

The Albanian legal framework on non-discrimination and gender equality in employment relationships

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Abstract

Discrimination and gender inequality in employment relationships are present in every society, at any time and whatever their victim is. With the development of society, despite the measures taken to prevent discrimination, this phenomenon continues to be present and appears in different forms. In a society with economic civilization and culture development, people cannot explain why do such phenomena that become an obstacle to the realization of a right as the right to employment exist, when it is sanctioned and guaranteed by the Constitution of the Republic of Albania, in international conventions ratified by our country, in the Labor Code and particular laws, such as the “Gender Equality law”. Discrimination in employment relationships and in the workplace continues to appear in its traditional format based on gender, race, ethnic origin, religion, age but also in new forms based on disability, sexual orientation, genetics and lifestyle. Despite all efforts to prevent discrimination, this phenomenon has always been a threat to all individuals seeking to enter into an employment relationship. We all have the right to work, to be treated equally during a competition for a particular job, to get a fair wage, to be paid equally with others for the same job, to get promotion, to be safety in work, to get vocational training and retraining benefits without being discriminated of race, religion, age, gender, political belief, sexual orientation, etc.

However, the first opportunity for discrimination is encountered from the moment when hiring an individual. But, despite the momentum when we are faced with discrimination or one of its kind, there should be placed great attention by the State through the relevant authorities and by the society itself by denouncing it. We shouldn't be subject of violation of the right to employment and equal treatment in employment relations. Not without reason the two principles: the principle of prohibition of discrimination and gender equality are two principles enshrined in international conventions, giving it a great importance.

In this paper there is addressed the Albanian legal framework that sanctioned and guaranteed the principles of prohibition of discrimination and gender equality, as the Constitution of the Republic of Albania, the Labor Code, the law on “Gender Equality in Albania”, as well as institutional mechanisms to ensure gender equality in Albania.

Keywords: Legal framework; principle, discrimination, nondiscrimination, gender inequality, work relations;

1. As sanctioned from the Constitution of the Republic of Albania

Constitution of the Republic of Albania sanctions the rights and fundamental freedoms as a guarantee and a fundamental element of democracy. The right to nondiscrimination in employment and the exercise and enjoyment of this right finds place in the Constitution, under which “No one can be discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious and philosophical, economic, educational, social, or ancestry.”¹ The definition of gender discrimination is not provided in the Constitution, but in the Convention on “Elimination of All Forms of Discrimination against Women” as a UN Convention which was ratified by the Republic of Albania in 1993. Also in this Convention there is also stated that: “States parties shall take all necessary measures to eliminate discrimination against women in employment, in order to provide the same rights on the basis of equality of men and women.”² In this framework, women have the right to free choice the profession and work, the right to promotion, job security, professional preparation and training, including apprenticeships.

The right to employment is sanctioned in the Constitution, specifically in Article 49 “Everyone has the right to earn the means of living by lawful work that he has chosen or accepted himself.”

He is free to choose his profession, work place and the system of his professional qualification “⁶. This principle applies to all citizens, for men and women. In fact, this makes the Constitution to be regarded as neutral in terms of gender. So, for the implementation of the principle of prohibition of discrimination there can not be tolerated any kind of discrimination in the field of employment and the exercise of the profession.

Constitutional Court in connection with Article 18 of the Constitution states that this constitutional provision³, sanctions first of all a negative obligation, under which the state should not interfere, so that no one be discriminated against because of his “social condition”. In conceptual terms “discrimination due to social condition” means that individuals can be differentiated and treated based on unequal social structure, which is not related to their merits. It is true that in the way the groups of words “social condition”, as a reason for discrimination, appears as a separate cause from other causes that the constitution maker has explicitly defined as race, religion, sex, etc. But the United Colleges of the High Court have not given any argument which is “social cause” that has created differential treatment between classes of employees and employers. The requesting party has claimed that, if the employer terminates the

¹ Article 18, point 2 of the Constitution of the Republic of Albania

² Article 11 of the Convention of UN “Elimination of all forms of discrimination to women”

³ Decision no. 33, dated 2007 of the Constitutional Court of Albania

contract respecting Sections 141, 143, and 144 of the Labor Code, may hide the true cause of termination of contract work.

The Constitutional Court, through its jurisprudence has interpreted Article 18 of the Constitution, stating that: "Equality in the law and before the law does not mean to have identical solutions for individuals or categories of persons who are in different conditions. Equality before the law and equality of individuals presupposes the equality of individuals who are in "equal" conditions and "only in exceptional cases and for reasonable or objective reasons there can be justified a differential treatment of certain categories that benefit from this right."

In this regard, the Constitutional Court considers that we are not subject to the same objective conditions, in some aspects. Their equality is just the same rights to enter into a work contract and to terminate it for those reasons that it and the law provides for. But, they are in unequal conditions for other aspects. On one side there is the employer who under the Labor Code has a number of tasks to accomplish when found to respect a working contractual relationship, and on the other side there is the employee who must meet a number of tasks or under this framework.

Decision no.20, dated 2006 of the Constitutional Court, in connection with Article 49 of the Constitution states that this constitutional provision includes the choice of profession, job and vocational training system, to ensure the livelihood in legitimated manner⁴. The choice of profession, as required by constitutional provisions, is an individual right in the sense that he is devoted to an activity to secure livelihoods. This right of individuals to obtain legitimate work, gains importance from social point of view as the profession is valued for the contribution that brings to the society. The right to work and freedom of occupation means any lawful activity that generates income and does not have any specified term, with the exception of specific legal regulations. In this sense, the action of state bodies that brings direct consequences in preventing occupational activity constitutes a violation of this freedom of action. The guarantee given by the Constitution regarding the right individual to work and freedom of occupation is intended to protect them from unjustified state restrictions. Freedom of occupation is not merely a right to have a job. It should not be understood as a social right, as well as negative freedom that doesnot allow the state to interfere in its exercise. Determination that article 49 of the Constitution makes to the right to work should be taken with a double meaning. It is a positive obligation requiring state commitment to create proper conditions for the realization of such a right, but also a negative obligation, which requires from the State to not intervene to violate this right. The constitutional doctrine treats this right in the same way, emphasizing that freedom to work is protected by constitutional arrangements.

2. Regulation from the Labor Code of the Republic of Albania

The Labor Code of the Republic of Albania, approved by Law 7961, dated 12.07.1995, is based on fundamental constitutional principles. It respects international conventions ratified and internationally recognized rights. The principle outlined in Article 18 in the Constitution to ban discrimination is further developed in the Labor Code where it stands as a fundamental right⁴. This code prohibits discrimination based on sex that affects an individual's right to be equal in employment and training, in the recruitment procedures and working conditions, in the performance of duties, in payment, in social assistance and termination of contract work, as well as in participation in trade unions. This code clearly gives the sense of discrimination as well as cases where distinctions, exclusions or preferences should not be regarded as discrimination. Under section 9 of this code, any form of discrimination at work is prohibited. Discrimination means any distinction, exclusion or preference based on race, color, sex, age, religion, political beliefs, religious origin, family relation, physical or mental defect, which affects an individual's right to be equal in employment and training. Distinctions, exclusions or preferences required for a particular job are not considered as discrimination. Measures taken by the Council of Ministers or by collective contracts to protect employees, as provided in this code are not considered discrimination.

If employees are discriminated against at work, for reasons mentioned in the above article, they are organized in unions in order to protect their rights. Unions are protected by law and every employee has the right to participate in them and their participation does not affect his suspension, violation or conditioning at work. These unions have often given important suggestions and have influenced in the improvement of the labor legislation. In this way in the Labor Code there are better protected the economic interests, social rights of workers and their wages, work, technical insurance, etc..

The employer is obliged to respect and to protect the personality of the employee in labor relations. This personality can be affected if the employee suffers concerns that come as a result of discriminatory actions. These actions are different, for example, sexual harassment at work or due to sexual selection, which is each person's personal right to decide freely, etc⁵.

The employer is forbidden to undertake any action that causes sexual concerns to employees and should not allow such actions by other employees⁶. Sexual harassment means any concern, which clearly undermines the psychological state of employees because of sex.

⁴ Article 9 of the Labor Code of the Republic of Albania

⁵ Prof. Dr. Kudret ÇELA "Labor Law", Tirana 2010, page 139

⁶ Article 32 of the Labor Code of the Republic of Albania

In order to ensure a preventive action, in the Labor Code there is defined a penalty up to 10 times the minimum monthly wage. Criminal Code does not include sexual harassment as a crime, as in other countries, in order to guarantee a high effective protection under the provisions of the Labor Code. Since the Labor Code was adopted, there is no reported case of harassment, although this phenomenon in Albania is considered widespread, especially in private domestic and foreign companies. Work and hygiene conditions must be realized by the employer for all employees, regardless of type or duration of employment, and without discrimination differences. Under article 72 the employer, in countries where women work, it is required that in addition to hygienic conditions to provide special rooms for them. Also, the Labor Code provides for special rules to protect women. Article 54, paragraph 3 of the Labor Code provides that a pregnant woman who works constantly standing, every four hours of work must rest at least 20 minutes. But this is not discrimination. Another article deals with remuneration and salary. Workers should not be conditioned on the value of salary or remuneration based on a cause that is just a discriminatory motive. Both women and men should receive the same wage for work of equal value.

3. The Law on “Equal Gender in Albania”

Law no. 9970, dated 24.07.2008 “On Gender Equality in Albania”, aims to provide effective protection from sex discrimination and any form of behavior that encourages discrimination because of sex, as well as to determine the necessary measures to guarantee equal opportunities between women and men, to eliminate discrimination based on sex, in any form that it appears¹³. This law consists in the establishment of equality between the sexes in employment, education and decision making. It also provides provisions for sexual harassment at work. In this law it is provided that they do not constitute sex discrimination when the state takes special measures, including legal provisions aimed at protecting specific women during pregnancy and childbirth, new mothers, and young parents, because natural birth or adoption of a child, creating the conditions for protection and comfort at work, in social insurance and social assistance, in providing necessary assistance for maternal and child health; in securing and promoting the social services system, favoring the development of a network of nurseries and kindergartens.

Facilitation of assistance to persons who have special responsibilities in the family, because of the daily care of disabled family members, due to age, physical or mental disability or for other causes of disability.

Limitations to work in certain sectors because of hard and dangerous work for pregnant and breastfeeding women.

All these legal definitions are in accordance with the principles, rights and fundamental freedoms set out in the Constitution of the Republic of Albania, in the Labor Code and the special legal regulations.

Law, through its provisions, intends to eliminate discrimination in employment, through protection and equal treatment based on gender, providing equal opportunities in the announcement of a job, applying the same criteria in all recruitment procedures; employment without gender discrimination at every level of the hierarchy, training and professional skills development and other temporary measures.

Under Article 16 of this Law¹⁵, the employer and any individual that acts on behalf of him, in the quality of the intermediary, agent or representative, shall be bound to the promotion of gender equality before and during the employment relationship to ensure the implementation of some rules like:⁷:

- a) To not include elements of gender discrimination in the vacancy announcement, to work and to provide equal opportunities for women and men to apply for free work places.
- b) To apply the same criteria in all recruitment procedures, except in special cases provided by law.
- c) To employ people without gender difference, in any position or vacancy, at all levels of professional hierarchy.
- d) To promote equal distribution between women and men, in different types of jobs and within different categories of employees, through training and professional skills development and other temporary measures.
- e) To create equal and appropriate working conditions, equal opportunities for information, training and equal treatment of employees during the employment relationship.
- f) To apply equal criteria in assessing the quality of work, not to apply an evaluation criterion, seemingly neutral, but which in practice disadvantages persons of the other gender.
- g) To provide equal pay for work of equal value.
- h) To take measures to stop discrimination, harassment, sexual harassment against the employee.
- i) Not to put in an unfavorable light or take disciplinary action against the employee who opposes or complains about discrimination, harassment, sexual harassment and employee witnessing discriminatory actions committed by the employer to other employees.

⁷ Article 16 of Law no. 9970, datë 24.07.2008 "Gender Equality in Albania"

In addition to the above provisions concerning the promotion of gender equality in labor relations, the legislator has provided cases when actions in the public or private sector are discriminatory. Under the law there would be considered as discriminated against¹⁶ due to gender if the employer⁸:

- a) Uses standards or differentiated procedures to employees for recruiting, training, retraining, promotion, professional promotion, management and distribution of work, duration and conditions of probation, social security, benefits in cases of retirement, unemployment, sickness, disability, inability to work, the right to leave and paid leave, health and safety at work, pay for equal work, union organizations, except for objective and reasonable, provided for in Article 9 of Law ;
- b) Develops differentiated working conditions for employees of the same level;
- c) Takes disciplinary measures against employees, changing working conditions, transfers to another job, job cuts or resting, away from work or terminates the employment contract;
- d) Puts the employee in unfavorable position because of a complaint against the above actions of the employer.

The provisions of law have determined, in accordance with the provisions of the Labor Code, that it is prohibited the discrimination in the selection of a candidate for the job and the completion of labor relations of the employer for reasons of maternity, birth, pregnancy possible in the future, parental, marital status, family responsibility. There are exceptional cases when the position is determined by the Council of Ministers as a difficult or dangerous work for breastfeeding mothers and pregnant women and therefore unemployment of women who are in social or health condition shall not be considered as discrimination.

Another important element in guaranteeing legal labor relations is to determine under which, during the process of reorganization and reform of employment, the employer must necessarily respect the rules of equal gender representation in the termination of labor relations. Through this provision it is intended to avoid cases where employers do not take into account the fact that gender has an equal representation of both sexes, in the case of termination of such relationship, the legal relationships are ended by exceeding the number of cases for one or another gender.

Based on the Labor Code of the Republic of Albania and the law "On gender equality in Albania" stipulates that:

It is prohibited any discrimination, harassment or sexual harassment in the workplace by the employer and / or employee.

⁸ Article 17 of law no. 9970, dated 24.07.2008 "Gender Equality in Albania"

For this purpose, the law has defined obligations that employers must meet to protect employees from discrimination, harassment, especially from sexual. By law the employer must⁹:

- a) Take preventive measures and must determine disciplinary measures in the internal regulations for prevention of harassment and sexual harassment against the employee, in accordance with this law;
- b) If it becomes aware, indirectly or through a complaint from an employee, who claims to have been discriminated against, disturbed or harassed by another employee, after being convinced, takes appropriate measures to prevent the continuation or the prevention of discrimination, harassment or sexual and applies disciplinary sanctions;
- c) Inform all employees on the prohibition of discrimination and sexual harassment in the workplace.

In addition to determining the measures that the employer is obliged to prevent any form of discrimination, harassment or sexual harassment in the workplace, the law states for preventive measures to prevent these phenomena. Thus, the employer must put in the collective labor contract rules to prevent discrimination because of sex and how to resolve complaints made by persons affected by such acts. A feature of the law "On gender equality in Albania", in contrast to the Labor Code is the extension of its rules not only in relationship to the dependent legal work, but also to work independently. Under paragraph 5 of Article 18 of the law "On gender equality in Albania", the provisions of this law are applicable also to the self.

4. Institutional mechanisms ensuring gender equality in Albania.

Law no. 9198 dated 01.07.2004 "On gender equality in society" after changes February 2006, defines that the authority responsible for gender equality is the Minister of Labor, Social Affairs and Equal Opportunities.

The government's vision for the advancement of women and achieving gender equality made possible to include these issues in its policies as key priorities, with an emphasis on strengthening the government mechanism. For this, in the Ministry of Labor and Social Affairs there is established an Equal Opportunities Directorate, by the Equal Opportunities Policy. This Department has as its primary mission: "formulating and developing policies to promote equality in areas such as gender equality, equality / inequality in skills, problems of ethnic, linguistic and ethno-cultural, age disparity, the generational of racial, etc. ". In particular, for gender equality issues the Directorate aims: "to promote gender equality and wider participation of women in economic, political and cultural sites."

⁹ Neni 18 te ligjit Nr. 9970, datë 24.07.2008 "Për Barazinë Gjinore në Shqipëri"

Duties of the Directorate for Gender Equality issues are:

- To formulate policies for equal opportunities focused on the prospect of gender equality and protection of the rights of other categories of society as mentioned in its mission.
- To propose initiatives to study and analyze the entire range of policies for equal opportunities and the use of these studies in the process of policy development.
- To draft legal acts necessary for the achievement of equality in various fields and implement and monitor the equality provisions of the law and regulations adopted under it.
- To supervise the implementation of international acts and agreements covering fields which are approved by the Government.
- Cooperate with non-profit organizations that are active in the field of equal opportunities.
- To coordinate the preparation work for the National Program for equal opportunities for the categories of the population covered by the scope of the Department of Equal Opportunity Policy.

Establishment and strengthening of the network of focal points at the ministry and prefecture level, has made possible the inclusion of gender policies in government policies, which will improve the situation of gender equality at national level. At the parliamentary level, within the Parliamentary Commission of Labor and Social Affairs, Subcommittee on Juveniles operates and Equal Opportunities, which according covering problems, examine and take legislative initiatives. This subcommittee cooperates with the Ministry of Labor and Social Affairs and Equal Opportunities for gender equality and children.

5. Examples of discrimination in employment and the application of the provisions of the Labor Code of the Republic of Albania.

The Labor Code considers the resolution of labor contract by the employer, without reasonable cause even when it is done for reasons inherent to the personality of the employee, but who have no legitimate connection with labor relations. Such motives are considered: race, color, sex, age, marital status, family obligations, pregnancy, religion, political beliefs, nationality, and social condition.

Race. We are dealing with a motive abuse when termination is due to race, for example, race African, Chinese, European, etc.

Color. This criterion includes all possible kinds of colors, white, black, yellow, etc..

Sex. We abusive motive if the reason for dismissal is being female or male, gay, gender because no legitimate connection with the work.

Age. Age is abusive if it is because motif itself does not hinder job performance. Thus there can be abusive if age motif does not match the performance of obligations arising from labor relations.

Marital status. It is to be married, and / or widowed, single, divorced. Family obligations. Family obligations mean by having a family, obligations to children, spouse, parents. Thus, dismissal is improper because the employee has more children.

Pregnancy. With pregnancy pregnant understand not only the state but also the desire to get pregnant.

Religious beliefs. By faith we understand all religions, not just the four main religions but also other religions and different sects.

Political beliefs. With political beliefs mean any kind of legitimate political persuasion. *Nationality.* This protects the minority from dismissal on grounds of nationality. All Albanian nationality are protected or not. *Social status.* With the social state understand the societal level, social origin, social class, to which the employee belongs.

Other. Other reasons are: clothes, in general appearance, language dialect, hometown, biography, tastes, diseases that do not hinder job performance, etc..

5.1 Kazusa on discrimination due to religious belief

Employees E1, E2, E3, E4, Orthodox from Korca work in a shoe factory as workers. Employer is Mr. Ben Paden, a citizen of Saudi Arabia. Director is Albanian. Mr. Ben Paden comes occasionally in Albania to check the progress of work. During a conversation with the factory worker, Mr. Ben Paden finds that four employees were with the Christian faith. For this reason he requires their immediate dismissal from work. The motive for dismissal is the employee's religious beliefs E1, E2, E3, E4. Under Article 146, paragraph 1, letter c, the Labor Code is part of the religious personality of the employee but in this case the Christian religion has no legitimate connection with labor relations. It does not prevent workers from performing obligations under the contract of employment. Motive is abusive.

5.2 Kazusa on discrimination due to political belief

Worker M. works as a waiter for employers D. who is a militant socialist party. Employer D hears from a neighbor that employee M. is a member of the Democratic Party and fires him from work.

The motive for dismissal is the employee's political persuasion. His political opinion is not reason or motive for dismissal because it prevents the employee M. to fulfill obligations under the contract of employment. Motive is abusive.

5.3 Kazusa on discrimination due to race and gender

Employee F with Roma origin works for employer K. works who has a real disdain for the Roma population. One day, the employer K. reveals that 100,000 were stolen from the cash shop currency. The Employer fires the employee without proof that worker F was the one who had stolen the money.

Motive is abusive because the employer K. was influenced by race and color of the employee to blame for the theft, which he could have done even for a white employee. Color and race are no reasons why a man should be no more or less a fair and correct in an employment relationship.

5.4 Kazusa on discrimination due to the sexual selection

D. Employer, owner of a factory, is in a difficult financial situation. In order to avoid spending much he decides to cut the number of employees. Having cut the list of employees he recalls that that N1 and N2 are gay employee and this thing had always worried him. He decided to dismiss worker N1 and N2. The motive for dismissal is abusive. It relates to the personality of the employees and their homosexuality is not an obstacle to the fulfillment of obligations arising from the work.

Conclusions

International legal instruments provide protection for individuals in labor relations, to minimize the causes and forms of discrimination or gender inequality, but despite the spirit of anti-discrimination legislation and international instruments concluded that discrimination in employment relations is present.

Law on "Gender Equality in Albania", meeting the legal framework on equal rights between men and women is established to provide equal positions in the field of employment, vocational training.

Discrimination and gender inequality in labor relations constitute a problem despite the fact that the legislation provides provisions that prohibit them.

Indirect discrimination is more difficult to be minimized and eliminated because of its nature.

Legal discrimination in the workplace remains a problem that is expressed both in positions occupied by women, as well as at the level of salary they receive.

Nowadays there is a widespread discrimination in job opportunities for a higher level and the possibilities of advancement.

Discrimination and gender inequality in labor relations is due to the social mentality of people and established gender stereotypes that influence an objective assessment of skills rather than the merits of the person seeking to enter into a relationship work.

Strengthening of legal and institutional mechanisms to ensure defense of gender equality in Albania

Review of legislation from a gender perspective in accordance with international standards.

Public awareness, in particular about the rights of women and young girls.

Including gender issues in public policy through concrete action plans, detailed and budgeted, to lay the groundwork for advancing gender equality and minimizing the phenomenon of discrimination at work in the future.

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