Administrative Court of First Instance Tirana)*

Meanwhile, with a completely different approach, some other courts consider unfounded the claim of the claimant (employer) for lack of administrative jurisdiction by the CPD, as the case was being reviewed by the court. In the court's assessment:

"The lawsuit filed for review in the judicial district court did not have as its object the investigation of the existence or non-existence of discrimination, which as a ground is provided in Article 146 of the Labor Code which defines cases of termination of employment contract without reasonable ground. Claiming for immediate termination and without respecting the contract termination procedure is a different claim

FINDING DISCRIMINATION DUE TO POLITICAL CONVICTION AND COMPENSATION OF DAMAGE IN 12 MONTHLY SALARIES

both in terms of legal ground and its consequences. It is therefore concluded that the CPD and the court had two separate claims under consideration. *"(See decision no. 215, dated 29.01.2020 of the Administrative Court of First Instance Tirana)* In the same line of reasoning, another court states that: "Referring to the state of the acts, the court concludes that the cases that constitute a subject for review in court through the lawsuit of the party claiming discrimination, and that which constitutes the subject for review in the administrative investigation at the CPD, do not overlap." *(See decision Nr. 1712, dated 24.07.2020 of the Administrative Court of First Instance of Tirana)*

During the civil trial with the object "Determination of discrimination due to political conviction and compensation of damages in 12 monthly salaries", the respondent - the employer - has submitted a request for suspension of the trial until the end of the administrative trial against the decision of the CPD. The court rejected the request with an intermediate decision, arguing that: "Filing an administrative appeal with the CPD does not constitute a condition or obstacle for the trial of the lawsuit subject to trial. Likewise, the trial initiated in the Administrative Court against the decision of the CPD does not constitute a reason for the suspension of this trial, as the resolution of the civil case is not dependent on the resolution

of the administrative matter ". (See decision no. 1034, dated 11.07.2019 of the Judicial District Court of Fier)

Although few, during the analysis of court decisions, cases were found when there was a court, which, after judicial control of the legality and merits of the decision of the CPD, has *concluded that*: "The administrative action subject to trial is illegal in terms of the fact that it has decided not to ascertain discrimination, but it is" sufficient "to ascertain the illegality of the termination of the employment contract, thus obtaining the attributes of the court. Moreover, the dispute over the employment contract is close to civil jurisdiction. It is the duty of the CPD to investigate whether the employer has fulfilled the obligations arising from the Law "On Protection from Discrimination" ... in relation to this obligation, it turns out that a full investigation has not been made, as even the employer could not argue that the situation of the claimant, the employee (family and economic circumstances) have not been decisive in terminating the employment contract due to "poor performance" after eight years of employment. The employer failed to convince the court on the basis of evidence that he did not discriminate or exclude the employee due to her condition. "(See decision no. 493, dated 18.02.2019 of the Administrative Court of First Instance Tirana)

The above analysis naturally leads to the conclusion that the need to clarify the boundaries of the administrative jurisdiction of the CPD in relation to the judicial one is necessary. Clarifying this ratio of norms is the only way to ensure an equally interpretive and substantive approach to the claims that the complainants present in court. It is necessary to clarify whether there are restrictions on the right of the employee who claims discrimination to address the CPD, when in the meantime he has a court decision confirming the termination of the contract for unreasonable grounds. The set of facts and circumstances, which can be considered as obstacles in the sense of Article 36 of the CPC, must be evidenced and argued explicitly, even through the identification or unification of case law. As long as the practice clearly confirms different interpretative positions, their continuation in the future would raise serious doubts about the violation of legal certainty and, even more, about the unequal treatment by the court of parties who are in the same or similar situations.

REMINDER:

- ***The principle of non-discrimination is of an essential nature, describing the Convention and national legal systems together with the principle of the rule of law, as well as the values of tolerance and social peace.***

- *Discrimination describes a situation where an individual is at a disadvantage in a certain way because of a "protected characteristic".*
- *Discrimination has different forms: direct discrimination, indirect discrimination, harassment and instruction to discriminate, etc.*
- *Direct discrimination is characterized by differentiated treatment: it must be demonstrated that the claimed victim has been treated less favorably because of possessing a characteristic that is included in the "protected ground".*
- *Less favorable treatment is determined by comparison between the claimed victim and another person in a similar situation who does not possess the protected characteristic.*
- *It may be that the "protected ground" is not the exact reason for the differentiated treatment. It is enough for the exact reason to be detached from the "protected ground"*
- *Discrimination because of association occurs when an individual is treated less favorably because of association with another individual who possesses the "protected characteristic".*
- *Harassment is a special manifestation of direct discrimination.*
- *Indirect discrimination is characterized by differentiated effects or impact: it must be demonstrated that a group is put at a disadvantage by a decision when compared to a comparative group.*
- *Evidence of indirect discrimination requires an individual to provide evidence that, as a group, those who have protected characteristics are subject to differentiated impact or effects compared to those who do not.*
- *In order for everyone to enjoy equal rights, governments, employers and service providers must take concrete positive or specific measures to align their rules and practices with those of different characteristics.* ²⁵⁹

REFERENCES TO THE ECtHR JURISDICTION AND INTERNATIONAL ACTS

The considerable period of implementation of safeguards for protection against discrimination creates the expectation that the case law will be a reflection of the dynamic developments and continuous enrichment of the jurisprudence of the ECtHR, ECJ, or the findings of doctrinal treatments, studies or scientific research in this field. Discrimination cases require a high standard of

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protection, guided by this consolidated practice.



The research showed that the number of decisions which deal with claims of discrimination from the perspective of international standards are small. The number of decisions referring to ECtHR decisions is low in relation to the total number of cases, although they should be the main guide for achieving real protection. Decisions that reflect good practices in the reasoning and interpretation of the Law, based on analysis in ECtHR decisions, are also few. The structure of the decisions of the same judge remains the same both in terms of format and content, including the decisions referred to, without bringing updates or innovations. Even those decisions where the claim of discrimination is based on a schematic and substantive analysis conducted by the ECtHR, the reasoning is mainly limited to the mention of Article 14 of the ECHR, or the listing of other articles, while completely lacking concrete references in the jurisprudence of the ECtHR and / or ECJ. These issues confirm the need to deepen knowledge and understanding in this regard, or even take initiatives for the design of training manuals, studies, thematic summaries of materials with updated information.

Even when international instruments such as the ECHR or other Conventions are referred to in decisions, the analysis is limited mainly to their mention, or simply to the listing of articles that provide for the prohibition of discrimination. The same reasoning applies to the jurisprudence of the Constitutional Court, which although not very elaborate in this area, still effective decisions guarantee protection according to the highest standards required to guarantee equality and protection against discrimination.²⁶⁰

²⁶⁰ Decisions No. 34, dated 20.12.2005, No. 39, dated 16.10.2007, No. 4, dated 12.02.2010 of the CC

The following list highlights the issues referred to in various decisions in support of the arguments of the complainants' unequal treatment:

- Natchova and Others v. Bulgaria [DHM] (2005);
- Timishev v. Russia (2005);
- D.H and Others v. Czech Republic;
- Guberina v. Croatia (2016);
- Jordan v. The United Kingdom (2001)
- European Action of Disabled Persons against France (2012);
- Baczkowski v. Poland (2009);
- Sampanis and Others v. Greece (2008)
- Weller v. Hungary (2009)
- Salgueiro Da Silva Mouta v. Portugal;
- Hoogendijk v. The Netherlands;
- Redfearn v. The United Kingdom (2012)
- Owners of the former Ionian complex against Albania.

In addition to the reference to concrete decision-making, few decisions bring to attention the negative and positive obligation that the ECHR imposes on the contracting states regarding the rights recognized by the Convention, namely: *"Negative obligation is related to not causing discriminatory situations by the state itself and state authorities, but at the same time the positive obligation must be fulfilled, which is related to creating opportunities and guaranteeing individuals the right not to be discriminated against."* See decisions no. 1831, dated 25.08.2018, No. 1295, dated 16.04.2019, No. 2984, dated 17.11.2020 of the Administrative Court of First Instance of Tirana)

The case law also refers to the Advisory Opinion of the Permanent International Court on Minority Schools in Albania, April 6, 1935, which argues that *"Equality in law prohibits discrimination of any kind; whereas equality may in fact include the need for a differentiated treatment in order to achieve a result that establishes a balance between different situations"* (See decision no. 1295, dated 16.04.2019 of the Administrative Court of First Instance Tirana)

The jurisprudence of the ECJ is even less referred to:

- Chacon Navas v. Eurest Colectividades SA (2006)
- Simone Leitner v. Tui Deutschland GmbH CO & KG, (2002)

International instruments referred to are:

- Council Directive 2000/78 / EC 27.11.2000 " On establishing a general framework for equal treatment in employment and in employment relations.
- Convention No. III of the International Employment Organization "On discrimination in employment and occupation",

- Convention No. 158 of the ILO 'On the prohibition of employment at the initiative of the employer",
- European Social Charter

FINDINGS AND RECOMMENDATIONS

The analysis of court decisions confirmed the sustainability of discriminatory practices based on a significant number of protected grounds or forms of discrimination. Contrary to the international and European legal instruments ratified by Albania, as well as a contemporary national legal framework fully aligned with EU law, the findings of this study show that only legal measures can not achieve substantial equality. Legislative frameworks and engagement policies or strategies in various areas where discrimination is present remain necessary but insufficient elements to be considered as meeting the requirement for a comprehensive approach to combating discrimination.²⁶¹

This study confirmed an early finding that the fight against discrimination requires strong implementation of the Law on Protection against Discrimination, active identification and analysis of discriminatory patterns in all areas of life, monitoring of progress made in eliminating discrimination, approval of programs for raising awareness and, if circumstances warrant it, also adopting positive action measures to remedy the situation of those individuals and groups who suffer from the disadvantages caused by discrimination. All of these activities have a common goal: they seek, or in any case, take advantage of, the existence of empirical evidence of discrimination. Statistical information and other data make discrimination visible, enabling it to be dealt with more effectively through informed action.²⁶²

The research also confirmed an already consolidated position that denial of equal opportunities comes at a high price for those who experience discriminatory situations, but also for society as a whole, as discrimination prejudices the rights and opportunities of individuals, leads to loss of human capital and causes social isolation.

²⁶¹ According to the EU Eurobarometer on discrimination in 2015, close to two thirds of people in the EU consider that new measures should be introduced to increase the level of protection against discrimination.

²⁶² European Handbook on Equality Data, 2016.

KEY FINDINGS:

- There is no structured analysis of the claim of discrimination based on the test of proportionality, according to the consolidated jurisprudence of the ECtHR;
- There is a lack of independent treatment of concepts related to the protected grounds of discrimination, especially "any other ground" or even the forms in which discriminatory behaviors occur;
- There are few decisions that reflect the standard of the ECtHR and the ECJ in interpreting concepts such as shifting the burden of proof and comparators while most decisions are satisfied with minimalist reasoning, or in isolated cases, using the arguments of the CPD.
- There are few decisions that analyze the causal link between the existence of a particular characteristic - protected ground - and unequal treatment;
- References to constitutional jurisprudence, conventions or international instruments in the field of equality are scarce and sometimes out of context;
- Updating decisions with new arguments rarely happens, and the structure and references remain the same over the years;
- There is a lack of unified practice regarding the limits of exercising the activity of the CPD in terms of:
 - imposing measures, mainly returning to work and fines,
 - simultaneous filing of a complaint with the CPD and in court,
 - suspension or termination of the administrative investigation, which are understood and implemented in different ways.
- The decisions bring only a list of legal norms applicable in the concrete case, without making a contextual interpretation of the legal provisions.
- The relationship between the descriptive and reasoning part of the decision is disproportionate, with unnecessary repetition of the parties' claims, which make it difficult to establish the court's position on the main claim.

The data obtained from the research of over 300 court decisions taken by the courts of civil and administrative jurisdiction, in the period 2013-2020 are essential for the subsequent mapping of issues by identifying the main areas where discrimination is most often encountered such as employment, education, services health, thus aiming to identify any gaps that may exist in the treatment of different

groups, regardless of the main ground, of these gaps. The data presented in graphic form identify issues, which require more studies and in-depth analysis, in order to take timely measures such as through trainings, roundtables or awareness campaigns with targeted focus. The importance of data collection and analysis takes on a special significance in the context of the axiom that only what can be measured can be managed. If data - any statistical information or not - on the practical application of the principle of equality and non-discrimination are not collected, analyzed and processed, the approach to the phenomenon will remain superficial, and the issues of judicial interpretation will be unified and, for consequently, in violation of standards, values and constitutional principles.

The jurisprudence of the ECtHR and the ECJ should be a guide to case law. Recognition, in-depth study and implementation of international standards remains a necessity. Judges are the ones who have to find the balance between a range of needs and interests. The decisions they make, in addition to giving justice to individual cases, affect the formation of societies, as they turn into patterns of behavior and values. In the face of this extraordinary challenge, judges must become promoters of the creation of societies that live in peace, harmony and respect for human dignity, as an irreplaceable value.

The problems identified in this legal analysis require a comprehensive dialogue between stakeholders to enable the harmonization of the legal framework that guarantees protection against discrimination, the inclusion of positive measures in strategic policies, the unification of case law where necessary and indispensable, better knowledge by judges of international standards and best practices, updating and deepening knowledge through ongoing training on developments in international law and jurisprudence, studies and publications in this field, intensification of public awareness campaigns, as well as strengthening the role of civil society as a promoter of equality and non-discrimination.

The following are some recommendations that require priority treatment:

- ***Take legislative measures to ensure full harmonization of the legal framework regarding the shifting of the burden of proof;***

- *Increase the role of courts as guarantors of fundamental equality and protection of social justice;*
 - *Increase the active role of courts in terms of legal education of the community, court users or other actors;*
 - *Ensure the uniformity of case law as the only mechanism for fulfilling the constitutional principle of legal certainty and for preventing discriminatory practices in the future;*
 - *Include in the continuing education calendar of the School of Magistrates (SoM) topics that address the principle of equality and non-discrimination;*
 - *To enable the increase of the SoM literature fund with studies and publications or translations in Albanian language of the jurisprudence of the ECtHR and the ECJ in relation to the principle of equality;*
 - *Organize thematic trainings on equality and non-discrimination with students of master studies at the Faculties of Law and the National School of Advocacy;*
 - *Organize awareness meetings and round tables with the participation of the CPD and civil society organizations, in order to create a stronger partnership in order to strengthen their capacity to effectively defend initiatives in defense of discrimination;*
 - *Organize regional meetings between the CPD and the Chambers of Advocates near those jurisdictions where discriminatory practices are most common, in order to discuss specific elements that should include complainants' protection and familiarity with international standards;*
 - *Increase the cooperation of the CPD with Employees' Unions in various fields to train them in advocating for positive actions to be taken by employers and service providers, as the only way to prevent indirect discrimination and ensure reasonable accommodation;*
 - *Periodically collect statistical data from the High Judicial Council and the CPD in order to analyze to identify the uniformity of interpretive tendencies and discrimination, forms and causes, as well as take measures to prevent them;*
- Provide ongoing technical support from international organizations, in order to strengthen the capacity of the CPD institution in ensuring substantial equality.

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ANNEX 1 - TOPIC DECISIONS

EQUALITY AND NON-DISCRIMINATION

ECtHR

Khamtokhu and Aksenchik v. Russia [GC], Nos.60367/08 and 961/11, 2017 (death penalty)
 Pichkur v. Ukraine, No. 10441/06, 2013 (*pagesa e pensionit e varur nga vendbanimi*)
 Savez crkava “Riječ života” and Others v. Croatia, No. 7798/08, 2010 (*denial of some rights to the religious community*)

ECJ

Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres [GC], C-236/09, 2011 (*changes in circumstances in insurance premiums and benefits between men and women*)
 Servet Kamberaj v. Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others [GC], C-571/10, 2012 (*Refusal of housing benefits for third-country nationals*)

DIRECT DISCRIMINATION

ECtHR

Burden v. the United Kingdom [GC], No. 13378/05, 2008 (denial of inheritance tax exemption for cohabiting siblings)

Guberina v. Croatia, No. 23682/13, 2016 (*discriminatory treatment due to the disability of the applicant's child t*)

GJED

Debra Allonby v. Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment, C-256/01, 2004 (*various working conditions resulting from employment in an external company*)

Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, C-267/12, 2013 (*exclusion of same-sex partners in civil cohabitation from limited benefits for married employees*)

P v. S and Cornwall County Council, C-13/94, 1996 (*dismissal after transgender*)

S. Coleman v. Attridge Law and Steve Law [GC], C-303/06, 2008 (*unfavorable treatment of an employee - mother of a child with disabilities*)

Sarah Margaret Richards v. Secretary of State for Work and Pensions, C-423/04, 2006 unfavorable treatment of an employee - mother of a child with disabilities

Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen [GC], C-267/06, 2008 (*exclusion of civil partnership partners from survivors' pension*)

Wolfgang Glatzel v. Freistaat Bayern, C-356/12, 2014 (*different conditions for different categories of driving license*)

INDIRECT DISCRIMINATION

ECtHR

D.H. and Others v. the Czech Republic [GC], No. 57325/00, 2007 (*placement of Roma children in special schools*)

KEDS

European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, 2013 (*limited state funds for the education of children and adolescents with autism*)

GJED

“CHEZ Razpredelenie Bulgaria” AD v. Komisia za zashtita ot diskriminatsia [GC], C-83/14, 2015 (*installation of electricity meters in the area populated by Roma*)

Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social,

Tesorería General de la Seguridad Social, C-385/11, 2012 (Limited pension right of a part-time worker) Johann Odar v. Baxter Deutschland GmbH, C-152/11, 2012 (*flexible compensation paid to workers with disabilities under the social plan*)

MULTIPLE AND CROSS-CUTTING DISCRIMINATION

ECtHR

B.S. v. Spain, No. 47159/08, 2012 (failure to comply with the duty to conduct a full investigation into claims of police ill-treatment) Carvalho Pinto de Sousa Morais v. Portugal [GC], No. 17484/15, 2017 (*discriminatory decision to reduce compensation given to a 50-year-old woman for a medical error*)
S.A.S. v. France [GC], No. 43835/11, 2014 (*ban on wearing a face mask*)

HARASSMENT AND INSTRUCTION TO DISCRIMINATE

ECtHR

Catan and Others v. the Republic of Moldova and Russia [GC], Nos. 43370/04, 18454/06 and 8252/05, 2012 (*student bullying*) Đorđević v. Croatia, No. 41526/10, 2012 (*harassment of an disabled man and his mother*)

ECJ

Carina Skareby v. European Commission, F-42/10, 2012 (*psychological harassment by a superior*)
CQ v. European Parliament, F-12/13, 2014 (*psychological harassment*) Q v. Commission of the European Communities, F-52/05, 2008 (*psychological harassment*)
S. Coleman v. Attridge Law and Steve Law [GC], C-303/06, 2008 (*unfavorable treatment of an employee - mother of a child with disabilities*)

SPECIAL MEASURES

ECtHR

Çam v. Turkey, No. 51500/08, 2016 (refusal of a music school to enroll a student due to her visual inability) Horváth and Kiss v. Hungary, No. 11146/11, 29 January 2013 (*placement of Roma children in special schools*)

ECJ

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THE CRIME OF HATE / THE LANGUAGE OF HATE

ECTHR

Delfi AS v. Estonia [GC], No. 64569/09, 2015 (responsibility of the online news portal for offensive comments made by anonymous third parties)
Halime Kiliç v. Turkey, No. 63034/11, 2016 (*domestic violence*)
Identoba and Others v. Georgia, No. 73235/12, 2015 (*homophobic attacks on participants of an LGBTI assembly*)
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Perinçek v. Switzerland [GC], No. 27510/08, 2015 (*denial of the genocide of the Armenian people by the Ottoman Empire*)
Škorjanec v. Croatia, No. 25536/14, 2017 (*racially motivated violence*)
Virabyan v. Armenia, No. 40094/05, 2012 (*ill-treatment due to political opinion*)
Justification of less favorable

ECJ

Abercrombie & Fitch Italia Srl v. Antonino Bordonaro, C-143/16, 2017 (*automatic discharge at age 25*)
Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA [GC], C-188/15, 2017 (*wearing an Islamic headscarf at work*)
Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 222/84, 1986 (*refusal of a female police officer to renew her contract and give her firearm training*)
Mario Vital Pérez v. Ayuntamiento de Oviedo, C-416/13, 2014

(age limit 30 for recruiting local police officers) Silke-Karin Mahlburg v. Land Mecklenburg-Vorpommern, C-207/98, 2000 (restrictions on the working conditions of pregnant women) Tanja Kreil v. Bundesrepublik Deutschland, C-285/98, 2000 (restriction of women access to military posts involving the use of weapons) Ute Kleinsteuber v. Mars GmbH, C-354/16, 2017 (calculation of early retirement pension for part-time worker)

EMPLOYMENT

ECtHR

Danilenkov and Others v. Russia, No. 67336/01, 2009 (harassment in the workplace due to union membership)
I.B. v. Greece, No. 552/10, 2013 (dismissal of an HIV-positive employee)

ECJ

Asociația Accept v. Consiliul Național pentru Combaterea Discriminării, C-81/12, 2013 (supplementary tax on pension income)
C., C-122/15, 2016 (*taksa suplementare mbi të ardhurat nga pensioni*)
J.J. de Lange v. Staatssecretaris van Financiën, C-548/15, 2016 (tax treatment of vocational training costs)
Jennifer Meyers v. Adjudication Officer, C-116/94, 1995 (method of calculating the eligibility of single parents for family loans)
Julia Schnorbus v. Land Hessen, C-79/99, 2000 (priority for a training post for male candidates who had completed their military service)
Jürgen Römer v. Freie und Hansestadt Hamburg, C-147/08, 2011 (supplementary pension available only to married couples)
Nadežda Riežniece v. Zemkopības ministrija and Lauku atbalsta dienests, C-7/12, 2013 (*dismissal after obtaining parental leave*)

WELFARE AND SOCIAL SECURITY

ECtHR

Andrle v. the Czech Republic, No. 6268/08, 2011 (different retirement ages for men and women)

Bah v. the United Kingdom, No. 56328/07, 2011 (*refusal to grant travel passes for large families because of foreign nationality*) Gouri v. France (dec.), No. 41069/11, 2017 (*financial aid for higher education studies granted dependent from place of residence*)

Stummerv. Austria [GC], No. 37452/02, 2011 (*work performed in prison*)

ECJ

Anita Cristini v. Société nationale des chemins de fer français, Case 32/75, 1975 (*refusal to grant travel passes for large families because of foreign nationality*)

Elodie Giersch and Others v. État du Grand-Duché de Luxembourg, C-20/12, 2013 (*financial aid for higher education studies granted dependent from place of residence*)

Vestische Arbeit Jobcenter Kreis Recklinghausen v. Jovanna García-Nieto and Others, C-299/14, 2016 (*refusal to grant subsistence benefits during first three months of residency in Germany*) X., C-318/13, 2014 (*different level of disability allowance granted to men and women*)

EDUCATION

ECTHR

Çam v. Turkey, No. 51500/08, 2016 (*refusal of a music school to enroll a student due to her disability to see*) Ponomaryovi v. Bulgaria, No. 5335/05, 2011 (*school fees for foreigners*)

ECJ

Commission of the European Communities v. Republic of Austria, C-147/03, 2005 (*admission to the university for holders of Austrian and foreign diplomas*)

Donato Casagrande v. Landeshauptstadt München, Case 9/74, 1974 (*educational grants*)

Laurence Prinz v. Region Hannover and Philipp Seeberger v. Studentenwerk Heidelberg, Joined cases C-523/11 and C-585/11, 2013 (*educational grants*)

Mohamed Ali Ben Alaya v. Bundesrepublik Deutschland, C-491/13, 2014 (*refusal of entry of a third-country student*)

ECJ

Hunde v. the Netherlands (dec.), No. 17931/16, 2016 (denial of housing and social assistance to asylum seekers whose asylum application has been rejected)

Moldovan and Others v. Romania (No. 2), Nos. 41138/98 and 64320/01, 2005 (*right to housing*)

Vrontou v. Cyprus, No.33631/06, 2015 (discriminatory refusal to issue a refugee card)

KEDS

Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013, 2014 (*obligation to provide housing for children and adult migrants*)

European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands, Complaint No.86/2012, 2014 (access to emergency assistance for adult migrants in an irregular situation)

ECJ

“CHEZ Razpredelenie Bulgaria” AD v. Komisia za zashtita ot diskriminatsia [GC], C-83/14, 2015 (*installation of electricity meters in the area populated by Roma*)

Servet Kamberaj v. Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others [GC], C-571/10, 2012 (*Refusal of housing benefits for third-country nationals*)

ACCESS TO JUSTICE

ECtHR Anakomba Yula v. Belgium, No. 45413/07, 2009 (*limited legal aid for irregular migrants*)

Moldovan and Others v. Romania (No. 2), Nos. 41138/98 and 64320/01, 2005 (*living conditions of the applicants*)

Paraskeva Todorova v. Bulgaria, No. 37193/07, 2010 (*refusal to suspend the execution of the sentence due to the Roma origin of the applicant*)

THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

ECtHR

A.H. and Others v. Russia, Nos. 6033/13 and 22 other applications, 2017 (*adoption of Russian children by American citizens*)

Kacper Nowakowski v. Poland, No. 32407/13, 2017 (*limited contact with his son due to the applicant's disability*)

Pajić v. Croatia, No. 68453/13, 2016 (*refusal to issue a residence permit to a homosexual partner*)
Vallianatos and Others v. Greece [GC], Nos. 29381/09 and 32684/09, 2013 (*no civil union for same-sex couples*)
X and Others v. Austria [GC], No. 19010/07, 2013 (*adoption of a partner's child by a homosexual person*)

ECJ

Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others, C-391/09, 2011 (*rules governing the spelling of surnames in the official national language*)

Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA, C-104/09, 2010 (*refusal to grant a leave to a father because the mother of his child was self-employed*)

POLITICAL PARTICIPATION

ECtHR

Partei Die Friesen v. Germany, No. 65480/10, 2016 (*electoral thresholds*)

Pilav v. Bosnia and Herzegovina, No. 41939/07, 2016 (*inability to run for president due to residence*)

CRIMINAL LAW

ECtHR

D.G. v. Ireland, No. 39474/98, 2002; ECtHR, Bouamar v. Belgium, No. 9106/80, 1988 (*detention of minors*)

Martzaklis and Others v. Greece, No. 20378/13, 2015 (*conditions of detention of persons with HIV positive*)

Stasi v. France, No. 25001/07, 2011 (*ill-treatment in prison due to the applicant's homosexuality*)

ECJ

Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra [GC], C-182/15, 2016 (*extradition to a third country of an EU citizen exercising freedom of movement*)

Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge [GC], C-42/11, 2012 (*failure to execute arrest warrants*)

GENDER

ECtHR

Andrle v. the Czech Republic, No. 6268/08, 2011 (*different retirement ages for men and women*)

Emel Boyraz v. Turkey, No. 61960/08, 2014 (*dismissal of a woman from the post of security officer*)

Konstantin Markin v. Russia [GC], No. 30078/06, 2012 (*restriction of parental leave for male military personnel*)

Ünal Tekeli v. Turkey, No. 29865/96, 2004 (*transmission of parents' surnames to their children*)

ECJ

Association Belge des Consommateurs Test-Achats ASBL and Others iii. Conseil des ministres [GC], C-236/09, 2011 (*gender specific risk factors in insurance contracts*)

C.D.v.S.T.[GC],C-167/12,2014(*refusal of maternity leave for surrogate mother*)

Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena, C-43/75, 1976 (*lower wages for female workers*)

Kathleen Hill and Ann Stapleton v. The Revenue Commissioners and Department of Finance, C-243/95, 1998 (*scheme of indirect division of labor at a disadvantage to women*)

Konstantinos Maïstrellis v. Ypourgos Dikaïosynis, Diáfaneias kai Anthropinon Dikaïomaton, C-222/14, 2015 (*obtaining disability status indirectly discriminates against women*)

M. A. De Weerd, née Roks, and Others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others, C-343/92, 1994 (*right to parental leave for a man whose wife is unemployed*)

Margaret Kenny and Others v. Minister for Justice, Equality and Law Reform, Minister for Finance and Commissioner of An Garda Síochána, C-427/11, 2013 (*lower wages for female workers*)

Z. v. A Government department and The Board of Management of a Community School [GC], C-363/12, 2014 (*refusal of maternity leave for surrogate mother*)

GENDER IDENTITY

GJEDNJ ECtHR

Hämäläinen v. Finland [GC], No. 37359/09, 2014 (*refusal to change the ID of the male to female applicant after her gender reassignment surgery, provided her marriage is transformed into a civil partnership*)

Van Kück v. Germany, No. 35968/97, 2003 (reimbursement of gender reassignment costs and hormone treatment surgery)
Y.Y. v. Turkey, No. 14793/08, 2015 (refusal to grant permission for gender reassignment surgery)

ECJ

K.B. v. National Health Service Pensions Agency et Secretary of State for Health, C-117/01, 2004 (*law excluding transgender people from widowhood pension*)

Sarah Margaret Richards v. Secretary of State for Work and Pensions, C-423/04, 2006 (lack of legal recognition of the new gender after gender reassignment surgery)

SEXUAL ORIENTATION

ECtHR

E.B. and Others v. Austria, Nos. 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07, 2013 (keeping a record of criminal records after it is found that the criminal provision violated the Constitution and the Convention)

E.B. v. France [GC], No. 43546/02, 2008 (discrimination based on sexual orientation in the context of adoption)

Karner v. Austria, No. 40016/98, 2003 (*discrimination against homosexual couples in the context of rental rights*)

O.M. v. Hungary, No. 9912/15, 2016 (*detention of a homosexual asylum seeker*)

S.L. v. Austria, No. 45330/99, 2003 (*criminalization of consensual sexual relations between men*)

Schalk and Kopf v. Austria, No. 30141/04, 2010 (*right to marry same-sex couples*)

Taddeucci and McCall v. Italy, No. 51362/09, 2016 (refusal to issue a residence permit to a same-sex couple)

KEDS

International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, Collective Complaint No. 45/2007, 2009 (*use of homophobic language in school material*)

ECJ

A and Others v. Staatssecretaris van Veiligheid en Justitie [GC], Joined cases C-148/13 to C-150/13, 2014 (*sexual orientation of asylum seekers*)

Asociația Accept v. Consiliul Național pentru Combaterea

Discriminării, C-81/12, 2013 (discriminatory comments made by a defender of a football club)

Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang, C-528/13, 2015 (*permanent ban on blood donation for gay men*)

Minister voor Immigratie en Asiel v. X and Y and Z v. Minister voor Immigratie en Asiel, Joined cases C-199/12, C-200/12, C-201/12, 2013 (*sexual orientation of asylum seekers*)

DISABILITY

ECtHR

Glor v. Switzerland, No. 13444/04, 2009 (*the applicant was rejected for military service due to disability, but was nevertheless obliged to pay taxes for non-performance of military service*)

Guberina v. Croatia, No. 23682/13, 2016 (*refusal to grant tax exemption for the purchase of a new property adapted to the needs of the applicant's child with severe disabilities*) Pretty v. the United Kingdom, No. 2346/02, 2002 (*right to die*)

Price v. the United Kingdom, No. 33394/96, 2001 (*detention of a person with a physical disability in a cell that was not adapted to her needs*)

KEDS

European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, 2013 (*education of children with autism*)

ECJ

Fag og Arbejde (FOA) v. Kommunernes Landsforening (KL), C-354/13, 2014 (*overweight as a disability*)

HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A / S, Joined cases C-335/11 and C-337/11, 2013 (*dismissal, notion of "disability"*)

Z. v. A Government department and the Board of Management of a Community School [GC], C-363/12, 2014 (*refusal of maternity leave through surrogacy, the notion of "disability"*)

ECJ

Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen [GC], C-441/14, 2016 (*seniority payment for employees entitled to old age pension*)

Gorka Salaberria Sorondo v. Academia Vasca de Poli d a y Emergencias [GC], C-258/15, 2016 (*age limit for recruitment as a police officer*)

J.J. de Lange v. Staatssecretaris van Financiën, C-548/15, 2016 (*Right to full exemption from taxable income of vocational training expenses only for persons under 30 years of age*)

Mario Vital Perez v. Ayuntamiento de Oviedo, C-416/13, 2014 (*age limit for recruitment as a police officer*)

Thomas Specht and Others v. Land Berlin and Bundesrepublik Deutschland, joined cases C-501/12 to C-506/12, C-540/12 and C-541/12, 2014 (*level of payment for civil servants determined by age at the time of recruitment*)

Werner Mangold v. Rudiger Helm [GC], C-144/04, 2005 (national legislation authorizing fixed-term contracts with older employees)

RACE, ETHNICITY, COLOR AND MEMBERSHIP IN A NATIONAL MINORITY**ECtHR**

Biao v. Denmark [GC], No. 38590/10, 2016 (*refusal to a wife from Ghana of a Danish citizen of the right of family reunification in Denmark*)

Boaca and Others v. Romania, No. 40355/11, 2016 (*lack of an investigation into a discrimination claim*)

Sejdic and Finci v. Bosnia and Herzegovina [GC], Nos. 27996/06 and 34836/06, 2009 (*right of minorities to participate in elections*)

ECJ

Centrum voor gelijkheid van kansen en voor racismebestrijding v. Feryn NV, C-54/07, 2008 (*public discriminatory statement by an employer*)

"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia [GC], C-83/14, 2015 (*placement of energy meters at unavailable heights in an area populated mainly by Roma*)

Anakomba Yula v. Belgium, No. 45413/07, 2009 (*restriction of legal aid for irregular immigrants*)

Andrejeva v. Latvia [GC], No. 55707/00, 2009 (refusal to grant the applicant a pension in respect of years of employment in the former Soviet Union before 1991, because he did not have Lithuanian citizenship)

C. v. Belgium, No. 21794/93, 1996 (*deportation of foreigners convicted of criminal offenses*)

Dhahbi v. Italy, No. 17120/09, 2014 (*third-country nationals treated less favorably by EU employees under the Italian family assistance scheme*)

Koua Poirrez v. France, No. 40892/98, 2003 (*application for disability allowance rejected because the applicant did not have French citizenship or citizenship of a country that had signed reciprocity agreement with France*)

Moustaquim v. Belgium, No. 12313/86, 1991 (*deportation of foreigners convicted of criminal offenses*)

Ponomaryovi v. Bulgaria, No. 5335/05, 2011 (*the right to education of foreigners*)

Rangelov v. Germany, No. 5123/07, 2012 (*denial of access to the therapeutic program for a foreigner*)

Zeibek v. Greece, No. 46368/06, 2009 (*refusal to pay a lifetime pension as the mother of a large family due to the nationality of one of the children*)

ECJ

Alfredo Rendón Marín v. Administración del Estado [GC], C-165/14, 2016 (*aplikantit, shtetas i një vendi të tretë, me fëmijë shtetas evropian, i ishte mohuar leja e qendrimit*)

European Commission v. Hungary, C-392/15, 2017 (*përrjashtimil shtetasve nga shtete të tjera Anëtare nga profesioni i reminderrisë*)

European Commission v. Kingdom of the Netherlands, C-508/10, 2012 (*pagesa për t'ù paguar nga qytetarë jo të BE për lëshimin e lejes së qendrimit*)

Ian William Cowan v. Public Treasury, Case 186/87, 1989 (*state compensation for victims of assault*)

Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, C-200/02, 2004 (*the right of a European minor to reside in the EU with his third-country parents*)

Roman Angonese v. Cassa di Risparmio di Bolzano SpA, C-281/98, 2000 (*employer requires those applying in a competition procedure to obtain a bilingual certificate from a local authority*)

Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others [GC], C-571/10, 2012 (*Refusal of housing benefits by third-country nationals*)

RELIGIOUS BELIEF OR RELIGION

ECtHR

Alujer Fernandez and Caballero García v. Spain (dec.), No. 53072/99, 2001 (*Inability of Baptist Church members to allocate a portion of their income tax directly to their church financial support*)

Cha'are Shalom Ve Tsedek v. France [GC], No. 27417/95, 2000

(refusal of permission to perform ritual slaughter of animals)
Ebrahimian v. France, No. 64846/11, 2015 (non-renewal of the contract for wearing the Islamic headscarf)
Eweida and Others v. the United Kingdom, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 2013 (religious discrimination at work)
izzettin Dogan and Others v. Turkey [GC], No. 62649/10, 2016 (refusal to provide a public service to followers of the Alevi faith)
Milanovic v. Serbia, No.44614 / 07, 2010 (lack of investigation by the authorities into the motives of the crime)
O'Donoghue and Others v. the United Kingdom, No.34848 / 07, 2010 (provisions requiring foreigners, other than those wishing to marry in the Church of England, to pay large fees for obtaining a marriage license)
S.A.S. v. France [GC], No.43835 / 11, 2014 (provisions prohibiting face covering in public)
Vojnity v. Hungary, No.29617 / 07, 2013 (deprivation of the applicant's entry rights due to his attempts to transmit his religious beliefs to his child)

ECJ

Asma Bougnaoui and Association de defense des droits de l'homme (ADDH) v. Micropole SA [GC], C-188/15, 2017 (dismissal for wearing the Islamic headscarf)
Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV [GC], C-157/15, (dismissal for wearing the Islamic headscarf)

LANGUAGE

ECJ

Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium, No. 1474/62 and others, 1968 (applicants' children have been denied education in French)
Macalin Moxamed Sed Dahir v. Sëitserland (dec.), application No. 12209/10, 2015 (rejection of a request to change the applicant's surname on the grounds that the Swiss pronunciation of the name had an offensive meaning in its mother tongue)

ECJ

European Commission v. Kingdom of Belgium, C-317/14, 2015 (language requirements for candidates applying for positions in local services located in French-speaking or German-speaking regions of Belgium)

SOCIAL ORIGIN, BIRTH AND PROPERTY

ECtHR

Chassagnou and Others. v. France [GC], No. 25088/94, 28331/95

and 28443/95, 1999 (*obligation to transfer hunting rights only to small property owner*)

Wolter and Safret v. Germany, Nos. 59752/13 66277/13, 23/03/2017, 2017 (*discrimination of children born out of wedlock*)

ECJ

Zoi Chatzi v. Ypourgos Oikonomikon, C-149/10, 2010 (*a parental leave for twins*)

POLITICAL OPINION OR OTHER

GJEDNJ

Redfearn v. the United Kingdom, No. 47335/06, 2012 (*dismissal due to political involvement*)

Virabyan v. Armenia, No. 40094/05, 2012 (*ill-treatment due to political opinion*)

OTHER STATUS

ECtHR

Varnas v. Lithuania, No.42615/06, 2013 (*you were denied permission to receive spousal visits during his detention*)

ECJ

Petya Milkova v. Izpалnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol, C-406/15, 2017 (*changes in protection in case of dismissal given to employees and civil servants*)

REPLACEMENT OF THE TIME OF CARRY

ECtHR

Timishev v. Russia, Nos. 55762/00 and 55974/00, 2005 (*applicant of Chechen origin is not allowed to pass through a checkpoint*)
Virabyan v. Armenia, No. 40094/05, 2012 (*ill-treatment due to political opinion*)

ECJ

Asociatia Accept v. Consiliul National pentru Combaterea Discriminariilor, C-81/12, 2013 (*discriminatory comments made by a defender of a football club*)

Centrum voor gelijkheid van kansen en voor racismebestrijding v. Feryn NV, C-54/07, 2008 (*public discriminatory statement by an employer*)

Galina Meister v. Speech Design Carrier Systems GmbH, C-415/10, 2012 (*access to information on completion of the recruitment process*)

Patrick Kelly v. National University of Ireland (University College, Dublin), C-104/10, 2011 (*access to information about the qualifications of other applicants on suspicion of discrimination*)
Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG, C-381/99, 2001 (*lower wages for female workers*)

UNFORGETTABLE CIRCUMSTANCES FOR FINDING DISCRIMINATION

ECtHR

D.H. and Others v. the Czech Republic [GC], No. 57325/00, 2007 (*placement of Roma children in special schools*)

ECJ

Centrum voor gelijkheid van kansen en voor racismebestrijding v. Feryn NV, C-54/07, 2008 (*public discriminatory statement made by an employer*)

Nils-Johannes Kratzer v. R + V Allgemeine Versicherung AG, C-423/15, 2016 (job applicant does not ask for the position, but the applicant's status in order to claim compensation)

THE ROLE OF STATISTICS AND OTHER DATA

ECtHR

Abdu v. Bulgaria, No. 26827/08, 2014 (*lack of effective investigation into racist violence*)

D.H. and Others v. the Czech Republic [GC], No. 57325/00, 2007 (*placement of Roma children in special schools*)

Di Trizio v. Switzerland, No. 7186/09, 2016 (*disability benefits for women in need*)

Opuz v. Turkey, No. 33401/02, 2009 (*domestic violence*)

ECJ

Hilde Schönheit v. Stadt Frankfurt am Main and Silvia Becker v. Land Hessen, Joined cases C-4/02 and C-5/02, 2003 (*difference in payable pensions between part-time and full-time workers*)

Lourdes Cachaldora Fernández v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS) [GC], C-527/13, 2015 (invalidity pension calculated on the basis of a period of eight years before the occurrence of the event causing the disability)

Regina v. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez, C-167/97, 1999 (protection against dismissal of workers who have been employed for more than two consecutive years with the designated employer)

ANNEX 2

International Acts in the Field of Human Rights and Antidiscrimination

1. Instruments in the framework of the UN

- Universal Declaration of Human Rights (UDHR) 1948,
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Rights of Persons with disabilities
- Convention on the Elimination of forms of Discrimination against Women (CEDAW) and the Optional Protocol
- International Convention on the Elimination of All Forms of Racial Discrimination
- The Convention on the Rights of the Child

2. Instruments in the framework of the Council of Europe

- European Convention for the Protection of Human Rights and Fundamental Freedoms
- Protocol 12 (2000) of the ECHR
- Revised European Social Charter
- Council of Europe Framework Convention for the Protection of National Minorities
- Convention on Preventing and Combating Violence against Women and Domestic Violence

3. European Union standards

- Charter of Fundamental Rights of the European Union
- Directive 2000/43 / EC "On the application of the principle of equal treatment between persons irrespective of racial or ethnic origin"
- Directive 2000/78 / EC "On establishing a general framework for equal treatment in employment and in employment relations"
- Directive 2004/113 / EC "On the application of the principle of equal treatment between men and women in access to and supply of goods and services"; 2006/54 / EC "On the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and employment relations " 2010/41 / EU (Gender Equality Directives).
- European Commission Recommendation on Standards of Equality Bodies
-