Sexual orientation, gender identity and non-discrimination

The Albanian labor legislation and its effects on employment and vocational training potentials

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Abstract

Albania is undergoing an important moment in its integration process to European Union. In this context, the Albanian legislation should compare with the best international standards, in guaranteeing the implementation of the rule of law, democratic principals, the citizen's equity and the observance of fundamental human rights and freedoms. The promotion, protection and the guaranteeing of the fundamental rights and freedoms of the individual, including the LGBT person's rights, must have the same attention and consideration, irrespective of the fact that the individual is being part of a social minor group, or part of the majority of the society.

The community of the Lesbians, Gays, Bisexuals and Transgender (LGBT) in Albania, based on the legislation in force, should enjoy equal rights and freedoms like all other members of the society.

The Constitution of the Republic of Albania, the Albanian labour legislation and the legislation generally, are inspired in accordance with the non-discrimination principles, objectives and definitions of international acts, promoting and expressing protection of human rights and freedoms in general, and in particular in the field of employment and vocational training. This paper will analyze, if the sexual orientation, is one of the causes of discrimination for employment and vocational training, in Albanian legislation, especially how it is expressed this issue on the Constitution of the Republic of Albania, the Albanian Labour Code, the Albanian law "On the protection against discrimination" ect.

Keywords: LGBT person's, non-discrimination, sexual orientation, gender identity, employment, vocational training

Introduction

Albania is undergoing an important moment in its integration process to European Union. In this context, the Albanian legislation should compare with the best international standards, in guaranteeing the implementation of the rule of law democratic principals, the citizen's equity and the observance of fundamental human rights and freedoms. The promotion, protection and the guaranteeing of the fundamental rights and freedoms of the individual, including the LGBT person's rights, must have the same attention and consideration, irrespective of the fact that the individual is being part of a social minor group, or part of the majority of the society.

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In the EU Progress Report on Albania for the year 2012 it is stipulated that: *"LGBT persons continue to suffer from discrimination and difficulty in accessing social and health services, notably for transgender persons"*[1] and "*At the same time, discrimination against lesbian, gay, bisexual and transgender persons, the Roma minority and other vulnerable groups persists.*"[2]. As well as, the EU Progress Report on Albania for the year 2011, has drawn the attention to the various issues and problematic that the Albanian society has regarding the treatment of the LGBT community. The report emphasizes that: *"...Several cases of violence and ill-treatment targeting the transgender community have been reported. Homophobia remains widespread, including on the part of public service professionals."*[3]

The fundamental rights and freedoms of the LGBT community, are foreseen in the Albanian legislation, but the most important thing it is also the guaranteeing of their implementation into practice. The rights of the LGBT person's are considered of great importance and therefore have been involved into the 11 Recommendations of the EU for Albania.

[1] Albania 2012 EU Progress Report, page 20, **www.mie.gov.al,** english version

[2] Albania 2012 EU Progress Report, page 22, **www.mie.gov.al,** english version

[3] Albania 2011 EU Progress Report, page 18, **www.mie.gov.al,** english version

Constitution of Albania and International Acts ratified by the Parliament of Albania

The Constitution places the principal of equity before law closely connected with the principle of non-discrimination. In the first paragraph of the article 18 is decided that "All are equal before the law". The second paragraph of this article stipulate that "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 ancestry."

"Sexual orientation stands for a stable model/structure of emotional, romantic or sexual attraction or the combination of them both- towards persons of different sex, the same sex, both sexes or none of sexes or the genders associating them."[4] According to the American Psychological Association, the sexual orientation refers also to the feeling for "the personal or social identity" of the persons, thus it is a different social relation of these individuals from other people.

"Gender identity is the way in which an individual identifies himself into a certain gender category like being a female or male and in some cases being none of them, who can be identified by the biological sex."[5] With regard to persons who carry a different gender identity from those two recognized genders (female, male), I consider that the provision is comprehensive and does not explicitly defines the kinds of gender, but it leaves open the inclusion inhere of the discrimination of a gender identity different from the classical one or of the biological sex.

Therefore, based on the prescription made above and in the stipulations of the article 18 of the Constitution, the sexual orientation or the gender identity of the individuals, isn't foreseen explicitly as a ground of discrimination by this article, so for the differentiation and the unequal treatment to the LGBT community, who for other reasons have or might have a social identity unrelated with their merits, or have a gender identity different from those two genders (female, male).

The principal of equity before law and of the non-discrimination sanctioned by the Constitution as a general principal that outlines all fundamental human rights and freedoms**,** should be applied by all, from institutions to individuals. This principal outlines the article 49 of the Constitution that says: "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, place of work, as well as his own system of professional qualification." So the constitutional provision guarantees to any persons the right of labor irrespective of gender, race, ethnicity, language, political wing or religion he/she belongs to. The right to work involves accordingly the chosen of profession, place of

[4] Definition according to rapporteurs of CoE resolution "On discrimination based on sexual orientation and gender identity.", https://wcd.coe.int/ViewDoc.

[5] Definition according to rapporteurs of CoE resolution "On discrimination based on sexual orientation and gender identity.", https://wcd.coe.int/ViewDoc.

work as well as the system of professional qualification aiming at earning means of living by lawful work. *"The definition provided by Article 49 of the Constitution should be considered of its double meaning. It implies a positive obligation that requires state commitment to create the conditions for its realization, but also a negative obligation, which requires that the state does not intervene so as not to violate this right"*.[6]

The Constitution, in its article 15, specially refers to the organs of public power highlighting that: "The organs of public power, in fulfillment of their duties, shall respect the fundamental rights and freedoms, as well as contribute to their realization.". In this context, all organs of public power should approve policies, legislation and measures within their field of activity, in order to respect and implement the fundamental rights and freedoms.

Albania has signed and ratified several international acts, which in essence refer to equal treatment, nondiscrimination, protection and observance of fundamental human rights and freedoms in general, but also to the rights of the LGBT community in particular. They are the European Convention for Human Rights, UN Declaration on "Sexual orientation and gender identity" undersigned by our country on 18 December 2008, Protocol no.12 of the European Convention for Human Rights "For a General Stop of Discrimination" signed and ratified in 2010, Convention no.111 of the International Labor Organization ILO "On discrimination in the field of employment and profession".

The CoE Member States adopted the ECHR to help achieve these aims, which was the first of the modern human rights treaties drawing from the United nations Universal Declaration of Human Rights. The ECHR sets out a legally binding obligation on its members to guarantee a list of human rights to everyone (not just citizens) within their jurisdiction. The prohibition on discrimination is guaranteed on ECHR, which guarantees equal treatment in the enjoyment of the other rights set down in the Convention[7]. Protocol 12 (2000) to the ECHR, expands the scope of the prohibition of discrimination by guaranteeing equal treatment in the enjoyment of any right, including rights under national law[8].

The Universal Declaration of Human Rights, stipulate that *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*[9] This declaration doesn't foreseen as a specifically ground of discrimination gender identity and sexual orientation, but when it refers to "other status", may at its contents, to include the statuses that are linked to these issues.

[6] Decision of the Constitutional Court nr.20/2006, www.gjk.gov.al

[7] Article 14 of the European Convention for Human Rights, www.conventions.coe.int

[8] Protocol 12 (2000) to the European Convention for Human Rights, www.conventions.coe.int

[9] Article 2 of Universal Declaration of Human Rights, www.ohchr.org/EN/

The Convention no.111 of the International Labour Organization "On discrimination in the field of employment and profession", stipulate:

"For the purpose of this Convention the term discrimination includes:

any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies."[10]

As it is mentioned above, the paragraph "a" of this article doesn't stipulate explicitly as a ground of discrimination, gender identity and sexual orientation, but this two causes my be covered by the paragraph "b" of this article, under the stipulation "other distinction".

The principle of non-discrimination is a governing principle in a number of CoE documents. Importantly, the 1996 version of the European Social Charter includes both a right to equal opportunities and equal treatment in matters of employment and occupation, protecting against discrimination on the grounds of sex.[11]

According to the Albania Constitution, *"…any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law"* and further to that, *"…an international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it"*[12]. Referring also to the undersigned international acts, the Albanian state, at the moment of signing has assured that policies and new legislation in the respective field will be comparable from the moment of signing to that of ratification, or will be compared under stipulation of the undersigned act.

Albania as a member state of the Council of Europe should have to take measures for the implementation of point V of the recommendation of the Resolution of Council of Ministers of the Council of Europe CM/REC (2010) 5, where employment issues are handled and stipulates that: "*Member states should ensure the establishment and*

[10] Article 1, ILO Convention "On discrimination in the field of employment and proefession", www.ilo.org

[11] See Article 20 and Article E, in part v of the European Social Charter, **www.conventions.coe.int**

[12] Article 122, of the Albania Republic Constitution, **www.parlament.al**

implementation of appropriate measures which provide effective protection against discrimination on grounds of sexual orientation or gender identity in employment and occupation in the public as well as in the private sector. These measures should cover conditions for access to employment and promotion, dismissals, pay and other working conditions, including the prevention, combating and punishment of harassment and other forms of victimization. Particular attention should be paid to providing effective protection of the right to privacy of transgender individuals in the context of employment, in particular regarding employment applications, to avoid any irrelevant disclosure of their gender history or their former name to the employer and other employees."[13]

Internal legislation in the field of non-discrimination on employment and vocational training.

Albania has an internal legislation, which regulates in details, and complements when is necessary according to the Constitution, any matters stipulated by the international acts regarding the equal treatment and non-discrimination.

The main law which rules the labour relations and the issues related to them, is the Law 7961/1995 "Labor Code of the Republic of Albania" (amended).

In article 9 of the Labor Code (amended), it is prohibited any kinds of discrimination in employment and occupation. The Labor Code[14], provides the definition of discrimination and reasons why it might happen, like gender, race, color of skin, sex, age, religion, political beliefs, nationality, social origin, family relation, physical or mental disability. According to this article *"…the employer is obliged to respect and to protect the personality of employee in labour relations. This personality can be affected if the employee suffers concerns that come as a result of discriminatory actions."*[15]

The afore mentioned reasons, taken out of the article 9 of the Labor Code, does not include the prohibition of discrimination because of sexual orientation or gender identity. Although there are no explicitly expressed legal restrictions in the Labor Code regarding the right to work, its content does not provide for a specific provision that prohibits discrimination because of sexual orientation and gender identity in employment and occupation. Such a gap in labor legislation constitutes a reason that affects the guaranteeing of the right to work of the LGBT community. In this case, the legal deficiency in the particular legislation can give rise to problems for the practical application of the principal of equity before law and the principal of nondiscrimination regarding the right to work, and consequently the law does not fulfill its purpose

[13] Resolution of Council of Ministers of the Council of Europe CM/REC (2010), https://wcd.coe.int/ViewDoc.

[14] Point 2 of Article 9 of Albanian Labour Code, **www.mpcs.gov.al**

[15] Prof.Dr.Kudret Cela "Labour Law", page 139

against discrimination, the discriminating way of behavior is not punished and the responsible Albanian authorities gets embarrassed of its inability to achieve the aims and objectives of the law.

Law no. 10221, dated 4.02.2010 "On the protection against discrimination" is a frame law that regulates the implementation and the principle of equity and it defines of the causes on which bases any persons might be discriminated directly or indirectly. According the law, *"….reasons for discrimination can be connected with gender, race, color of skin, nationality language, gender identity, sexual orientation, political beliefs, religion, economical, educational and social status, pregnancy, family origin, age, family relation, place of living, health situation, physical or mental disability,or any other reason."*[16]

In the Law 10221/2010 is provided that *"It is prohibited the discrimination of any persons concerning the right to employment"*[17], including here person's sexual orientation. According to article 14 of this law, the Council of Ministers, Ministry of Labor, Social Affaires and Equal Opportunities and the Ministry Of Interior, are responsible for taking measures of positive character to combat discrimination regarding the right to work.

The above stipulation of law matches with the stipulations of the Labor Code that according to it *"The Ministry of Labor is the competent administrative authority for the drafting and implementation of legislation and labor policies"*[18], so it is entitle to propose the amendments in the Labour Code relating with this issue.

Law 10221/2010 is a frame law providing for the principles, rules and general measures for protection against discrimination, whereas the other legal acts in power, regulate particularly the discrimination with regard to the right of work, the right of education, the right for access to services etc. As for the above, the special legal regulation that I'm referring to, is law 7961/1995 "Labor Code of the Republic of Albania" (amended)

EU legal instruments on non-discrimination and the approximation of Albanian legislation

In the framework of the Albanian integration process to EU, article 70 on Stabilization-Association Process Albania-EU stipulates the general obligation for the Albanian legislation approximation to that of the EU. According to this article, the parties recognize the importance of the Albanian existing legislation approximation to that of the EU, its effective implementation and Albania will try to make sure that the existing laws and the next legislation will gradually match up with *acquis* of the Community and will be appropriately implemented.

[16] Article 1 of Law no. 10221, dated 4.02.2010 "On the protection against discrimination", www.qpz.gov.al

[17] Article 12, paragraph 1, of Law no. 10221, dated 4.02.2010 "On the protection against discrimination", www.qpz.gov.al

[18] Article 199, of Albanian Labour Code, **www.mpcs.gov.al**

Paragraph 3 of this agreement article, states that this approximation starts from the day the Agreement is signed and will gradually cover all the elements *acquis communautaire*. On the first phase, according to the article 6 of MSA, the approximation will be focused *"…on the main elements of acquis of the internal market as well as on other important fields like competition, intellectual rights, the industrial rights, the commercial rights to property, public procurement, standards and certification, financial services, land and see shipping- specifically highlighting the environmental security and standards and social aspects – the law on the trade companies, accountancy, consumer protection, data protection, health and working insurance and equal opportunities."*[19]

Moreover, the Opinion of the European Commission on Albania in 2010 has emphasized the fact that it has begun the process of approximation of Albanian legislation with the EU acquis communautaire in the field of labor law, equal treatment of women and men and anti-discrimination, but further efforts are necessary for full compliance on these issues. As stated above, given that the Stabilization and Association Agreement between Albania and EU, but also given the European Commission's Opinion that the application of the principle of equal treatment in labor legislation is regarded as an essential element for the approximation of legislation, Albania should increase efforts to take legal initiatives aimed at full compliance with the EU acquis communautaire.

According to EC Treaty[20], one of the fundamental goals of the European Union is the prevention and combating of discrimination based on, among other grounds, religion or belief, disability, age or sexual orientation. Since the Treaty of Amsterdam came into force in 1999, new EC laws were adopted:

- the Employment Equality Directive prohibited discrimination on the basis of sexual orientation, religious belief, age and disability in the area of employment; and
- the Racial Equality Directive prohibited discrimination on the basis of race or ethnicity in the context of employment, but also in accessing the welfare system and social security, and goods and services.

This was a significant expansion of the scope of non-discrimination law under the EU, which recognized that in order to allow individuals to reach their full potential in the employment market, it was also essential to guarantee them equal access to areas such as health, education and housing.

In 2004, the Gender Goods and Services Directive expanded the scope of sex discrimination to the area of goods and services. However, protection on the grounds of sex does not quite match the scope of protection under the Racial Equality Directive, since the Gender Social Security Directive guarantees equal treatment in relation to social security only and not to the broader welfare system, such as social protection and access to healthcare and education.

[19] Article 70 of Stabilization and Association Agreement EU-Albania, **www.mie.gov.al**

[20] Article 13 of Amsterdam Treaty, www.eurotreaties.com/amsterdamtreaty.pdf

The Lisbon Treaty, foresee that *"Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."*[21]

Although sexual orientation, religious belief, disability and age, are only protected grounds in the context of employment, a proposal to extend protection for these grounds to the area of accessing goods and services (known as 'Horizontal Directive') is currently being debated in the EU institutions.

On 2 July 2008, the European Commission proposed a directive that would ban discrimination on the grounds of age, disability, religion or belief and sexual orientation in all areas of EU competence. The European Union currently prohibits discrimination on the grounds of race, religion or belief, disability, age, or sexual orientation in employment and occupation. The EU extends the protection from discrimination on the ground of race alone to the areas of social protection, social advantages, and access to goods and services. The EU also protects from discrimination on the basis of gender in employment and occupation, as well as in access to goods and services.

The proposed Directive, if adopted, will extend protection from discrimination on the grounds of religion or belief, disability, age, or sexual orientation in the areas of social protection, social advantages, and access to goods and services. This Directive would eliminate the hierarchy of rights that currently exists in the EU by giving the listed grounds the same protections guaranteed under the Race Directive.

At the moment, EU law protects people against discrimination based on sexual orientation – as well as age, disability, religion and belief – in the area of employment (Employment Framework Directive 2000/78).

In Article 1 of Directive 2000/78 EC, it is established that the Directive's purpose is to define a general framework for combating discrimination on the basis of religion or belief, disability, age or sexual orientation with regard to employment and occupation, with the aim that Member States apply the principle of equal treatment. The scope of the implementation of this Directive is both the public and private sectors, including public bodies, and is related to:

- conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

[21] Article 19.1 of Lisbon Treaty, www.europa.eu**/EUROPA/ Treaty of Lisbon**

- access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- employment and working conditions, including dismissals and pay;
- membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations."[22]

According to this Directive a person is legally protected across the EU against, for example being refused a job or fired because of his/her sexual orientation, or being harassed by colleagues at work because you are gay or lesbian. However, European legislation does not protect against discrimination based on sexual orientation, age, disability, religion and belief, in other areas of life such access to goods and services (including housing), social protection and social advantages, education and health care. So this means that not everyone in the EU is protected against, homophobic bullying in school, refusal of medical services and treatment to openly LGBT people, refusal to give a double room in a hotel to a same-sex couple, refused access to social security schemes, such as survivors' pensions and financial assistance to carers.

Based on the information above and the provisions of Directive 2000/78EC on "Establishing a general framework for equal treatment in employment and occupation," the Article 9 of the Labor Code, should also include sexual orientation and gender identity, as grounds for which discrimination should be prohibited.

So, based on the above stipulation, the framework Directive has included gender identity and sexual orientation as grounds of non-discrimination, as well the employment and working condition as the filed of its implementation.

Furthermore, in order to guarantee the implementation of the principle of equal treatment, the Directive stipulates that "*Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."*[23]

This explicit determination, through the law, of the party that is obliged to prove that it did not violate the principle of equal treatment (in this case the employer), would guarantee the implementation of this principle in practice, it would clarify the procedures for examining the alleged violation, and would help restore the

[22] Article 3 of Directive 2000/78EC, www.eur-lex.europa.eu/LexUriServ/LexUriServ

[23] Article 10, of Directive 2000/78EC, www.eur-lex.europa.eu/LexUriServ/LexUriServ

right through judicial authorities or other competent bodies, in cases where it may be infringed for persons who claim they have been discriminated (regardless of the cause of discrimination).

At the end, it is important to stress that the legal protection against discrimination based on the different grounds varies from one EU country to another. All Member States have legal rules going beyond what is already required by European law, but discrimination on some grounds (age, disability and sexual orientation) is less covered by national laws than other grounds, or national laws may prohibit discrimination for all the grounds but only in some areas of life. What is important is that there is not minimum applicable standards of non-discrimination across the EU.

Conclusions

At the conclusion of this analysis, I can say that Article 9 of the Labor Code does not guarantee equal treatment of LGBT persons to exercise the right to employment and vocational training.

The law is not in accordance with the constitutional principle of equality of citizens before the law as guaranteed by Article 18 of the Constitution, which stipulates that: "All are equal before the law",

The Labour Code is not in compliance as well as a series of international acts on human rights ratified by the Albanian state, as cited above, including Article 1 of the "Universal Declaration of Human Rights", adopted and declared by the General Assembly in its resolution 217 A of 10 December 1948, which determined that: "all human beings are born free and equal in dignity and rights".

To restore this right of LGBT persons, and in order to approximate the Albanian labour legislation with the EU acquiss communautaire, it is necessary that Law 7961/1995 "Labor Code of the Republic of Albania":

a. to include in paragraph 2 of Article 9 these two grounds "sexual orientation and gender identity" as grounds for discrimination, and

b. at the end of article 9 of Law 7961/1995 of the "Labor Code of the Republic of Albania", should be added a new paragraph in which it will be determined on which side the burden of proof falls, for cases where there has been alleged discrimination is alleged to have been on a person. Paragraph should be formulated in full compliance with the provisions of Article 10 of Directive 2000/78 EC, thus placing the burden of proof on the employer.

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