
THE LEGAL FRAMEWORK FOR THE PROTECTION OF THE RIGHTS OF LGBTI COMMUNITY IN ALBANIA

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ABSTRACT: *Adhering to the principle of equality and non-discrimination is one of the challenges of the Albanian state to be part of the great European family and to meet the necessary criteria to characterize a democratic country. This challenge becomes greater as it requires not only political and institutional willingness, but also close cooperation with society to change attitudes and mentality discriminating against individuals or groups. Protecting the rights of individuals from discriminatory behavior because of sexual orientation and gender identity is such an issue. This paper aims to analyze how the Albanian legislation protects the rights of LGBTI. It is important to analyze the process of approximation of legislation with the international legislation. Positive changes were made, but remain current need for this process to continue. In the EU Progress Report for Albania 2013 explicitly states: There is legislation in the field of anti-discrimination policies, e.g. concerning the rights of persons lesbian, gay, bisexual, transgender and intersexual (LGBTI). Albanian authorities should implement the existing legislation and to draft new legislation in the field of anti-discrimination.*

KEYWORDS: Sexual Orientation, Gender Identity, Approximate Legislation, Protection From Discrimination.

INTRODUCTION

Protecting the rights and freedoms of LGBTI community has a fundamentally important principle that has to do with acceptance of LGBTI enjoy the same rights as any other person to exercise discrimination and human rights¹. This has been the approach of the international institutions, while respecting the rights of the community has always been part of the obligations of Albania in the European integration process. The first step to realize this obligation is closely associated with the drafting of legislation on protection of these rights². Albania has already drafted legislation in accordance with international laws and has established mechanisms for protection from discrimination against LGBTI community. Interesting to see the evolution reflect

¹ Council of the European Union: "Toolkit to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual and transgender (LGBT) people", pg 3.

See:

http://www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2Fwww.consilium.europa.eu%2Fuedocs%2FcmsUpload%2Fst11179.en10.pdf&external=N

² European Network of Equality Bodies "Equality bodies promoting equality & non-discrimination for LGBTI people", Brussels 2013.

the treatment of sexual orientation and gender identity as a cause for which protection is provided by discriminatory attitudes in international and national level.

Understanding of sexual orientation and gender identity in view of international acts to human rights.

To give the meaning of the concept of "sexual orientation" refer Yogyakarta principles, which he describes as "a model / stable stand structure withdrawal emotional, romantic and sexual or their combination against the opposite sex, the same sex, of both sexes or both of the sexes and genders that accompany them"³. "While this document *"gender identity is understood to refer 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"*⁴. Të njëjtin përcaktim jep dhe Gross, sipas të cilit *"identiteti gjinor është mënyra se si një njeri vet-identifikohet me një kategori gjinore, si për shembull të jesh femër ose mashkull, apo në disa raste asnjë prej tyre, i cili mund të jetë i dallueshëm nga seksi biologjik"*⁵. Gross gives the same definition according to which "gender identity is how a person self-identifies with a gender category, as for example to be female or male, or in some cases none of them, which may be distinct from biological sex". To understand the concept of gender identity is important to distinguish between the concepts of "sex" and "gender". While the concept of "sex" refers us to the biological difference between men and women, the concept of "gender" includes the social aspect of the difference between the sexes, beyond the biological.⁶

But, as has evolved to protect individuals from discriminatory behavior because of these individual qualities in view of international acts? We will review some of them, keeping in mind that are ratified and the Republic of Albania:

- Universal Declaration of Human Rights and the Citizen of 1948 (Article 7),
- International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966 resolution 2200A (XXI) of the General Assembly (Article 26),
- Convention on the Elimination of All Forms of Discrimination against Women, and
- Convention on the Rights of the Child have paid special attention to the principle of equality and non-discrimination.

However, it should be noted that these acts have not anticipated sexual orientation and gender identity as grounds on which offered protection from discriminatory behavior. Mostly they have included as causes "sex" or "gender". This gap is overcome through interpretation that made these documents establish mechanisms to monitor their implementation. Thus, the Committee on the

³ The Yogyakarta Principles, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, adopted by a group of 29 human rights experts in November 2006 in Yogyakarta, Indonesia. See: http://yogyakartaprinciples.org/principles_en.htm

⁴ Ibidem.

⁵ Diskriminimi për shkak të orientimit seksual dhe identitetit gjinor në Europë, Studim i Këshillit të Europës, 2011".

⁶ Commissioner for Human Rights "Human Rights And Gender Identity", Strasbourg, July 2009, fq 5.

See: www.commissioner.coe.int

Elimination of All Forms of Discrimination against Women has determined that discrimination against women on the grounds of sex and gender is also associated with other causes, among which sexual orientation and gender identity⁷. Committee on the Rights of the Child, General Comment No.4 has explicitly provided sexual orientation due to which child protection provided under this Convention.

Special Rapporteurs of the United Nations have expressed concern about the situation of LGBTI community through the UN Declaration on "sexual orientation and gender identity." In the United Nations Human Rights Council another resolution, Supporting LGBT rights, Proposed by South Africa, passed in 2011⁸.

Montreal Declaration "On human rights of Lesbian, Gay, Bisexual and Transgender" is a document that declared recognition of the rights of LGBTI community in health, education and immigration. The statement also addresses the various issues that threaten the global promotion of the rights of LGBTI⁹. In the context of regional acts ratified or signed by Albania will initially refer to the European Convention on Human Rights (Article 14) and Protocol. 12 thereof. They have provided the principle of equality and non-discrimination, regardless of sexual orientation and gender identity is meant by the term "sex". The jurisprudence of the European Court of Human Rights supports through its decisions, the right not to be discriminated against because of sexual orientation and gender identity. Recommendation CM / Rec (2010) 5 of the Committee of Ministers of the Council of Europe "On measures to combat discrimination on grounds of sexual orientation and gender identity", recommends that states take measures to safeguard the right to life, security and protection from violence to persons because of their sexual orientation and their gender identity.

EU legislation does not contain an open list of grounds for which provides protection while many member states have such a list. The European Court of Justice has the right to interpret the definition of the grounds of discrimination, through examination of concrete cases. As grounds of discrimination there are included: race, color, ethnic or social origin, genetic features, language religion or belief, political or other types association with a national minority, property, birth, disability, age or sexual orientation¹⁰.

⁷Commissioner for Human Rights: "Discrimination on grounds of sexual orientation and gender identity in Europe", fq 36. In this publication the Commissioner refer to the Recommendation no. 28 of this Committee.

⁸This Resolution was signed by Albania.

⁹This statement is the product of the International Conference on the rights of LGBTI community in the first World Games, 29 July 2006. See: <http://www.declarationofmontreal.org/declaration/DeclarationofMontreal.pdf>.

¹⁰Irma Baraku, Paulina Hoti "The concept of discrimination and other concepts related to it in the albanian legislation - comparative overview with the EU directives in the anti-discrimination field", "4th International Conference on European Studies – Social, Economic and Political Transition of the Balkans", organised by EPOKA University, Tiranë, 8-9 November 2013. (Published in Book of Abstracts, pg.55 and in proceedings book pg. 205-213: ISBN 978-9928-135-09-4).

1. **Protection against discrimination because of sexual orientation and gender identity in albanian legislation.**

Albanian legislation provides an overall protection of fundamental human rights and specifically the principle of equality and non-discrimination. The Constitution does not expressly provide for sexual orientation and gender identity as discrimination. In an expanded sense of gender identity may be implied in the term "sex". Changes in the legal analysis conducted reveal some issues which *are numbered 'a' to 'g'* in the following:

a. The decriminalization sexual relations between persons of the same sex is one of the priorities of international institutions addressed in legislation.

In Albania, homosexuality was decriminalized in 2001, with changes made to the Criminal Code. But the paradox remains that while in articles 100-107, Section VI "Sexual Crimes" of the Criminal Code, still called such even homosexual relationships.

b. The creating of a secure environment, which respect and protect the physical integrity of LGBTI persons is another obligation of a democratic state. In May 2013 Criminal Code of the Republic of Albania recognizes several other changes, which enhance the legal guarantees for the protection of LGBTI community. These changes are:

- realized as aggravating circumstances the inclusion of other causes provided for in the law "On protection from discrimination", among which sexual orientation and gender identity (Article 50, paragraph j)
- have criminalized incitement to hatred due to sexual orientation (Article 265 of the Criminal Code).

But, it is necessary that the article 84/ai Criminal Code be amended or added to another article in order to forecast specific figure threat offense because of sexual orientation and gender identity of the person. This is important as there are recorded cases where community members become victims of hate-based incidents, face harassment from police, family violence exercise or the exercise of verbal and physical violence by unidentified persons. Crimes due to sexual orientation and gender identity so far not homophobic crimes as reflected in official statistics. But, *"a minimum of statistics should be collected and published on the number of incidents constitute hate crime reported by the public and recorded by authorities, the number of convictions, the cause for which the behavior is considered discrimination"*¹¹.

c. Avoidance of hate speech against the LGBT community, especially in social networks remains a challenge.

In many cases, the discussion on LGBT rights is associated with the use of debate to "hate speech". We note that "hate speech" against gay people lesbian, bisexual and transgender (LGBT), deals with all forms of expression, widespread as the media, as well as via the Internet, which spread, incite, promote or justify hatred, discrimination or hostility against LGBTI

¹¹European Union Agency for Fundamental Rights "Making hate crime visible in the European Union: acknowledging victims' rights", Luxembourg, 2012, pg 11.

people¹². Assessing whether certain phrases or statements will be considered "hate speech" should be done in accordance with the freedom of expression guaranteed in Article 10 of the ECHR.¹³ For various stakeholders such as the Ombudsman, the Commissioner for Protection from Discrimination and civil society representatives have recommended reformulated or new articles are added after Article 119 / a "distribution of racist or xenophobic material through computer systems" and 119 / b "Insulting motivated by racism or xenophobia computer system" in order to criminalize the distribution of homophobic and insulting through the computer system because of sexual orientation and gender identity of the person. This recommendation was not included in the amendments to the Criminal Code in May 2013.

Media has expressed a particular interest to the LGBT çështjes and greatly influences (positive & negative) in addressing the issues of LGBTI community: On one side is found in these debates associate homosexuality with deviant and criminal behavior, specifically identifying pedophilia or sexual orientation tendency of treating homosexuality as a topic related to scandalous news. Transmission of information on criminal offenses related to the individual's personal characteristics (sexual orientation) or presumed to have committed the offense even when this feature does not define the setting of the offense as such, establishes a practice that indirectly discriminates against individuals or communities because of these characteristics.

On the other hand the media is an important tool in promoting the rights of LGBTI community as influencing the public opinion. Also particularly important attitude and support of opinion-makers. "Protecting open by politicians makes LGBTI people to live more comfortably in their lives as such. Get important ... to promote a more balanced public opinion on LGBTI issues, facilitating dialogue involving politicians, media and religious communities ... "¹⁴.

d.Treatment with dignity and non-discrimination of people because of sexual orientation and gender identity is a principle that must take into account public administration employees.

Administrative Procedure Code, provides for the principle of equality and anti-discrimination as one of the general principles which should support the activities of the public administration (Article 11 of the IAC) for a limited number of causes, among which are not included sexual orientation and gender identity.

¹²Recommendation CM / Rec (2010) 5 of the Committee of Ministers of the Council of Europe "On measures to combat discrimination on grounds of sexual orientation and gender identity".

¹³Irma Baraku "Over the hate crime and hate speech", a regional workshop on the theme: "The human rights of LGBTI Community, Equal Treatment and Combating Discrimination", Beograd, 2013.

See:http://ec.europa.eu/enlargement/taix/dyn/taix-vents/library/detail_en.jsp?EventID=53050 and Irma Baraku; Entela Hoxha "Between freedom of expression and 'hate speech', the protection of vulnerable groups and" International Scientific Conference "Euro-American Conference for Academic Disciplines (Paris 2013)", organized by IJAS Conference Series, Paris, 8-11 April 2013 . (Published in the Proceedings, fq.229-232: ISSN 1943-6114).

¹⁴See: European Union Agency for Fundamental Rights "EU LGBT survey European Union lesbian, gay, bisexual and transgender survey", Luxembourg, 2013, fq 10 and European Union Agency for Fundamental Rights "Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States", Luxembourg, 2013, fq 10.

However the changes made to the Criminal Code (May 2013), is included in Article 253 "Violation of equality of citizens" sexual orientation and gender identity of the person, ensuring a wider protection of persons against discriminatory behavior maintained by employees state function or public service.¹⁵.

e. *The right to be Albanian familjare.*

The Albanian legislation does not recognize cohabitation and marriage between persons of the same sex. The debates on this subject have been strong. ECHR jurisprudence has emphasized the right of LGBTI people to have a family life without discrimination because of sexual orientation or gender identity. Albanian institutions have taken the commitment to implement changes in the Family Code to include in it the concept of coexistence between two persons of the same sex.

f. *The right of association, assembly and freedom of expression of LGBTI persons should have special attention.*

In Albania there are no legal obstacles to LGBTI community association¹⁶. Implementation of activities and gatherings not legally impeded. The exercise of the above rights has seen a positive development.

Initially there are real opportunities for representatives of this community to make public institutions and present before the community's problems. It is important that the community be heard by stakeholders on issues relating to the rights of the community. Commissioner for Protection from Discrimination has given a Recommendation to the Commission for Labour and Social Affairs and Health, for "giving all possible guarantees that opinion, their opinion and be heard word assessed and taken into consideration when they are involved in directly on specific issues to help this community to normally enjoy their rights and freedoms"¹⁷.

*Developing specific policies in support of the community is important and suggest that European institutions' strategies for equality between men and women that contribute to combat stereotypes, discrimination and gender-based violence, including programs to combat stereotypes and discrimination because of sexual orientation and gender identity"*¹⁸.

g. *Protection of LGBTI persons by Law "On Protection from Discrimination"*

Adoption of the Law No. 10 221, dated 02.04.2010 "On Protection from Discrimination" for LGBT constitutes a positive step in the protection of their rights¹⁹. *This law contains a non-*

¹⁵ Realized through Law no. 144/2013 "On some amendments to Law no. 7895, dated 27.1.1995 "Criminal Code of the Republic of Albania".

¹⁶ There are four NGOs representing the LGBT community or have focused their activities in defense of this community.

¹⁷ See: http://kmd.al/skedaret/1370257491-Rekomandim_kuvendit_LGBT_varianti%20final.pdf . We emphasise that over the years this attitude has changed. At the meeting of the Committee on Labour, Social Affairs and Health dated 09/12/2013 LGBTI community representatives were part of the hearing for the prevention and control of HIV / AIDS.

¹⁸European Union Agency for Fundamental Rights "EU LGBT survey European Union lesbian, gay, bisexual and transgender survey", Luxembourg, 2013, pg 10.

¹⁹Law "On Protection from Discrimination" is in accordance with EU Directives in the field of non-discrimination, including: European Council Directive 2000/43/CE of 29 June 2000 on "Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin"; European Council Directive 2000/78/CE of 27 November 2000 on "Establishing a general framework for equal treatment in employment and

*exhaustive list of reasons for which offers protection from discriminatory behavior, and among them, expressly provides sexual orientation and gender identity*²⁰.

This law extends protection from discrimination not only from such conduct held by the public administration, but also by private entities. According to Article 7, paragraph 1 constitutes discrimination "Any act or omission of the public authorities or the natural or legal persons who participate in the life and public or private sectors, to create the basis for denial of equality to a person or group of persons, or that exposes them to unfair treatment and unequal when they are under the same or similar, in comparison with other people or other groups of persons "

The law provides protection from discriminatory behavior in three key areas:

- education,
- employment
- and provision of goods and services.

The special regulation of these areas contains detailed provisions of the rights and obligations of the respective entities in separate chapters of the law.

Education. In this area it is worth mentioning that there is an approximation of the law "On pre-university education in the Republic of Albania", adopted in 2012 by the Law "On protection from discrimination", as to the causes of discrimination including "sexual orientation" in addition many other causes²¹. Although this article does not include all the reasons set out in Article 1 of the Law "On Protection from Discrimination" has left enough space for the implementation of the latter by pre-university educational system.

In fact, community treatment remains problematic in the premises of educational institutions and performances in these environments's bullying. Commissioner for Protection from Discrimination has developed a monitoring law on the recognition of teachers and students in six schools in six municipalities university education, where 17% of students and 6% of the surveyed teachers list sexual orientation discrimination²².

Under this law, discrimination related to several important aspects such as the content of the principles and criteria of educational activity, including:

- curriculum and teaching methods;
- treat students or students in receipt, evaluation, disciplinary measures or their exclusion.

occupation";European Council Directive 2004/113/CE of 13 December 2004 on "Implementing the principle of equal treatment between men and women in the access to and supply of goods and services"; European Directive 2006/54/EC of the European Parliament and of the European Council of 5 July 2006 on "Implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation".

²⁰ Article 1 of the law provides that its purpose is "implementing and adhering to the principle of equality in relation to gender, race, color, ethnicity, language, gender identity, sexual orientation, political opinions, religious or philosophical, economic, educational or social , pregnancy, parenting, parental responsibility, age, marital or family status, marital status, residence, health status, genetic predispositions, disability, affiliation to a particular group, or for any other reason".

²¹ Article 5/1 of Law nr.69/2012 "On pre-university education in the Republic of Albania"

²² Komisioneri për Mbrojtjen nga Diskriminimi: Raporti Vjetor 2011, fq 16-22.

See:<http://kmd.al/skedaret/1367580047-1361193260-Raport%20Vjetor%202011.pdf>

• prohibition or the denial of admission to a public educational institution of a person or group of persons, for the reasons mentioned in Article 1 of this law".

World Health Organization (WHO) since 1990 has removed homosexuality from the International Classification of Disease Statistics and Health Problems associated with. However, in some texts homosexuality continues to be treated as a disease. Commissioner for Protection from Discrimination requested removal from the market of all texts "Legal Medicine" used by the Faculty of Medicine and Faculty of Law, which discriminate against the LGBT community²³. A special place occupied heads of educational institutions, who are charged with the obligation to take positive measures within their institution to: increase awareness of this law within the institution (among others by posting law in a visible place), fighting discriminatory behavior patterns that constitute or promote discrimination within the institution; Effective handling of complaints of discrimination in the institution.

Employment. Law "On Protection from Discrimination" provides for the prohibition of discrimination in relation to some important aspects of employment such as the announcement of job vacancies; recruitment and selection of employees; treatment of employees in the workplace, union membership and the opportunity to benefit from the facilities it provides for members. There are no reports or statistics about the situation of LGBT people in employment. Currently, diversity policies do not apply for the issue of sexual orientation and gender identity.

Meanwhile, in Article 9, paragraph 1, of the Labour Code prohibits discrimination in the field of hired labor and profession, it does not provide sexual orientation and gender identity as grounds for prohibiting discrimination in hiring or profession.

Provision of goods and services. There is to be noted that homophobia exists, not only in school or work environments, but also in service delivery. Particular emphasis must be set on medical care services, where often there happened denied service to LGBTI persons, as a discrimination against this community. LGBTI community, especially transgender people continue to suffer from discrimination and have difficulties in accessing health and social services²⁴. European institutions stress the necessity that the health plans included measures on health studies, training curricula and health policies that take into consideration the needs of LGBTI people²⁵. The community has reported discriminatory behavior in commercial services unit through hostile attitudes or denial of delivery service²⁶.

Mechanisms for the protection from discriminatory behavior

Commissioner for Human Rights at the Council of Europe has expressed the necessity of creating national institutions to equality and non-discrimination and defining a clear mandate for the review of complaints from the community. Albanian lawmaker has overcome this difficulty.

²³ Decision No. 5, dated 23.01.2014 of the Commissioner for Protection from Discrimination.

²⁴ Albania Progress Report 2012 that accompanies the Communication from the Commission to the European Parliament and the Council.

²⁵ European Union Agency for Fundamental Rights "EU LGBT survey European Union lesbian, gay, bisexual and transgender survey", Luxembourg, 2013, fq 13.

²⁶ Decision No. 5, dated 23.01.2014 of the Commissioner for Protection from Discrimination.

Law "On Protection from Discrimination" predicted the creation of the Commissioner for Protection from Discrimination institution, which "provides effective protection from discrimination and any form of conduct that encourages discrimination" (Article 21, item 1). This institution has the power not only "make recommendations on any matter relating to discrimination" (Article 32, paragraph f), but also "to impose administrative sanctions as defined by the law" (Article 32, paragraph d).

Powers of the Commissioner for Protection from Discrimination are in accordance with Article 20 of Directive 2006/54/EC of the European Parliament and the Council, according to which equality bodies:

- i. provide independent assistance to victims of discrimination through treatment or assistance in court cases;
- j. perform independent polls and surveys concerning discrimination;
- k. publish reports and also provide legislative recommendations on any matters related to discrimination.

On the other hand, this law provides the right to file a civil suit to claim the object of discrimination (Article 36), which may also require compensation for damage caused by discriminatory conduct (Article 37) or to carry forward the report to the competent authorities prosecution.

The concept of burden of proof in discrimination.

Addressing discrimination is closely linked with the concept of burden of proof, which also needs legal intervention. Law "On Protection from Discrimination" does not fully explain the concept of burden of proof in an administrative investigation procedure followed by the Commissioner. Referring to the right of subjects to appeal before the Commissioner has determined that the applicant law "may appeal along with the available evidence to the Commissioner" (Article 33, item 1).

Albanian Code of Administrative Procedure in Article 82, paragraph 1 has clearly defined "*the burden of proof falls upon the facts alleged stakeholders*", regardless of any obligation under the other provisions of the active role to be played by the administration in an administrative investigation procedure. This treatment is explicitly confirmed as one of the general principles of administrative adjudication.

Differently from the civil process in court, in the administrative adjudication under the principle provided from article 3, 3rd paragraph of the Law on Administrative Courts, for the activity of public administration, the burden of proof belongs to the latter. This burden is widened in proving the facts on which is based the activity conducted by its organs, and in proving the law that has served as the legal basis for the administrative act issued under its activity²⁷.

²⁷ Entela Hoxhaj, Irma Baraku: "The burden of proof in the administrative process in Albania", botuar në revistën European Scientific Journal, botim i European Scientific Institute, Vol.10, No.10, April 2014, pg 425-432.

Concerning the facts claimed by the party of private law, but not related to the administrative action / activity, it is this party of the administrative process the (party of private law) that has the obligation to bring the proofs on which bases its requests²⁸.

Anticipating the right of subjects to follow the path of the appeal court, the anti-discrimination law stipulates "*the plaintiff has the obligation to provide evidence in support of the claim, using any lawful evidence that can prove discriminatory behavior*". However, the burden of proof in this case exceeds significantly to the defendant. After the plaintiff presents evidence on which he bases his claim on the basis of which the court may presume discriminatory conduct, the defendant is obligated to prove that the facts did not constitute discrimination under the law (Article 36, paragraph 5, 6). Anticipating explicitly the right of subjects to follow the path of the appeal court, the anti-discrimination law stipulates that "*the plaintiff has the obligation to provide evidence in support of the claim, using any kind of lawful evidence that can prove discriminatory behavior.*" However, the burden of proof in this case exceeds significantly to the defendant. After the plaintiff presents evidence on which he bases his claim on the basis of which the court may presume discriminatory conduct, the defendant is obligated to prove that the facts did not constitute discrimination under the law (Article 36, paragraph 5, 6).

This shifting of the burden of proof has been expressed prior to the adoption of anti-discrimination law. Labor Code, Article 115, paragraph 3 (Equal payment between the sexes) states that "*when the employee poses serious data that imply the existence of discrimination, the employer is obliged to prove the contrary*". Also Article 105 / a, paragraph 2 (protection of employment of women) provided "*in case of termination of the contract of employment by the employer, when the wife is at work in the law*". On the protection of maternity discrimination or related to 'turning back to work after childbirth' according to Article 30 of this Code, the employer has the obligation to prove that the cause of dismissal was not pregnancy or childbirth. "But this shifting of the burden of proof in the Labor Code is not extended to all aspects of labor relations.

Regarding this issue in its Decision 33 /2007 the Albanian Constitutional Court made an interesting interpretation in a case with object repeal as unconstitutional for the articles 141, 143, 144, 146 /1 of the Labour Code and argued "the reversal of the burden of proof in issues of discrimination". In its reasoning, the Court stated that: "*In conceptual terms 'discrimination based on social status' means that individuals can be differed and treated unequally based on social composition, which is unrelated to their merits ... The obligation of the employer to prove the claim (burden of proof) would be discriminatory, as forecasted in article 146 /2 of the Labor Code, if proved that the employee has been excluded on the basis of gender, race, religion, ethnicity, language, persuasion, political, economic condition, educational, social or parental affiliation (if the legislator would make sharing a social group from others, unfavorable treating one group from another, but within the category of employees). The aim of the legislator in this case is not associated with any desire or willingness to unfavorably treat certain categories, but enables the employee to the article 146 /2 of the Labor Code to prove – to the court – the*

²⁸ E. Dobjani, E.Toska, E.Puto, E.Dobjani, 2013, *E drejta administrative – kontrolli mbi administratën publike*, (Eng: *Administrative law – the control on public administration*), SHB EMAL, Tiranë, fq 74.

discriminatory elements on the basis of which may benefit even compensation for dissolution of the contract without reasonable cause”.

This Decision of the Albanian Constitutional Court served later as a basis for the primary courts to share the burden of proof in cases of discrimination related to labour relations. As from above, there should be made a distinction between the term "shift the burden of proof" and "reversal of burden of proof." Thus, shifting the burden of proof, as well as EU legislation provides, sets the requirement that victims should bring forth the evidence as a reasonable suspicion that discrimination has occurred. Once reasonable doubt is set, arises the obligation of the defendant to prove the contrary.

Finally, we hope that the treatment of the legislative aspects that guarantee the rights of LGBTI community in this paper will encourage scientific debate on this issue. On the other hand, we think that the arguments of this paper will serve especially for the defense of human rights, independent institutions that protect human rights, legislators and policy makers to take legislative initiatives and policy that would allow for the exercise of human rights every citizen of Albania²⁹.

CONCLUSIONS

1. The quality of Albanian legislation must improve to prevent discrimination on grounds of sexual orientation and gender identity in accordance with international laws, civil and European law "On protection from discrimination":

- Inclusion of the concept of sexual orientation and gender identity as grounds for which protection is provided by discriminatory behavior in existing legislation (Labour Code, some provisions of the penal code ...).
- Forecast forms of discrimination in the Code of Practice in accordance with those specified in the law "On protection from discrimination.
- Implementation of changes to the Code of Civil Procedure in order to facilitate discrimination issues legally shift the burden of proof.
- Making changes necessary to guarantee an individual's right to family life LGBTI community.

2. It is very important to make research and gather information on the measures and discriminatory practices, especially when it comes to "hate crimes" and "hate incidents" due to sexual orientation or gender identity, keeping on the right to respect for private life. It is crucial that police statistics must reflect also crimes due to sexual orientation.

3. It is important the awareness of society in general and specific groups of community rights LGBTI with the aim of promoting debate incompatible with the use of hate speech.

²⁹We refer here Directive 78/2000 of the European Union "On the establishment of the regulatory framework for equal treatment in employment relations". According this directive appears that only the employer has the burden of proof and the employee should create suspicion to a judge that there was no discrimination without being obliged to prove.

4. It is important to ensure that victims of discrimination can have the appropriate information and can use remedies.
5. The realisation of surveys and monitoring the observance of the rights of LGBTI community in various fields as education, employment and services.
6. Inclusion public figures (journalists, politicians, teachers ...) to protect the rights of the LGBT community in order to promote positive models.
7. It is necessary the training of different actors for dealing with equality and non-discrimination as community police, health workers, psychologists, teachers, local government officials, judges.

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