



ЗАЩИТА ОТ ДИСКРИМИНАЦИЯ В БЪЛГАРИЯ, В ЕВРОПА И В СВЕТА

Сборник доклади

от международна научна конференция,
19-20 април 2024 г., НБУ

ЗАЩИТА ОТ
ДИСКРИМИНАЦИЯ
В БЪЛГАРИЯ, В ЕВРОПА
И В СВЕТА



П о р е д и ц а
ФОРУМ „ЮРИДИЧЕСКИ ИЗСЛЕДВАНИЯ“
Книга трета

S e r i e s
LEGAL RESEARCH FORUM
Book Three

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Сборник доклади
от международна научна конференция,
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Сборник доклади от международна научна конференция,
19–20 април 2024 г., Нов български университет

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П о р е д и ц а
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Поредицата представя резултатите от ежегодните международни и национални научни конференции, организирани от департамент „Право“ на Нов български университет. Всяко издание събира задълбочени изследвания и анализи от водещи учени, практики и млади изследователи, обедини около актуални теми, които отразяват динамиката и предизвикателствата на съвременното правно пространство. Целта на поредицата е да разшири научния дебат и да стимулира развитието в областта на правото, като насърчи обмена на идеи и знания по широк кръг от теоретични и практически въпроси. Изданията се характеризират с висока степен на методологична прецизност и научна обоснованост, което ги прави ценен ресурс както за академичната общност, така и за практикуващите юристи, студенти и всички заинтересовани от развитието на правната мисъл.



S e r i e s
LEGAL RESEARCH FORUM
Book Three

This series presents the results of the annual international and national scientific conferences organized by the Department of Law at New Bulgarian University. Each edition gathers in-depth research and analyses from leading scholars, practitioners, and young researchers, focused on relevant topics that reflect the dynamics and challenges of the contemporary legal landscape.

The purpose of this series is to expand the scholarly debate and foster progress in the field of law by encouraging the exchange of ideas and knowledge on a broad array of theoretical and practical issues. The volumes are distinguished by a high degree of methodological precision and scientific rigor, making them a valuable resource for the academic community, practicing lawyers, students, and all those interested in the advancement of legal thought.

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УВОДНИ ДУМИ

На 19 и 20 април 2024 г. в Нов български университет, София, се проведе международната научна конференция „Защита от дискриминация в България, в Европа и в света“. Конференцията беше организирана по повод 20-годишнината от влизането в сила на българския Закон за защита от дискриминация. Научната конференция се проведе в хибриден формат на участие (присъствено и онлайн). В нея участваха с научни доклади 86 участници: от България – 54-ма и от други държави – 32-ма. Те представляваха 30 университета и научни организации (10 от България и 20 от други държави), както и представители на Комисията за защита от дискриминация, адвокати, съдии. Участниците бяха от 14 държави (България и други държави). Много от българските и чуждестранните участници са практикуващи адвокати в своите страни, както и членове на национални и международни неправителствени организации в областта на правото. В научната конференция взеха участие и 6-ма докторанти (от България – 3-ма, вкл. от Нов български университет; от други държави – 3-ма), както и студенти – 3-ма (от България – 2-ма от Нов български университет; от други държави – 1 от Република Беларус). Научната конференция беше замислена и проведена като интердисциплинарна, като се включиха с доклади представители на различни научни области – право (различни правни отрасли), политология, история, психология, социология, философия. Всеки участник в конференцията получи сертификат за участие и научен принос.

Научната конференция беше организирана от департамент „Право“ на Нов български университет от Организационен комитет в състав: проф. д-р Екатерина Михайлова – председател; членове: доц. Ивайло Стайков, д.ю.н., доц. д-р Деяна Марчева, доц. д-р Катерина Йочева, доц. д-р Ралица Костадинова, доц. д-р Силвия Цонева, гл. ас. д-р Мария Чочова.

За целите на рецензирането на подадените заявки за участие и впоследствие на представените научни доклади за публикуване беше сформиран Международен научен и рецензентски комитет, в който се включиха: проф. д-р Благой Видин, бивш ръководител на департамент „Право“, Нов

български университет, и бивш член на Комисията за защита от дискриминация, България; проф. Екатерина Матеева, д.ю.н., Юридически факултет, СУ „Св. Климент Охридски“ и департамент „Право“, Нов български университет, България; проф. Малина Новкиришка, д.ю.н., Юридически факултет, СУ „Св. Климент Охридски“ и департамент „Право“, Нов български университет, България; проф. д-р Красимира Средкова, председател на Българска асоциация по трудово право и обществено осигуряване, България; проф. д-р Мартин Белов, Юридически факултет, СУ „Св. Климент Охридски“, България; Professor Sacha Garben, PhD, College of Europe, European Legal Studies Department, Bruges, Belgium; Professor Emilia Mišćenić, PhD, S.J.D. (KFU Graz), LL.M. (Saarland), Institute of European and Private International Law, University of Rijeka, Faculty of Law, Croatia; Professor Ljubinka Kovačević, PhD, University of Belgrade, Faculty of Law, Deputy Head of the Department of Public Law, Serbia; Professor Aleksandar Ristovski, PhD, Ss. Cyril and Methodius University of Skopje, Faculty of Law „Justinian I“, North Macedonia; Professor Țop Dănuți Cristin, PhD, Valahia University of Târgoviste, Faculty of Law and Administrative Sciences, Institute of Legal Research of the Romanian Academy, Romania; Professor María Teresa Velasco Portero, PhD, Loyola University Andalusia, Department of Law, Spain; Professor Nikita Lyutov, D. Sc., Maqsut Narikbayev University KAZGUU, Astana, Kazakhstan; Associate Professor Olena Rym, PhD, Ivan Franko National University of Lviv, Department of Social Law, Ukraine; Associate Professor Hisham Jadallah Mansour Shakhathreh, PhD, Jadara University, Faculty of Law, Jordan.

При откриването на научната конференция приветствия към участниците поднесоха: проф. д-р Веселин Методиев, председател на Настоятелството на Нов български университет; доц. д-р Ана Джумалиева, председател на Комисията за защита от дискриминация; проф. д-р Веселин Вучков, ръководител на департамент „Право“ на Нов български университет; проф. д-р Красимира Средкова, председател на Българска асоциация по трудово право и обществено осигуряване.

Освен самите представени научни доклади голяма ценност имаха дискусиите в края на всеки панел, които бяха в дух на академизъм и свободен дебат. Научната конференция създаде нови контакти между участниците, както и, вярвам, нови приятелства. Особена благодарност изказвам на чуждестранните участници в конференция, които споделиха теоретични тези и практически опит относно прилагането на антидискриминационното законодателство в техните държави. На високо ниво бяха и представените научни доклади от студентите и докторантите.

Изказвам специална благодарност на колегите от Организационния комитет, които бяха и модератори на отделните тематични панели, както и

на членовете на Международния научен и рецензентски комитет на научната конференция за техния принос в подготовката и провеждането на научния форум.

Настоящият сборник съдържа част от докладите, изнесени на международната научна конференция. За съжаление, не всички участници в конференцията представиха за публикуване своите доклади. Сборникът съдържа 40 научни публикации – студии и статии. Чуждестранните автори са 23-ма от 10 държави (някои от докладите са в съавторство). Българските автори са 25-ма от 10 университета и Българската академия на науките.

Публикациите в сборника са групирани в пет тематични раздела: Дискриминацията в интердисциплинарния диалог на хуманитарните и социалните науки; Антидискриминационното право в света; Трудовоправни аспекти на дискриминацията в Европа; Публичноправни и наказателноправни аспекти на дискриминацията; Трудовоправни и осигурителноправни аспекти на дискриминацията.

Всички представени за публикуване научни изследвания са написани на високо научно ниво, с убедителна аргументация на научната теза, с подчертана практическа насоченост на направените изводи. Не само интердисциплинарността, но и обстоятелството, че много от авторите са чужденци, придават голяма научна и практическа стойност на сборника. Читателят ще има възможност да се запознае не само с актуалните проблеми при защитата от дискриминация в България, но и от научните въпроси в тази проблематика, които се поставят и разискват в някои чужди национални законодателства.

Издаването на настоящия сборник е не само изпълнение на проекта към Централния фонд за стратегическо развитие в Нов български университет, но и признателност към представителния Международен научен и рецензентски комитет на международната научна конференция от 14 члена, както и към многобройните участници, които представиха за публикуване своите научни доклади.

Сборникът с доклади от международната научна конференция е съществен научен принос на авторите на отделните публикации в особено актуалната не само в България, а и в Европа и в света тема за защитата от дискриминация във всички области на социалната действителност.

доц. Ивайло Стайков, д.ю.н.

PREFACE

On 19 and 20 April 2024 the International Scientific Conference “Protection against Discrimination in Bulgaria, Europe and the World” took place at the New Bulgarian University, Sofia. The conference was organized in celebration of the 20th anniversary of the entry into force of the Bulgarian Law on Protection against Discrimination. The scientific conference was held in a hybrid format (in-person and online). It was attended by 86 participants: 54 from Bulgaria and 32 from other countries. Participants represented 30 universities and scientific organizations (10 from Bulgaria and 20 from other countries), as well as the Commission for Protection against Discrimination, lawyers and a judge. Representatives from 14 countries (Bulgaria and other countries) took part. Many of the Bulgarian and foreign participants were practicing lawyers, as well as members of national and international NGOs in the field of law. The scientific conference was also attended by 6 PhD students (3 from Bulgaria, including from New Bulgarian University; 3 from other countries), as well as students – 3 (from Bulgaria – 2 students of New Bulgarian University; from other countries – 1 from the Republic of Belarus). The scientific conference was conceived and conducted as an interdisciplinary one, with the participation of representatives of different scientific fields – law (various branches of law), political science, history, psychology, sociology, philosophy. Each conference participant received a certificate of participation and scientific contribution.

The scientific conference was organized by the Department of Law of New Bulgarian University by the Organizing Committee composed of: Assoc. prof. Ivaylo Staykov, D.J.S., Assoc. Prof. Dr. Deyana Marcheva, Assoc. Prof. Dr. Katerina Yocheva, Assoc. Prof. Dr. Ralitsa Kostadinova, Assoc. Prof. Dr. Sylvia Tsoneva, Asist. Dr. Maria Chochova.

To review the submitted applications for participation and subsequently the submitted scientific papers for publication, an International Scientific and Review Committee was formed, which included: Prof. Dr. Blagoy Vidin, former Head of the Department of Law, New Bulgarian University, and former member of the Commission for Protection from Discrimination, Prof. Ekaterina Mateeva, D.J.S., Faculty of Law, Sofia University “St. Kliment Ohridski”, Department of

Law, New Bulgarian University, Bulgaria; Prof. Malina Novkirishka, D.J.S., Faculty of Law, Sofia University “Sv. Kliment Ohridski” and Department of Law, New Bulgarian University, Bulgaria; Prof. Dr. Krasimira Sredkova, President of the Bulgarian Association of Labour Law and Social Insurance, Bulgaria; Prof. Dr. Martin Belov, Faculty of Law, Sofia University “St. Kliment Ohridski” Bulgaria, Professor Sacha Garben, PhD, College of Europe, European Legal Studies Department, Bruges, Belgium; Professor Emilia Mišćenić, PhD, S.J.D. (KFU Graz), LL.M. (Saarland), Institute of European and Private International Law, University of Rijeka, Faculty of Law, Croatia; Professor Ljubinka Kovačević, PhD, University of Belgrade, Faculty of Law, Deputy Head of the Department of Public Law, Serbia; Professor Aleksandar Ristovski, PhD, Ss. Cyril and Methodius University of Skopje, Faculty of Law „Justinian I“, North Macedonia; Professor Țop Dănuți Cristin, PhD, Valahia University of Târgoviste, Faculty of Law and Administrative Sciences, Institute of Legal Research of the Romanian Academy, Romania; Professor María Teresa Velasco Portero, PhD, Loyola University Andalusia, Department of Law, Spain; Professor Nikita Lyutov, D. Sc., Maqsut Narikbayev University KAZGUU, Astana, Kazakhstan; Associate Professor Olena Rym, PhD, Ivan Franko National University of Lviv, Department of Social Law, Ukraine; Associate Professor Hisham Jadallah Mansour Shakhathreh, PhD, Jadara University, Faculty of Law, Jordan.

The scientific conference was opened with welcoming addresses to the participants delivered by Prof. Dr. Veselin Metodiev, Chairman of the Board of Trustees of New Bulgarian University; Assoc. Prof. Dr. Ana Dzhumalieva, Chairman of the Commission for Protection against Discrimination; Prof. Dr. Veselin Vuchkov, Head of the Department of Law of New Bulgarian University; Prof. Dr. Krasimira Sredkova, President of the Bulgarian Association of Labour Law and Social Insurance.

Apart from the scientific papers themselves, the discussions at the end of each panel were highly valuable, fostering academic atmosphere and free debate. The scientific conference created new contacts among the participants, and I believe, new friendships. I am particularly grateful to the foreign conference participants, who shared theoretical knowledge and practical experience on the implementation of anti-discrimination legislation in their respective countries. The scientific papers presented by the undergraduate and PhD students were also of high quality.

I would like to express my special gratitude to my colleagues from the Organizing Committee, who were also moderators of the various thematic panels, as well as to the members of the International Scientific and Review Committee

of the scientific conference for their contribution to the preparation and execution of the scientific forum.

This collection contains some of the papers presented at the international scientific conference. Unfortunately, not all participants in the conference submitted their papers for publication. The collection contains 40 scientific publications – studies and articles. There are 23 international authors from 10 countries (some of the papers are co-authored). The Bulgarian contributors include 25 authors from 10 universities and the Bulgarian Academy of Sciences.

The publications in the collection are organized in five thematic sections: Discrimination in the interdisciplinary dialogue of the humanities and social sciences; Anti-discrimination law in the world; Labour law aspects of discrimination in Europe; Public and criminal law aspects of discrimination; Labour and social security law aspects of discrimination. All scientific papers submitted for publication demonstrate high scientific standard, well-founded scientific arguments and strong practical orientation of the conclusions. Besides its interdisciplinary approach, the fact that many of the authors come from other countries adds significant scientific and practical value to the collection. Readers will not only have the opportunity to get acquainted with the current challenges of protection against discrimination in Bulgaria but will also gain insights into scientific debates and issues, which are raised and debated in other national legislations.

The publication of this collection is not only a fulfillment of the project funded by the Central Fund for Strategic Development at New Bulgarian University, but is also a tribute to the distinguished 14-member International Scientific and Review Committee of the International Scientific Conference, as well as to the numerous participants who submitted their scientific papers for publication.

The collection of papers from the international scientific conference represents a significant scientific contribution of the authors of the publications to the highly relevant not only in Bulgaria, but also in Europe and the world, topic of protection against discrimination in all areas of social reality.

Assoc. Prof. Ivaylo Staykov, D.J.S.

Translated by Assoc. Prof. Dr. Sylvia Tsoneva

ДИСКРИМИНАЦИЯТА
В ИНТЕРДИСЦИПЛИНАРНИЯ
ДИАЛОГ
НА ХУМАНИТАРНИТЕ И
СОЦИАЛНИТЕ НАУКИ



DIVORTIUM EX LEGE.

Разводът по закон.

Няколко думи за семейния статус на жените в римската архаика

Константин Танев*

Бракът се институционализира в социума в ранното предградско развитие в Лациум чрез родовите религиозни ритуали поради разслоението им на аристокрацията (патриции) и множество (тълпа или плебс). Ранните общности не познават развода. Той възниква далеч след началото на Републиката при нарушения от страна на съпругата като прерогатив на мъжа. Първоначално имал изключително ритуално-религиозен характер. Проследяват се исторически и нормативни сведения за *divortium* и *repudium* от Плутарх, Дионисий Халикарнаски, Авъл Гелий, Цицерон, Салвий Юлиан, Гай, Юлий Павел и Доротей в светлината на проучвания от XX и XXI в. Краят на Републиката се означава с концепцията за автономността на лицата и съответно възниква и разводът по взаимно съгласие. Установява се, че в *divortium ex lege* *lex* не се използва като закон, а като родов обичай.

Ключови думи: *Matrimonium, Divortium ex lege, Repudium, Adulterium, Stuprum, Dolus malus*



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DIVORTIUM EX LEGE.
Divorce by law.
Some words on the marital status of women
in roman archaic

Konstantin Tanev

Marriage as a social institution settled during the early preurban development in Latium through the religious rituals of the clan because of its division into the aristocracy (patricians) and the multitude (mobs or plebs). Early communities did not know about divorce, as it appeared long after the beginning of the Republic in cases of a wife's mistaken behaviour. It is the prerogative of the husband. Originally, it had an exclusively ritual, religious character. The study focuses on historical and normative accounts of *divortium* and *repudium* in Plutarch, Dionysius of Halicarnassus, Aulus Gellius, Cicero, Salvius Julianus, Gaius, Julius Paulus, and Dorotheus, in the light of XX and XXI investigations. The concept of personal autonomy, implemented at the end of the Republic, gives momentum to divorce by mutual consent. The results show the *Divortium ex lege* not as the implementation of legislative enactment but rather as a customary projection.

Keywords: *Matrimonium, Divortium ex lege, Repudium, Adulterium, Stuprum, Dolus malus*



I

1. Бракът като социален и правен институт варира в различните епохи. Строго формален в Архаиката, в края на Републиката и началото на Империята, време на икономически и идеологически промени, той се преоформя заради обособяването на личността като автономен елемент на правната среда и губи ранната си строгост. Социумът между VI и III в. се структурира около родовете, фокус на власт и права върху достъпните ресурси и политическата функционалност на основата на култовите практики на урбанистичните центрове (т. нар. „полисна религия“, *religion civique*¹). Древният Рим се отличава с „бароковата пъстрота“² на етническото си многообразие и характерна нормативна вариативност относно брака. Тя е инструментът за формирането на аристокрациите и концентрирането у тях на поземлените ресурси³. В Древния Лациум битът е предимно земеделски и скотовъден. Земята, обект на господство на родовете, остава извън обращение, а достъпът до нея е само за „стопанствата“ (*familiae*) с прерогативи върху „родовата“ (*ager gentilicus*) или „римската земя“ (*a. romanus*). Размяната засяга продуктите от обработката ѝ, но тя е прехвърлима само *mortis causa*. Бракът въвежда т. нар. „класова ендогамия“⁴ и е насочен към *manus maritalis* или *patria potestas*. Това се свързва именно с наследяване ползването на поземлените участъци от подвластните. В ранния ритуал съпругата доброволно се подчинява на съпруга чрез манципация. Тя го „закупува“ и в отговор, той нея, т. нар. „взаимно купуване“ (*coemptio*, Gai. 2.113: ...*emit eum <mulier et is> mulierem*⁵), което означава, че те се „съгласяват за попа-

¹ Cfr. J. Scheid, 2013. *Les Dieux, l'État et l'individu: Réflexions sur la religion civique à Rome*, Paris, Éditions du Seuil. C. Ando (transl., ed.), 2016. Philadelphia, University of Pennsylvania Press.

² Cfr. Scheid, 2013, 73 и сл.

³ Лациалните народи имат селски бит и общи правни обичаи (земеделци или скотовъдци, „селячество“ – *Bauerntum*), а поземлените ресурси са с особен статус. Cfr. M. Kaser, 1955. *Das römische Privatrecht, I, Das altrömische, das vorklassische und klassische Recht*, München, Beck, 15.

⁴ „Класовата ендогамия“ била преодоляна относително късно от римляните чак във времената на Цицерон и „неравните“ бракове били все пак приемани, но като „безчестни“. Cfr. Liv. 39.19.5: (*utique Feceniae Hispalae datio, deminutio, gentis enuptio, tutoris optio item esset, quasi ei vir testamento dedisset; utique ei ingenuo nubere liceret, neu quid ei qui eam duxisset ob id fraudi ignominiaeve esset*) и самият Цицерон (Cic. Sest. 52.110; Phil. 2.2.3, 3.6.11, 13.10.23; Att. 16.11.1). Бракът между *liberti* и *ingenui*, cfr. G. Franciosi, 1975. *Clan gentilizio e strutture monogamiche. Contributo alla storia della famiglia romana (Corso di diritto romano)*, I, Napoli, Jovene, 47 et passim, заедно с по-старата библиография.

⁵ Gai. 2.113. *Coemptione uero in manum conueniunt per mancipationem, id est per quandam imaginariam uenditionem: nam adhibitis non minus quam v testibus ciuibus Romanis puberibus, item libripende, emit eum <mulier et is> mulierem, cuius in manum conuenit.*

дане под мануса“ (...in manum conueniunt per mancipationem). Съпругът въз основа на договор преди брака с фамилията ѝ получава достъп до територии от нейния pater familias.

2. Бракът в Архаиката има специфична структура, чието нарушаване се приемало само в изключителни случаи. Не са познати исторически примери от епохата, свързани с прекратяването му, вероятно поради значението му и като социален институт, и като ритуал (елемент от религиозните представи на формиращата се аристокрация). Той е основанието, „властта“ (potestas) на pater familias да бъде пренесена mortis causa чрез т. нар. heredium към неговите наследници и изключва външните за класата лица (включително незаконни деца), като избягва т. нар. „смесване на кръвта“ (turbatio sanguinis⁶). Всъщност гаранцията за правилното осъществяване на правоприемството е „достойнството“ на майката (castitas, pudor) и съответно всяка простъпка, която поставя под съмнение произхода на децата от бащата, трябва да доведе до прекратяването на съюза. Това се осъществява с изключително формални способности.

II

1. В класическия период при променената социална и икономическа среда „разводът“ (divortium) се превръща в неформален акт, като се демонстрира отпадането на affectio maritalis. При conventio in manu mariti са били необходими съответно и обратните актове на тези, довели до съюза и подчиняването на съпругата, diffareatio и remancipatio. След разделянето се извършва и едностранна декларация от съпруга, поискал развода – т. нар. repudium. Това става с писмен акт, с устна декларация, с „писмо“ (per epistulam), подписвано от петима свидетели, или чрез „пратеник“ (nuntius). Съществувал и формален „развод“, извършван „при наличието на точно определени основания“ (divortium ex iusta causa). Традиционното приложно поле на repudium⁷ се

Чрез коемпция попадат под властта чрез манципация, т. е. чрез имажинерна продажба. След като идвали не по-малко от пет свидетели, пълнолетни римски граждани, също и везномерец, купувала го е жената и той жената, под чието господство попадала.

⁶ D. 48.5.6.1 1 Pap. l. 1 de adult. Lex stuprum et adulterium promiscui et kataxrystikwteron appellat. Sed proprie adulterium in nupta committitur, propter partum ex altero conceptum composito nomine: stuprum vero in virginem viduamve committitur, quod Graeci fvoran appellant.

⁷ P. E. Corbett, 1930. The Roman Law of Marriage, Oxford, Calderon, 211–218; O. Robleda, 1982. Il divorzio in Roma prima di Costantino, ANRW, II 14, 347–390; P. Giunti, 2004. Consors vitae, matrimonio e ripudio in Roma antica, Milano, Giuffrè.

концентрира в брака *cum manu*, а не *sine manu*⁸, при което вероятно е бил изключителен прерогатив на мъжа. В края на Античността отново се въвеждат ограничения в това отношение⁹.

2. Във времената на младата Република „изгонването“ (*repudium*) се допуска само в случаите на сериозни простъпки¹⁰, които увреждат цялостния ред, т.нар. *rax divina*, като компрометират задълженията към боговете и застрашават благоденствието на рода. В епохата самоопределението е чрез общността, видно от редица антропологически данни, както е при специалната курия на глупците в едноименния „празник на глупците“ (*Feriae stultorum*), честван след „деня на овните“, Форнакалия (*Fornacalia*)¹¹.

⁸ G. Mastroianni, *Matronae e repudium nell'ultimo secolo di Roma repubblicana*, F. Cenerini, e F. Rohr Vio (a cura di), *Matronae in domo et in re publica agentes – spazi e occasioni dell'azione femminile nel mondo romano tra tarda repubblica e primo impero*, Trieste, EUT, 2016, 65–87.

⁹ Наред с Плутарх (Plut. Rom. 22.3) и С. 8.38.2 – Alexander A. Menophilo) показва свободно сключване и разтрогване на брака в Класиката: *Libera matrimonia esse antiquitus placuit. Ideoque pacta, ne liceret divertere, non valere et stipulationes, quibus poenae inrogarentur ei qui divortium fecisset, ratas non haberi constat. PP. iii non. Febr. Maximo ii et Aeliano cons.* – От Александър Август до Менофил. Било е прието от незапомнени времена, че бракът е свободен. Следователно е очевидно, че всеки пакт, който изключва развода или стипулация за налагане парично наказание на този, който се е развел не може да бъде потвърдена. (2 февруари 223 г.). Cfr. J. Urbanik, *Dissolubility and Indissolubility of Marriage in the Greek and Roman Tradition*, *Mater Familias. Z. Beneincasa*, J. Urbanik (a cura di) P. Niczyporuk, M. Nowak (collaborazione). AA. VV. Scritti per Maria Zabłocka. *The Journal of Touristic Papyrology*, Supplement 29 (2016), 1039 – 1068, 1042, 1043.

¹⁰ Допустимо е само при тежки простъпки на жената, наказвани със смърт. Това и редките случаи на развод свидетелства за минималната възможност за прекратяването на брака в периода, Cfr. Robleda, 1982, 364.

¹¹ „Празникът на глупците“ (*Feriae stultorum*), празненство, свързвано с предходния „празник на овена“ (*fornacalia*) или на бог Квирин, на 17-ти февруари. Тогава по курии се провеждали „банкети“ (*convivia*). По-късно тези, най-често плебеи, които отсъствали, защото били заети или не помнели към кои *curiae* принадлежали (глупците), участвали в отделно събитие с това име. Cfr. L.L. VI 13 *Quirinalia a Quirino*, quod <e>i deo feriae et eorum hominum, qui Fornacalibus suis non fuerunt feriat; Festus, 304 Lindsay = 254 Morel *Quirinalia: idem stultorum feriae appellantur quod qui d<i>em suorum fornacalium sacrorum †cognominant † eo potissimum rem divinam faciunt*, 418 Lindsay = 317 Morel s.v. *Stultorum feriae: ... quod eo die omnes sacrificant i qui sollemni die aut non potuerunt rem divinam facere aut ignoraverunt ...* Fornacalium ... commissumque ... more at ... quibus p<ermittebantur post feriae ferari>; Paulus, 419 Lindsay = 316 Morel s.v. *Stultorum feriae: ... quod eo die sacrificant hi qui sollemni die aut non poterunt rem divinam facere aut ignoraverunt*; Plut. Ait. Rom. 89 = 285d *Διὰ τὰ Κυρινάλια μωρῶν ἑορτὴν ὀνομάζουσιν; ἥ ὅτι τὴν ἡμέραν ταύτην ἀποδεδώκεσαν, ὡς Ἰόβας φησί, τοῖς τὰς αὐτῶν ἀγνοοῦσιν; ἥ τοῖς μὴ θύσασιν, ὥσπερ οἱ λοιποὶ, κατὰ φυλάς ἐν τοῖς Φουρνικαλίους δι' ἀσχολίαν ἢ ἀποδημίαν ἢ ἀγνοίαν ἐδόθη τῇ ἡμέρᾳ ταύτῃ τὴν ἑορτὴν*

III

1. Често се посочва, че според разказите на Дионисий Халикарнаски, Валерий Максим¹² и Авъл Гелий исторически първият случай на развод при лациалните народи е на Карвилий Руга през 230 г. пр. Хр. Той освободил жена си, защото била бездетна¹³, въпреки че все още пазел чувствата си към нея. Освен него са налице сведения за по-ранен случай на изгонване, този на Аний от 307 – 306 г.¹⁴ Авъл Гелий (Gell. N.A. 4.3.2¹⁵) посочва, че при Карвилиевия развод са въведени *cautiones rei uxoriae*, от което той се приема за първия случай на развод. Важна е защитата на вещите на жената. *Cautiones r. u.* се основавали на стипулация, докато *actiones r. u.*¹⁶ освен, че са много по-късни (около 200 г. пр. Хр.), като преторска защита те дават право на съдията да определи стойността на вещите по справедливост. Съответно при *repudium* излизат два основни въпроса, очистителното наказание на жената и връщането на вещите ѝ.

ἐκεῖνην ἀποαβεῖν. Cfr. M. Robinson. Festivals, Fools and the Fasti: The Quirinalia and the Feriae Stultorum (Ovid, Fast. II 475–532). *Aevum Antiquum* N.S.3, 2003, pp. 609–621.

¹² Val. Max. II 9, 2.

¹³ В Лациум липсвал *divortium* до някой си Карвилий (230 пр. Хр.) (Gell. 4.3.1 *Quod nullae fuerunt rei uxoriae actiones in urbe Roma ante Carvilianum divortium : adque inibi quid est pellex : quaequae eius vocabuli ratio est*). Cic. Sen. 4, 11; Liv. 23, 22, 4; Val. Max. 2.1.4 *Repudium inter uxorem et uirum a condita urbe usque ad centesimum et quinquagesimum annum nullum intercessit. primus autem Sp. Caruilius uxorem sterilitatis causa dimisit. qui, quamquam tolerabili ratione motus uidebatur, reprehensione tamen non caruit, quia ne cupiditatem quidem liberorum coniugali fidei praeponi debuisse arbitrabantur.*; Gell. 4, 3, 2. Cfr. A. Jacobs, , *Carvilius Ruga v Uxor : a famous Roman divorcee*, Southern African Society of Legal Historians, *A Journal of Legal History*, 15, 2, (2009), 92–111; A. Watson. *The Divorce of Carvilius Ruga*. *Tijdschrift voor Rechtsgeschiedenis*, 38 (1965), 38–50. Карвилий се заклеял пред цензорите, че сключва брак с оглед раждането на деца. Ана Тарвацка свързва това с насърчаването раждаемостта. Тенденция, характерна за магистратурата, без да е едно абсолютно право. A. Tarwacka, *Authority in the Family Under the Roman Law*, J. Słyk, M. Wileczek-Karczewska (ed.), AA. VV. *Parental Authority. Cross-Disciplinary Analysis of a Legal Institution*. Vol. 1. *Parental Authority from a Historical Perspective*, Kraków, AWS, 2023, 15, 16.

¹⁴ Cfr. Watson, 1965, 25–26, n. 8, като се позовава на Val. Max. 2.9.2 и Liv. 9.43.25.

¹⁵ Servius quoque Sulpicius in libro, quem composuit De Dotibus, tum primum *cautiones rei uxoriae* necessarias esse visas scripsit, cum Spurius Carvilius, cui Ruga cognomentum fuit, vir nobilis, *divortium cum uxore fecit, quia liberi ex ea corporis vitio non gignerentur, anno urbis conditae quingentesimo vicesimo tertio* M. Atilio, P. Valerio consulibus. Atque is Carvilius traditur uxorem quam dimisit egregie dilexisse carissimamque morum eius gratia habuisse, set iurisiurandi religionem animo atque amoris praeveruisse quod iurare a censoribus coactus erat, uxorem se liberum quaerendum gratia habiturum.

¹⁶ M. Kaser, und K. Hackl, 1996, *Römische Zivilprozess*, München, Beck, 318–319.

Против идеята, че Карвилиевият развод е първият в Лациум, стои Цицероновото свидетелство за XII-те таблици (Cic. Phil. 2.69¹⁷). Там мъжът заповядва на жена си да върне ключовете и да си вземе вещите (SUAS RES SIBI HABERE IUSSIT CLAVES ADEMIT, exegit), но определянето на децемвиралната норма зависи от мястото на запетаята, след *tabulis* или след *iussit*¹⁸.

Cic. Phil. 2.69 ...*illam suam suas res sibi habere iussit, ex duodecim tabulis clavis ademit, exegit. quam porro spectatus civis, quam probatus cuius ex omni vita nihil est honestius quam quod cum mima fecit divortium.*

В първия случай, „...*iussit ex duodecim tabulis, ...*“, се разбира, че все пак мъжът заповядва вземането на вещите на основание на Децемвиралната норма и чак след това ѝ взема ключовете. Докато второто четене, „... *illam suam suas res sibi habere iussit, ex duodecim tabulis clavis ademit...*“, по-често приемано днес, изключва такова разпореждане в IV-та таблица. Той ѝ нарежда да си вземе нещата и отделно, по Таблиците, ѝ взема ключовете, което е формалният акт.

Исторически уредбата постепенно засилва позицията на съпругата при прекратяването на брака и създава за нея по-надеждни възможности да възстанови вещите си. Нормативната основа за брака в неговите изконни форми има ритуално значение, тъй като първоначално родът, а впоследствие и фамилията, притежават самостоятелен религиозен идентитет. Доколкото ранните семейни съюзи възпроизвеждат родовите аристокрации, съществува ясно определен формализъм за изграждането и прекратяването на брачния съюз, който постепенно губи своето значение. Във времената на Август, когато латинската култура и обичаи се налагат окончателно на Апенините, протича процес на повторна формализация на отношенията. Тя всъщност потиска практиките на нелатинските общности.

2. Аргумент за съществуването на защита на имуществото на съпругата преди 230 г. е известният разказ на Плутарх за Закона на Ромул за развода (Plut. Rom. 22.3).

Ромул също обявил закони, сред тях имало много строг, който не разрешавал на жената да напусне съпруга си, но позволявал на мъжа

¹⁷ Tab. IV.3. Girard, *Illam suam SUAS RES SIBI HABERE IUSSIT CLAVES ADEMIT, exegit. Quam porro spectatus civis, quam probatus, cuius ex omni vita nihil est honestius quam quod mima fecit divortium* (Cic., phil. 2.28.69), Cfr. P. F. Girard, et F. Senn, 1977. *Les lois des Romains*, Napoli, 22–73; Crawford, <<<repudium mittito.>>> (Cic., phil. 2.69; Gai., 3 ad XII tab., D. 48.5.44), Cfr. M. H. Crawford, 1996. *Roman Statutes*, II, London, 555 – 721, n. 40. Става дума за следния израз: „нареждал да си вземе вещите и вземал ключовете“. Според изданието на Крауфорд вероятно в Закона са се съдържали само думи, свързани с репудиума: „съобщавал за репудиума“, но не и формулата за вещите и ключовете, която пък според Жирар била част от тяхното съдържание.

¹⁸ Cfr. Watson, 1965, 27; P. E. Corbett, *The Augustan Divorce*, L. Q. Rev. 45, 178, 1929, 218f.

да се разведе с жена си заради отравяне на децата или за кражба на ключовете и прелюбодеяние, разпоредено било, че ако някой изгони жена си заради друга причина, половината от неговото имущество ще принадлежи на жена му, а другата половина ще се отреди на Деметра, който и да освободи жена, трябва да направи приношение на подземните богове¹⁹.

Ромул свежда основанията в съобщението за *repudium* до три: „умишлено абортиране“ (ἐπί φαρμακεία τέκνων), буквално „отровителство на децата“; употребата на „чисто вино“ (*temetum*), изрично забранено на жените (*caerent temeto omnes mulieres*²⁰); свързаната с това „кражба на ключовете от избата“ (κλειδῶν ὑποβολῇ) и „прелюбодеянието“ (μοιχευθεῖσαν²¹). Ако мъжът я „гони поради друго“ (δ' ἄλλως τις ἀποπέμψαιτο), имуществото му се разполюва между жената и съкровището на Деметра/Церера. Освен това при репудиум винаги се прави очистителна жертва на подземните божества. Дионисий Халикарнаски (Dion. Hal. A. R. 2.25.6) потвърждава основанията за наказание.

[6] други престъпления били отсъждани по нейните отношения заедно с нейния съпруг, между тях било прелюбодеянието или ако се установявало, че тя е пила вино — нещо, което гърците щели да разглеждат като най-лекото от всички нарушения. Ромул им разрешавал да наказват и двете деяния със смърт като най-тежките нарушения, за които жените могли да са виновни, тъй като той го разглеждал като безразсъдна глупост, а пиянството като източник на прелюбодеянието²².

Прелюбодеянието и употребата на вино са най-тежкото, което жената може да направи, основание за смъртното ѝ наказание според разпоредбите на Ромул. Тук акцентът е върху наказанието (налагано от бащиното ѝ семейство с участието на съпруга). За разлика от Ромул, при гърците пиенето

¹⁹ Plut. Rom. 22.3 ἔθηκε δὲ καὶ νόμους τινάς, ὧν σφοδρὸς μὲν ἐστὶν ὁ γυναικὶ μὴ διδοῦς ἀπολείπειν ἄνδρα, γυναῖκα δὲ διδοῦς ἐκβάλλειν ἐπὶ φαρμακεία τέκνων ἢ κλειδῶν ὑποβολῇ καὶ μοιχευθεῖσαν· εἰ δ' ἄλλως τις ἀποπέμψαιτο, τῆς οὐσίας αὐτοῦ τὸ μὲν τῆς γυναικὸς εἶναι, τὸ δὲ τῆς Δήμητρος ἱερὸν κελεύων· τὸν δ' ἀποδόμενον γυναῖκα θύεσθαι χθονίοις θεοῖς.

²⁰ Cfr. Cic. De re publica, 46.6.6.

²¹ P. Giunti, 1990. Adulterio e leggi regie. Un reato fra storia e propaganda, Milano, Giuffrè.

²² Dion. Hal. A. R. 2.25.6: ἀμαρτάνουσα δὲ τι δικαστὴν τὸν ἀδικούμενον ἐλάμβανε καὶ τοῦ μεγέθους τῆς τιμωρίας κύριον. ταῦτα δὲ οἱ συγγενεῖς μετὰ τοῦ ἀνδρὸς ἐδίκαζον· ἐν οἷς ἦν φθορὰ σώματος καί, ὁ πάντων ἐλάχιστον ἀμαρτημάτων Ἑλλήσι δόξειεν ἂν ὑπάρχειν, εἰ τις οἶνον εὐρεθείη πιοῦσα γυνή. ἀμφοτέρω γὰρ ταῦτα θανάτῳ ζημιοῦν συνεχώρησεν ὁ Ῥωμύλος, ὡς ἀμαρτημάτων γυναικείων αἰσχιστα, φθορὰν μὲν ἀπονοίας ἀρχὴν νομίσας, μέθην δὲ φθορᾶς.

на вино било последно в реда на нарушенията. В Рим то било причина за прелюбодеянието, като и двете са крайна глупост²³.

Неминуемият *gerudium* прекъсва връзката със съпруга и с неговото семейство, и поставя жената извън тяхната власт. Важен е начинът, по-който Плутарх (ок. 46 – сл. 119 г.) и Дионисий (60 – 7 г. сл. Хр.) характеризират закона на Ромул. Особено за Плутарх той е „тежък“ (σφοδρὸς), т.е. несправедлив, като не разрешава на жената развод (ἔστιν ὁ γυναικὶ μὴ δίδους ἀπολείπειν ἄνδρα). Оттук се вижда промяната в социалния статус на човека като цяло. Под влияние на свързаното с Платон и Аристотел стоическо учение в края на Републиката и началото на Империята отделният гражданин е вече автономен. Хората и най-вече римляните имат законни интереси и са равнопоставени пред правото – познание и мироглед, различни от архаичната колективна идентификация.

Исторически позоваването на Ромул засяга автентичността на описаните от Плутарх норми. „Царските закони“ (*leges regiae*) често се разглеждат като мит. Формално те се приемат в Курията по предложение на рекса. Той като върховен жрец установява и еднолично норми, като осигурява „божествения мир“ (*pac divina*). Множество антични автори свидетелстват за тези *leges*, Касий Емина, (Plin. N. H. 32.10.20), Марк Фулвий Нобилор (Lyd. *ost.* 16a), Цицерон (*pro Rab. perd.* 4.15) и т. н. Защитата на Рабирий споменава за колекция (*monumenta annalium* или *commentaria regum*²⁴), вероятно съх-

²³ Това вероятно е обща норма или общ закон за наказанието на жената. Авторът всъщност разкрива разликите с режима при Август. В Архаиката се предвижда убийството на жената от мъжа ѝ, докато *Lex Iulia de adulteriis* му дава *accusatio adulterii iure mariti*, с която да задържи или възстанови „зестпата“ (*dos*). Cfr. R. Fiori, *Il divieto per le donne di bere vino: legge o precedente giudiziale?* G. D. Merola, P. Santini (a cura di), *Lawine commercio e consumo del vino nel mondo antico aspetti giuridici atti del simposio internazionale Napoli, 17–18 gennaio 2019, Napoli, Jovene, 48.*

²⁴ Plin. Nat. 32.10 *pisces marinos in usu fuisse protinus a condita roma auctor est cassius hemina, cuius verba de ea re subiciam: „numa constituit ut pisces, qui squamosi non essent, ni pollucerent, parsimonia commentus, ut convivia publica et privata ceneaque ad pulvinaria facilius compararentur, ni qui ad polluctum emerent pretio minus parcerent eaque praemercentur.“* Касий Емина ни съобщава, че морските риби са били използвани в Рим още от времето на неговото основаване. Но аз ще приведа неговите собствени думи по този въпрос: „Нума постановил на празниците на боговете да не се сервира риба без люспи; това било проява на пестеливост, чисто намерение било банкетите, както публичните, така и частните, а също и трапезите пред леглата на боговете, да се организират с по-малко разходи, отколкото преди; желанието му било също така да се избегне рискът доставчиците на храна за свещените банкети да не пестят средства за закупуване на провизии и така да предотвратят появата на пазара“. *Naturalis Historia. Pliny the Elder. Karl Friedrich Theodor Mayhoff. Lipsiae. Teubner. 1906.*

Macr. Sat. 1.13.20 *Quando autem primum intercalatum sit, varie refertur, et Macer quidem Licinius eius rei originem Romulo adsignat. Antias libro secundo Numam Pompilium sacrorum*

ранена в архивите на т. нар. regia. Това подкрепя разбирането, че до късната Република норми от римския regnum²⁵ са още достъпни и доказва, че архаичните право и религия съставят единен мироглед. Теза, оспорвана в началото и средата на XX век, от нормативния подход, който отделя естеството на правото от това на религията. То не е културна реалност, а научен резултат от разграничаването и още XII-те таблици съдържат светски, цивилни, а не религиозни норми. Фриц Шулц²⁶ описва това като *Isolierung*, предопределен от прагматизма на римляните. Въпреки това днес по-често се подчертава, че в Архаиката правото и религията са единен комплекс²⁷.

3. Характерът на нормите, приписвани на Ромул, религиозен или светски (резултат от куриатните закони), занимава още Пиер Ноай. За него текстът на Плутарх е най-старото сведение не само за връщането на „зестрата“ (dos) и actio rei uxoriae, но и за брачните норми като цяло²⁸. Простъпките на съпругата не се свързват нито с Ромул, нито с комициите и имат религиозен и много по-древен характер. Абортът, употребата на вино, кражбата на ключовете и прелюбодеянието са религиозно табу. А жената е надарена с „висша власт и сила“ (mana) – понятие, свързвано с културата на Меланезия. Тя е в центъра на основните житейски фази (бременност,

causa id invenisse contendit. За началото на практиката на интеркалацията се дават различни сведения. Лициний Мацер приписва произхода ѝ на Ромул. Антиас във втората си книга твърди, че тя е изобретение на Нума Помпилий и че причината за нея е свързана с празнуването на религиозни обреди.

Lyd. ost. 16a: ταῦτα μὲν οὖν Φούλβιός φη[σιν, εκ τῶν τοῦ Νουμᾶ ἱστορήσας.

Cic. pro Rab. perd. 15:... hic se popularem dicere audet, me alienum a commodis vestris, cum iste omnis et suppliciorum et verborum acerbitates non ex memoria vestra ac patrum vestrorum sed ex annalium monumentis atque ex regum commentariis conquisierit, ego omnibus meis opibus, omnibus consiliis, omnibus dictis atque factis repugnarim et restiterim crudelitati? Този човек се осмелява да твърди, нали, че е благодетел на народа и че аз съм чужд на вашите интереси, след като именно той е издирил всеки случай на горчиви наказания и горчиви думи не от вашата памет или от паметта на вашите бащи, а от летописните архиви и царските коментари, докато аз с цялата си енергия, с всяка своя стратегия и с всичко, което съм казал или направил, съм дал отпор и съм отблъснал дивачеството?

²⁵ B. Santalucia, 2009. Dalla vendetta alla pena, in Altri studi di diritto penale romano, Padova, CEDAM 7–35; Corbino, A. Diritto privato e diritto criminale, P. Cerami, A. Corbino, A. Metro, G. Purpura (a cura di), Ordinamento costituzionale e produzione del diritto in Roma antica. I fondamenti dell'esperienza giuridica occidentale, 2^a ed., Napoli, Jovene 2006, 167–181.

²⁶ F. Schulz, 1934. Prinzipien des römischen Rechts, München, Dunker und Humblot.

²⁷ Scheid и Fiori.

²⁸ P. Noailles, les tabous du mariage dans le droit primitif des romains: Communication Faite à l'Institut Français de Sociologie. Annales Sociologiques. Série C. Sociologie Juridique et Morale, 2 (1937), 6–34, 7.

раждане и менструация)²⁹, ограничават се достъпът и досегът с нея (Val. Max. II.1,5), отстъпва ѝ се път (Val. Max. V.2.1) и т. н.

Няма доказателства за подобна нормативна конструкция в Рим. Хипотезата за табу върху жената би я поставило извън правото като обект единствено на божествената воля. Но простъпките ѝ са предмет на нормите и тя се наказва според правото. Въпреки че съобщава за закон, Плутарх оставя достатъчно информация за брака и репудиума като религиозни ритуали за съхраняване на положението на родителите у законните им деца³⁰. Поради това зависимостта на тези норми от религиозните церемонии и представи изглежда много убедително. Именно ритуалите, свързани с Церера, приемана в латинския пантеон като Церера, регулират спазването на нужната форма. Това се вижда от санкцията да се предаде половината от имуществото за Богинята (τὸ δὲ τῆς Δήμητρος ἱερὸν κελεύων) и от общото изискване при всеки *repudium* да се прави жертва на подземните божества (τὸν δ' ἀποδόμενον γυναῖκα θύεσθαι χθονίοις θεοῖς), ритуали, свързвани с нея. Церера наред с другото се отбелязвала и с обреди, посветени на „прехода“ (т. нар. „гранична“ или „лиминална“ функция), така ограничавали имотите или житейските фази (смърт, брак, развод и инициация³¹). За това Барбет Стенли Шпет описва сред епитетите на Богинята „носещата закона“ (*Legifera*), по Сервий (*Serv. Verg. Aen.* 4.58)³² и таблицата от Аньоне³³. Церера, „носи-lex“, гарантира лимеса между имотите и приемането или изключването на жената. Честват я като закрилник на мира и фертилитета с факелни шествия, жертви на прасе или бременна крава (при брак на вдовица). Варон припомня, че в Етрурия древните царе и знатни я почитат

²⁹ Той се позова на практиките при много народи, свързвани с кръвта и червената охра в изследването на Люсиен Леви Брюл, Cfr. Lévy Bruhl, L., 1963. *Le surnaturel et la nature dans la mentalité primitive*. Nouvelle édition. Paris, Presses universitaires des France, 361–422, 433–478.

³⁰ Festus, s.v. *Flaminia*; *Matrimēs*; called by Dionysius, II.22, ἀμφιθαλεῖς.

³¹ Spaeth, B. S. 1996. *The Roman goddess Ceres*, Austin, University of Texas Press.

³² *Serv. A. 4.58 LEGIFERAE CERERI leges enim ipsa dicitur invenisse: nam et sacra ipsius thesmophoria vocantur, [id est legumlatio] sed hoc ideo fingitur, quia ante inventum frumentum a Cerere passim homines sine lege vagabantur quae feritas interrupta est invento usu frumentorum, postquam ex agrorum divisione nata sunt iura. ...Alii dicunt hos deos quos commemoravit nuptiis esse contrarios, Cererem quia propter raptum filiae nuptias exsecratur; vel ex quo Iovi nupta praelata Iunone repudiata est ...Alii dicunt favere nuptiis Cererem, quod prima nupserit Iovi et condendis urbibus praesit, ut Calvus docet: Et leges sanctas docuit, et cara iugavit coipora conubiis et magnas condidit urbes: nam ideo et atrati sulco clauditur civitas ...Nam facturi aliquid* ante adversos placamus deos: et sic propitios invocamus: ut: „Nigram hiemi pecudem, Zephyris felicibus albam.“ Ergo modo nuptura placat ante Cererem: quae propter raptum filiae nupturas exsecratur.*

³³ Оска таблица (ок. 250 г. пр. Хр.), Vetter, E. 1953. *Handbuch der italischen Dialekte*. I. Heidelberg, Winter.

(Varr. Rust. 2.4.9 – 1) не само периодично, но и извънредно, за лустрация при беди и размирици като гарантира недосегаемост на плебейските трибуни и наказва отхвърлилите републиката.

В таблицата от Анъоне две древноиталийски богини се свързват с Церера (Kerri). Първата, „тази, която стои между“ (Interstita/Anterstatai), и втората, „която носи законите между“, Legifera Intera (Liganakdikeí Entrai). За Рафаеле Калдарели³⁴ първата е изначалният атрибут на Церера. Шпет приема въз основа на Ений (Serv. Verg. Aen. 3.13), че обичайно при определен акт се почитат и божествата, които му се противопоставят. При брак почитат и Церера наред с Юнона, защото го застрашава. Хадес откраднал дъщеря ѝ, Персефона, а Юпитер предпочел Юнона за жена пред нея. Затова Церера покровителства развода, като установява законност. Шпет³⁵ приема фразата за жертвата на съпруга за подземните божества, τὸν δ' ἀποδόμενον γυναῖκα θύεσθαι χθονίοις θεοῖς, в смисъла, че причастието „отхвърлил“ (ἀποδόμενον) следва да се разбира като „продад в робство“. Съответно инфинитивът „да принесе в жертва“ (θύεσθαι) означава, че самият съпруг „се принася в жертва“, наказание за продажбата на жена си в робство вместо *repudium*. Това за архаичното правно съзнание е нетипично. Ранният Лациум преди Рим не познава робството, резултат на Етруското влияние, а и Дионисий наред с репудиума предвижда смърт, а не поробване. Оценката на Шпет за фамилията и родовите *sacra* е важна. Лиминалната роля на Церера и силата ѝ легитимира акта като крайна стъпка на развод след съобщението за репудиум и ограничава действията на мъжа. В класиката жената може да се разведе. Това е автентична норма, а не къснорепубликански „памфлет с политическа насоченост“³⁶. Бракът е непрекъснат, жената се подчинява на мъжа и е господар в дома, негов наследник³⁷, но не заради *lex* на курията или рекса, а по обичая.

IV

1. Къснорепубликанските, класическите юристи и Августовото законодателство (*leges Iuliae, de maritandis ordinibus, de adulteriis coercendis*, от 18 и 17 г. пр. Хр. и *lex Papia et Poppaea* от 5 г. сл. Хр.) създават по-свободна рамка. Но „разводът по закон“ е още актуален, видно от коментара на Гай по XII-те таблици (D. 48.5.44 Gai. l. 3 XII. tab.).

Ако отхвърлянето не е било направено по закон и жената дотогава се е приемала за омъжена, въпреки това този, който е щял да я доведе за

³⁴ Cfr. Spaeth, 1996. *ibid.*; Caldarelli, R. A proposito di un teonimo della Tabula Agnonensis. QLF 1 (1982–1984), 35–42.

³⁵ Spaeth (1996), *ibid.* 59.

³⁶ Cfr. Fiori (2020), 48–51, заедно с цитираната литература.

³⁷ Dion. Hal. A. R. 2.25.5 (...*κυρία τοῦ οἴκου ...καὶ τελευτήσαντος ἀνδρὸς κληρονόμος ἐγίνετο τῶν χρημάτων...*), Fiori (2020), *ibid.*, Той приема, че става дума за общо правило, а не закон технически смисъл (v. *ibid.* 51 sq.).

съпруга, не би бил прелюбодеец. Същото отговорил и Салвий Юлиан, понеже казал, че без злоумисъл не се извършва прелюбодееане. Въпреки това трябва да се каже, че този, който знае, че тя не е отхвърлена по закон, го извършва със злоумисъл³⁸.

Съпруга, която не е отхвърлена според закона, е доведена за жена от втори мъж, който като не знае за това, не извършва прелюбодееане, както се определя и от Салвий Юлиан – злоумисълът е необходимата предпоставка за *adulterium*. Гай фиксира като *dolus malus* и затаяването на дефекта в репудиума. Основната неяснота, която остава за фрагмента, е неговият контекст. Книга D. 48.4 е под заглавието *Ad legem Iuliam de adulteriis coercendis*, докато Гай поставя текста си в Коментара към Таблиците, както се вижда и от литературната референция на компилаторите. Крауфорд потвърждава за *Tab. IV.3* само думите: „...съобщава за отхвърляне“ (<<<*repudium mittito*>>>³⁹). Има се предвид формулата *suas res sibi habere iussit claves ademittit*⁴⁰ от архаичната кодификация в Цицероновите Филипики (*Cic. phil. 2.69*), жената да си вземе нещата и да върне ключовете. Крауфорд не потвърждава в последното издание на Таблиците наличието освен на тези думи на другата част от изречението.

2. През 1965 г. Едоардо Волтера⁴¹ приема, че щом Гай дискутира Таблиците, думите му трябва да се свържат с *Lex Iulia de adulteriis*, заради това, че казусът засяга брак на прелюбодейка. Пита се ще бъде ли това случай на прелюбодееане, след като първият ѝ съпруг се е развел и не е спазил формалностите на Августовия закон. Волтера свързва текста с дългата традиция на бигамията, но не оспорва референцията му към Гаевия коментар на Таблиците. Той подчертава, че думите *ex lege* нямат предвид тях, тъй като за децемвирите *adulterium* не е *crimen*. Тогава Ройвен Ярон⁴² не възприема този аргумент за достатъчен. Още Ернст Леви⁴³ през 1925 г. изяснява трудността с контекста на фрагмента и че Гай приема основанията

³⁸ D. 48.5.44 Gai. l. 3 ad XII tab. Si ex lege repudium missum non sit et idcirco mulier adhuc nupta esse videatur, tamen si quis eam uxorem duxerit, adulter non erit. Idque Salvius Iulianus respondit, quia adulterium, inquit, sine dolo malo non committitur: quamquam dicendum, ne is, qui sciret eam ex lege repudiatam non esse, dolo malo committat.

³⁹ Cic. phil. 2.69; D. 48.5.44 Gai. 3 ad XII tab., Crawford.

⁴⁰ V. supra.

⁴¹ Volterra, E., *Intorno a D. 48, 5, 44 (43)*, AA. VV. Studi in onore di Biondo Biondi II, Milano, Giuffrè, 1965, S. 123–140 [=Scritti giuridici, vol. 2, Napoli, Jovene, 1991], 521–536.

⁴² Cfr. Yaron, R., *De Divortio Varia*, 1964. Tijdschrift voor Rechtsgeschiedenis, 32, 4, 533–557. В статията, публикувана през април същата година, авторът посочва, че Волтера е публикувал наскоро своето изследване (Volterra, 1965, което всъщност излиза през 1965 г.). Най-вероятно Ярон е разполагал с отпечатък преди официалното излизане на сборника в чест Бондо Бонди.

⁴³ Levy, E., 1925. *Der Hergang der Römischen Ehescheidung*. Weimar, Böhlau.

за развод от Таблиците. За Ярон въпросът не би могъл да бъде разрешен окончателно, като връзката на *dolus malus* с *Lex Iulia de adult.* не изключва такава и с по-ранни норми. Фриц Брандсма (2016 г.)⁴⁴ свързва логиката на Юлиан с по-късното право, а не с режима от Републиката, но не обяснява защо Гай го е оставил в коментара към XII-те таблици. Той се позовава на Карло Вентурини (1992 г.)⁴⁵ по повод правилото на Юлиан за умисъла на прелюбодееца и приложението му практиката Северовите юристи да заобикалят формалностите на *lex Iulia* за прекратяването на брака (т. е. при неформален развод⁴⁶). Те признават втория за законен, без първият да е правилно прекратен, което създава опасност от бигамия. Подходът вече е нов, не оценяват прекратяването на първия, а проследяват предпоставките за втория като *iustae nuptiae*. Доротей (Schol. 1 ad Bas. 60,37,43 (D. 48.5.44), BS 3719,26 – 3720,1) намира сходство във формата на отхвърлянето на съпругата в Павловия и Гаевия фрагменти (D. 24.2.9 Paul. *l. 2 de adult.*)⁴⁷.

Ако мъжът изпрати репудиум, но не го изпрати според закона (например седем свидетели не се подпишат), и следователно същата жена все още се смята за омъжена за мъжа и някой друг я вземе за жена, този [мъж] не е прелюбодеец⁴⁸.

3. Без съмнение Доротей познава мнението на Павел и отговора на Юлиан, но това не обяснява контекста на Гаевия коментар. Репудиумът като формален акт, със строго определени основания, е изконна римска представа. Проблем възниква при приемането на неформалния развод, което изисква нов критерий за оценка на съпрузите. В края на Републиката

⁴⁴ Gab es eine Form der Ehescheidung bei den Römern seit der *lex Iulia de adulteriis*? U. Manthe, S. Nishimura, M. Igimi (hrsg.). AA. VV. Aus der Werkstatt römischer Juristen. Einige Bemerkungen zu D. 24,2,9, Vorträge der Europäisch-Ostasiatischen Tagung 2013 in Fukuoka, Berlin, Duncker & Humblot, 2016, 9–22.

⁴⁵ Venturini, C., *Divorzio informale e crimen adulterii* (per una riconsiderazione di D. 48.5.44[43]). *Iura* 41 (1990) pubbl. 1993, 25–51, [= *Seminarios Complutenses de Derecho Romano*, 4, 1992, 133–156.

⁴⁶ За него D. 22.2.33, 24.1.64, 24.1.32.13, 24.2.11, 24.1.57 са интерполирани, но доказват неформалния развод чрез обещание на мъжа да ѝ върне нещата, напускането на дома пр. Cfr. M. Andreev, *Divorce et adultère dans le droit romain classique*. *Revue historique de droit français et étranger*, 1, 1957, 1–32, 4–9.

⁴⁷ *Nullum divortium ratum est nisi septem civibus Romanis puberibus adhibitis praeter libertum eius qui divortium faciet...* „Никакъв развод не се приема, освен ако седем пълнолетни римски не са призовани наред с неговия освободенец, който се развеждал...“ Павловият коментар е свързан с този закон като формалностите произтичат от него. Но *nullum divortium ratum est nisi* е интерполация. Cfr. Andreev, 1957, 3.

⁴⁸ Според Атеней Навкратски (кр. на II – нач. III в.), *Athen.* XII, p. 517, D. Ἐὰν πέμψῃ μὲν ῥεπουδίον ὁ ἀνὴρ, μὴ κατὰ τὸν νόμον δὲ πέμψῃ (τυχὸν γὰρ οὐχ ὑπέγραψαν ζ' μάρτυρες) καὶ διὰ τοῦτο ἔτι τῷ νόμῳ νομίζεται ὕπανδρος εἶναι ἢ γυνὴ αὐτῆ καὶ τις ἕτερος γαμετὴν ταύτην ἀγάγῃται, οὐκ ἔστιν αὐτὸς μοιχός.

„изнасилването“ (stuprum⁴⁹) и adulterium се различават заради злоумисъла на прелюбодееца-насилник⁵⁰. Именно този dolus malus решава в класиката проблемите от неформалния развод. Гай започва от Таблиците, стига до divortium ex lege и после до цитата на Юлиан. Той изучава промяната на режима, но не и корените преди I. Iulia, като исторически е вероятно това да са религиозни практики.

V

1. а) Нормите за жените се разпределят в два кръга. Изворите различават латинската и етруската традиция, както пише историкът Теопомп от Хиос (ок. 380 – ок. 315 г.).

Теопомп в XIV книга от Историите казва, „установено е от закона при етруските да бъдат общи жените, те наистина са полагали най-голяма грижа за тялото и често тренирали с мъжете, често и между тях самите и не намирали за срамно да се показват голи. Хранели се те не с мъжете си, но с който и да е присъствал и пиели пред когото им било приятно, и пиели много и за очите били красиви. Изхранвали етруските всички деца, които се раждали, като не знаели кое от кой баща е“.⁵¹ За разлика от латинските етруските жени имат голяма свобода, употребяват вино, неограничени са извън дома, срещат когото предпочитат и се упражняват на палестрата. В резултат произходът на децата им е несигурен. Този бит обаче е извън настоящото изследване и тук само се изясняват културните контрасти в ранния римски социум.

б) Теопомп пише по времето на ранния римски полис (ср. на IV в.)⁵²: „и се казва, че е установено със закон при етруските“ (καὶ νόμον εἶναι φησι παρὰ τοῖς Τυρρῆνοις). Плутарх (Rom. 22.3) припомня: „установил такъв закон“ (ἔθηκε δὲ καὶ νόμους τινάς), Гай (D. 48.5.44 Gai. l. 3 ad XII tab.) също:

⁴⁹ Liv. 1.57.10. r. Bauman, R. A., „Quod metus causa” and the Criminal Law. Latomus, 1993, 52, 3, 550–556, Rizzeli, G., Adulterium. Immagini, etica, diritto. Rivista di diritto romano, 8, 2008, pp. 30–41, n. 138; Botta, F., „Per vim inferre”. Studi su stuprum violento e raptus nel diritto romano e bizantino. Cagliari, AV, 2004.

⁵⁰ Tanev, K., 2023. The Case of Lucretia – Symbolizing the Political Reality, Právněhistorické studie, 01, 27, 11–23.

⁵¹ Athenaeus XII, p. 517, D.: Θεόπομπος δ' ἐν τῇ μγ' τῶν Ἱστοριῶν καὶ νόμον εἶναι φησι παρὰ τοῖς Τυρρῆνοις κοινὰς ὑπάρχειν τὰς γυναῖκας· ταύτας δὲ ἐπιμελεῖσθαι σφόδρα τῶν σωμάτων, καὶ γυμνάζεσθαι πολλάκις καὶ μετ' ἀνδρῶν, ἐνίοτε δὲ καὶ πρὸς ἑαυτάς· οὐ γὰρ αἰσχρὸν εἶναι αὐταῖς φαίνεσθαι γυμναῖς δειπνεῖν δὲ αὐτάς οὐ παρὰ τοῖς ἀνδράσι τοῖς ἑαυτῶν, ἀλλὰ παρ' οἷς ἂν τύχωσι τῶν παρόντων, καὶ προπίνουσιν οἷς ἂν βουλευθῶσιν· εἶναι δὲ καὶ πιεῖν δεινὰς καὶ τὰς ὄψεις πάνυ καλὰς τρέφειν δὲ τοὺς Τυρρῆνοὺς πάντα τὰ γινόμενα παιδία, οὐκ εἰδότας ὅτου πατρός ἐστιν ἕκαστον.

⁵² Cfr. по-подробно Roncati, S., 2018. Donne e vino nell'antichità: una storia di divieti? RIDA 65, 195 – 210.

„ако отхвърлянето не е съобщено според закона“ (Si ex lege repudium missum non sit). В Plut. Rom. 22.3 разводът би могъл да е или по XII-те таблици, или по l. Iulia, но тези хипотези са исторически недостоверни. Най-вероятно тримата автори имат предвид обичая на латините или етруските като религиозен ритуал, а не технически като закон.

2. След Втората Пуническа война битът на етруските (тиренците) се променя радикално. Техните родове вече търсят своята идентичност с латинската аристокрация, а латинският език и култура са стандарт за социално поведение. Кулминацията на процеса е при управлението на Август. Това разкриват археологическите находки, като показват, че етруските матрони искат да са част от латинския обичай. Джоселин Пени Смол⁵³ публикува етруски урни от Волтера от I в. пр. Хр. с изрисувани сцени на изнасилването и самоубийството на Лукреция⁵⁴, съпругата на Луций Колатин. Те показват как този народ постепенно възприема римския обичай, където целомъдрието на жената е гаранция за запазването на аристократичната структура на семейството. Такава амалгама обяснява защо законът за развода е свързан с митовете за основаването на Града и с Ромул, символ на изконната римска традиция, закон, който етруските искат да следват. Образът на първия рекс указва единството на нормите за брака и развода при римляните като общност.

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⁵³ Small, J. P., The Death of Lucretia. *American Journal of Archaeology*, 80, 4, 1976, pp. 349–360. Иан Доналдсън също отбелязва тази публикация като пример за единствения оцелял образ на Лукреция, Cfr. Donaldson, I., *The Rapes of Lucretia a Myth and its Translations*, Oxford: Oxford University Press, 1982, 5, 6, 14.

⁵⁴ Tanev, 2023, 11–23.

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Полицейското бездействие като форма на структурна дискриминация в случаи на насилие над жени, основано на пола

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Въз основа на модела Duluth настоящата статия се фокусира върху бездействието на полицията в случаи на насилие от интимния партньор в България. Примерите са от осем фокусирани групи с жертви, полицаи и социални работници в няколко града в България. Резултатите от проучването показват, че липсата на национален механизъм за насочване е основна структурна бариера, свързана с липсата на по-нататъшно правилно разследване, преследване, и предоставяне на услуги за подслон и реинтеграция. Дискусията в края на статията представя систематичен преглед на добри международни институционални практики и ги свързва с резултата от настоящото проучване, предлагайки инструмент за застъпничество за гражданското общество и възможност за формиране на политики за вземащите публични решения.

Ключови думи: *насилие, основано на пола, домашно насилие, насилие от интимен партньор, делют модел, структурна дискриминация*



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Police Inaction as a Form of Structural Discrimination in Cases of Gender-Based Violence Against Women

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Based on the Duluth model, the current article focus on the police inaction in cases of intimate partner violence in Bulgaria. The examples come from eight focused groups with victims, police officers and social workers in several cities in Bulgaria. The study outcomes show the lack of national referral mechanism as a main structural barrier, related to lack of further proper investigation, prosecution, sheltering services and reintegration. The discussion at the end of the article presents a systematic review of a good international institutional practices and relates them to the outcome of the current study, offering an advocacy tool for the civil society and policy option to the public decision makers.

Keywords: *Gender based violence, Domestic abuse, Intimate partner violence, Duluth model, Structural discrimination*



Въведение, „основано на пола“

През 2011 година в Истанбул Съветът на Европа приема „Конвенция за превенция и борба с насилието над жени и домашното насилие“, която определя насилието над жени, основано на пола като *„насилие, което е насочено срещу жена, защото тя е жена, или което засяга предимно жените“* (CETS 210: art. 3, “d”). Поради лошо изготвен неофициален превод¹ и поради влошения политически контекст, с решение № 13 от 27.07.2018 г. Конституционният съд постанови, че „Конвенцията не съответства на Конституцията“. Това, разбира се, е абсурдно решение, показващо не просто непознаване на оригиналните текстове на Конвенция 210 (на английски и френски език), но и пренебрегване на ясни конституционни текстове като чл. 6 и чл. 46 от КРБ, чл. 4 от Закона за защита от дискриминация, чл. 2 от Семейния кодекс и чл. 2 от Закона за равнопоставеност на жените и мъжете. Нещо повече, дефиницията за „полово-специфичен“ (gender) в конвенция 210 е сходна с дефиницията в Директива 40-1 на НАТО за включването на перспектива, основана на пола в командния ред на алианса (BI – SCD 40-1/2012), и на практика се прилага в България от 2012 г. поради членството ни в НАТО. Освен това е широко използвана в редица документи на СЗО, УНИЦЕФ и ВКБООН. На практика целият казус с отхвърлянето на „Истанбулската конвенция“ (както стана известна у нас) показва дълбоко неразбиране на социалните проблеми, свързани с насилието, основано на пола. „Основано на пола“ в Конвенция 210, означава да е свързано *„със социално изградени роли, поведения, дейности и характеристики, които определено общество смята за подходящи за жените и за мъжете“* (CETS 210: art. 3, “c”) или със *„социално приписаните качества, свързани с това да си мъж и жена, научени чрез социализация и определящи нагласите и ценностите на личността в даден контекст. Като това означава и отношенията между жените и мъжете, между момичетата и момчетата, както и отношенията между жените и тези между мъжете“*, в директивата на НАТО (BI – SCD 40-1/2012: 1–4, „a“).

Невидимото насилие

В хода на дебатите около Истанбулската конвенция, множество юристи и политици изказаха мнение, че не е необходимо ратифицирането на конвенцията, защото България вече има приет Закон за защита от домашно насилие [ЗЗДН]. Понеже законът различава пет вида насилие: (1)

¹ В документа, внесен в Конституционния съд, прилагателното „gender“ се срещаше като две различни съществителни: „пол“ и „социален пол“ и като неологизъм прилагателно „джендърен“.

физическо, (2) сексуално, (3) психическо, (4) икономическо, както и (5) принудителното ограничаване на личния живот, личната свобода и личните права, обикновено това се разглежда като достатъчно изчерпателна нормативна уредба. Същевременно обаче и в ЗЗДН, и в правилника за неговото приложение (ПМС № 113/2010) няма конкретни дефиниции за тези видове насилие и това отваря врата за интерпретации от всички заинтересовани лица: жертви, извършители, социални и здравни работници, психолози, полицаи, магистрати, както и за конфликти и напрежения между отделните групи лица. Всъщност огромният проблем със ЗЗДН е, че той предполага жертвата сама да може да разпознае формите на домашно насилие и сама да инициира процеса на разследване и преследване на съответното деяние. Съществуващите международни изследвания обаче показват, че в голяма част от случаите е налице психическа травма, но домашното насилие не се разпознава и не се съобщава (Davis et al. 2003) в резултат от дългосрочни ефекти от емоционално насилие (Easteal et al. 2019), включително, когато има физически следи от травми и наранявания и идентификация от здравни служители (Othman et al. 2014). Казано с други думи, насилието може да остане невидимо не просто за институциите, но и за близкия приятелски кръг и роднините.

Домашното насилие обаче има много повече измерения, които са свързани с различни методи на контрол и които имат множество социални последици. През 90-те години на XX век в САЩ е разработен т. нар. Дълют модел, познат и като Минесотско колело на власт и контрол² (Pence & Paymer, 1993; Dutton & Starzomski, 1997), което постепенно се превръща в международен златен стандарт при превенцията, закрилата, разследването и преследването на домашното насилие. Моделът показва, че с изключение на „употребата на децата“, всички форми на власт и контрол при домашното насилие са в корелация помежду си, което предполага съществуването на синдром на злоупотреба с власт и контрол, който комбинира няколко социални и психологически проявления в един акт. Когато към модела „Дълют“ биват съотнесени и културните идентичности, се оказва, че добре познатите дискриминационни пресечности също играят съществена роля, като най-силно са изразени сексизмът, хетеросексизмът и ейджизмът, следвани от расизма, етноцентризма и аблеизма, а в най-външния кръг са класизма и религиозната идентичност (Chavis & Hill, 2008). Видовете насилие, методите на контрол и симптоматичните проявления на насилието, съгласно модела „Дълют“ са представени на таблица 1.

² Кръстен на град Дълют, щата Минесота.

Таблица 1.
Видове домашно насилие, методи на контрол и видове проявление
на насилието, съгласно модела „Дълют“

Вид насилие	Метод на контрол	Проявление на насилието
Сплашване	Погледи Жестове Действия	Чупене на неща Унищожаване на собственост Тормоз на домашни любимци Размахване на оръжие
Емоционален тормоз	Унижаване	Използване на обидни думи Вменяване на вина Вменяване на лудост Подиграване на външния вид
Социална изолация	Контрол на социалните контакти и каналите за информация	Ограничаване на излизането от дома Ограничаване на употребата на телефон и интернет Явно следене на чатове и поща Оправдаване на тези действия с ревност
Омаловажаване, отричане и обвиняване	Омаловажаване и несериозно отношение към акта на насилието	Казване, че насилието не се е случило Казване, че жертвата всъщност го е извършила Изместване на отговорността за насилието върху жертвата
Икономическа злоупотреба	Ограничаване на достъпа до финанси	Възпрепятстване на трудовата заетост Лишаване от личните финанси Поставяне във финансова зависимост Скриване на семейния бюджет
Принуда и заплахы	Заплаха, че ще се случи нещо, което ще нарани жертвата	Заплаха с напускане или развод Заплаха със самоубийство Заплаха със социалните служби Принуда към нелегална дейност Принуда за отказ от правосъдие/закрила
Злоупотреба с привилегия	Третиране на жертвата като прислуга	Взимане на еднолични решения Поведение на „господаря на къщата“ Еднолично определяне на полово специфичните роли в домакинството
Употреба на децата	Вменяване на вина чрез децата	Заплаха за отнемане на децата Използване на децата за изпращане на заплашителни послания Унижаване пред децата

Източник: авторска систематизация въз основа на Pence & Paymer, 1993, и Dutton & Starzomski, 1997.

Теория на промяната: Структурна дискриминация

В Закона за защита от дискриминация [ЗЗДискр.] полът е първата защитена характеристика, която се изброява (чл. 4, ал. 1), а законът разграничава пряка и непряка дискриминация. Като **пряка дискриминация** е определено „всяко по-неблагоприятно третиране на лице на основата на признаците по ал. 1, отколкото се третира, било е третирано или би било третирано друго лице при сравними сходни обстоятелства“ (чл. 4, ал. 2), а за **непряка дискриминация** се счита „поставянето на лице или лица, носители на признак по чл. 4, ал. 1, или на лица, които, без да са носители на такъв признак съвместно с първите търпят по-малко благоприятно третиране или са поставени в особено неблагоприятно положение, произтичащо от привидно неутрални разпоредба, критерий или практика, освен ако разпоредбата, критерият или практиката са обективно оправдани с оглед на законова цел и средствата за постигане на целта са подходящи и необходими“ (чл. 4, ал. 3). В своите допълнителни разпоредби, ЗЗДискр. въвежда и понятието **множествена дискриминация** за ситуациите, в които е налице „дискриминация на основата на повече от един от признаците по чл. 4, ал. 1“ (ЗЗДискр., § 1, т. 11), т.е. тогава, когато няколко основания действат и си взаимодействат едновременно, напр. дискриминацията към жените мигрантки, които са жертви на насилствена ексцизия или инфибулация като деца; или към жените от ромски произход, които не са имали акт за раждане и говорят параромски диалект; или към трансжени от Черна Африка; или към жени мюсюлманки от Близкия изток, които се намират в брак с полигинен партньор. Във всички тези чисто илюстративни случаи има съчетаване на три и повече характеристики по такъв начин, че не могат да бъдат разделени и затова пораждат специфични видове дискриминация.

Същевременно, избраните илюстративни случаи включват ситуации, които вероятно няма да бъдат разпознати като дискриминационни признаци в българската правна система, понеже отсъстват от експлицитно разписаните основания в чл. 4, ал. 1. Става дума за признаците „пострадали от ексцизия или инфибулация“, „които не са имали акт за раждане“, „трансжени“, „брак с полигинен партньор“. Всъщност, и четирите илюстративни случая могат да съдържат насилие, основано на пола, но то не е описано и съответно не е разпознавано добре от институционалните среди в България. Именно тук идва необходимостта от изричното въвеждане на понятието **структурна дискриминация** – каквото отсъства в националното ни законодателство към момента. Съгласно насоките на Съвета на ЕС относно правата на човека за недискриминация, понятието **Структурна дискриминация** „се отнася до

правила, норми, установени практики, модели на отношение и поведение в институции и други обществени структури, които, съзнателно или несъзнателно, представляват пречки за групи или индивиди при достъпа до техните права и възможности и които допринасят за по-малко благоприятни последици за тях спрямо по-голямата част от населението“ (CEU 6337/19). Казано с други думи, структурната дискриминация е свързана с начина, по който функционира дадено общество и начина, по който нормативни практики и установени модели на поведение възпроизвеждат и усилват социалните неравенства, като създават прегради пред същинската равнопоставеност и еднаквите възможности. Много хора си представят, че расовата дискриминация е свързана с отношение на действията на отделни предубедени бели хора срещу отделни цветнокожи хора, например. Но структурната дискриминация се отнася до политиките на институциите на мнозинството и поведението на лицата, които прилагат тези политики и контролират тези институции, които са привидно расово или етнически неутрални по намерение, но имат различен и/или вреден ефект върху малцинствените групи (Pincus, 1996). Учебнически пример за подобна структурна дискриминация в България се появи преди малко повече от 10 години. С измененията в Закона за гражданската регистрация от май 2011 г. е въведено изискването при издаване или подновяване на лична карта лицата да предоставят удостоверение за регистрация на постоянен адрес. Промените в закона номинално имат за цел да прекратят т. нар. изборен туризъм, но фактически довеждат до невъзможност групи български граждани, живеещи в квартали с концентрация на бедност, да изпълнят задължението си и да заявят постоянен и настоящ адрес. Причината за това, е че в големите градски зони, значителна част от жилищата са част от т. нар. неформално строителство, т.е. без документи за собственост на имотите, и с незаконно изпълнен градеж на сградата. Това поражда непреодолима пречка за издаването на валиден документ за самоличност, който се превръща в бариера пред достъпа до удостоверение за раждане, което на своя страна пък става пречка пред достъпа до образование, здравеопазване и заетост. По този начин една законова промяна, направена с привидно добро намерение, повлича след себе си поредица от негативни социални феномени и декласиране на огромен дял от населението на страната. Тереният ми опит показва обаче, че публичните институции нямат никаква чувствителност към този проблем и ако на прага им се появи жена без акт за раждане, тя бива третирана като гражданин, който не е изпълнил своето задължение, вместо като лице, което се намира в изключително уязвимо положение и има нужда от многостранна социална подкрепа.

Целта на настоящето изследване е да покаже как пасивността при реакцията на полицията в случаи на насилие, основано на пола, може и трябва да се разглежда като структурна дискриминация. Макар, че теоретично стъпва на изследвания, които са свързани по-скоро с лицата с физически затруднения и ментални предизвикателства (Rebell, 1985; Dirth & Branscombe, 2017), хората с различни разстройства на личността (Lee et al., 2006; Corrigan & Chow, 2007; Angermeyer et al., 2014), както и някои проявления на стъкления таван, т.е. пред кариерното и професионалното развитие на жените (Hughes, 2011) – изследването намира сходства и основание за паралели поради процесите на социална стигматизация и прояви на стереотипи, основани на половите специфики.

Изследователският въпрос е какви са гледните точки на жертвите, на полицаите и на социалните работници към случаите на бездействие и бавно разследване при домашно насилие и в частност при насилие от интимния партньор, основано на пола? Хипотезата на изследването е, че бездействието или изключително бавното разследване и преследване в случаите на насилие основано на пола е дискриминация, защото излага жертвата на травми и рискове, които допълнително затрудняват разследването и преследването на насилието.

Методология на изследването

Този доклад разчита на вторичен анализ на данни от емпирично изследване, проведено в началото на 2023 г. за целите на проект ISEDA³. Проучването включва три фокус групи с общо 20 жени, потърпевши от домашно насилие, които са потърсили законова защита и са получили социална и психологическа подкрепа в центровете на граждански организации, работещи в Бургас (асоциация „Деметра“), Варна (SOS „Семейства в риск“) и Димитровград („Х&Д Джендър перспективи“); три фокус групи с общо 22 представители на МВР от различни подразделения: районни координатори за борба с домашното насилие (ОДП Бургас); териториална полиция (ОДП Пловдив), охранителна полиция (СДВР); както и две фокус групи с общо 21 представители на граждански организации, работещи по програми,

³ ISEDA (Innovative Solutions to Eliminate Domestic Abuse – Иновативни решения за елиминиране на домашното насилие) е международен проект, финансиран от програма „Хоризонт Европа“. Представители на България в проекта са асоциация „Деметра“ и ГДНП. Авторът използва случая да благодари на двете организации и особено на д-р Диана Видева за възможността да проведе теренната работа в България и да публикува резултатите от нея тук.

които осигуряват услуги по превенция, ранна идентификация, закрила и реинтеграция в случаите на домашно насилие в страната.

Фокус групите с жени, потърпевши от домашно насилие са проведени в контролирана защитена среда в кризисните центрове в Бургас, Варна и Димитровград. Участниците са поканени от социални работници, с които са в контакт във връзка с личните си случаи, и предварително са запознати с целите на изследването, като са подписали информирано съгласие. Участниците не съобщават имената си, нито други биографични факти като форма на допълнителна защита. Тези данни са събрани на отделен лист, който се съхранява в самите центрове, разделно от аудиозаписите. От своя страна центровете нямат достъп до записите и транскрипциите, доколкото социалните работници биха могли да идентифицират участниците по гласа или разказаната история. По време на дискусиите в съседно помещение присъства клиничен психолог, който води случаите в съответния център и може да се включи в разговора, ако възникне необходимост от кризисна интервенция. Въпросниците са разработени от академични психолози от изследователската група “Intersectionality” в университета на Аликанте (Испания), с цел да бъдат изследвани всички трудности, свързани с превенцията, повишаването на информираността, подкрепата на жертвите и работата с извършителите. Дискусиите в България протичат без инциденти и намесата на психолог не става необходима.

Фокус групите със служители на МВР са организирани посредством вътрешна заповед от ГДНП, които са координатор на проекта за България. Дискусиите са проведени в заседателни зали в областните дирекции на Бургас, Пловдив и СДВР, като служителите са предварително информирани за темата и целта на изследването и са подписали информирано съгласие. Въпросникът е разработен от същия методологически екип, който изготвя ръководствата за потърпевшите от насилие, но целта е да се направи оценка на нуждите от обучение на полицейските служители и да установят системните трудности, свързани с докладването на домашно насилие и липса на данни за вземането на решения относно подобряване на публичните политики от гледна точка на полицейските служители.

Едната фокус група с граждански организации е проведена на живо в Центъра за превенция на насилието и престъпността (ЦПНП) в гр. Бургас със служители на асоциация „Деметра“, ангажирани с различен тип услуги за жертви на насилие: социален работник и психолог от ЦПНП; социален работник от резидентна услуга; психолог от програма за работа с извършители; юрист; психолог от Център за подпомагане на жертви на сексуално

насилие „Вселена“. Втората фокус група е проведена онлайн с представители на всички 11 организации, членуващи в Алианса за защита от насилие, основано на пола. Въпросникът за дискусиите с граждански организации е хибриден и включва някои елементи от ръководството за потърпевши от насилие и други тематични блокове от въпросника за полиция, така че да може да обобщи личния опит и системната регулация.

Резултати от изследването: Бездействие и структурни бариери

Изследването показва, че има няколко различни източника, които са причина за бездействието на полицията. От гледна точка на жертвите, на първо място, **няма единен национален механизъм за противодействие на домашното насилие**. Това означава, че на практика всяка Областна дирекция на полицията сама разработва правилата и организацията си на реакция, които са силно зависими от партньорствата с гражданските организации в региона и от личностните нагласи на полицейските служители. Липсата на утвърден национален механизъм води до това, че потърпевши от домашно насилие се оплакват, че на телефон 112 отказват да приемат такива сигнали – макар че това е общата инструкция към гражданите и от полицаите, и от социалните работници:

„Самата ни система за регистриране на домашно насилие е много слаба от гледна точка на това, че на 112 ако звъниш или на дежурния в полицията, а в по-малките градове е и по-сложно. Идват полицаите и пишат. За мен едно протоколче. За него едно протоколче. Нищо че аз съм с разбито лице. Аз подавам сигнал на 112, а те тръгват да ми се карат защо на 112 звъня” (ЖДН5, ФГ Димитровград).

На второ място идват патриархалните личностни нагласи сред полицейските служители и **латентната мизогиния**. Насилието бива омаловажавано от явилия се на сигнала полицейски служител, а жертвата бива унижавана чрез обидно етикетизиране.

„...липса на сензитивност към жертвата; victim blaming – обвиняване на жертвата⁴... говорят за „лудата жена“ – жената, която

⁴ „Обвиняването на жертвата“, за което говори респондетката, е свързано с поддържането на исторически възникнали предразсъдъци срещу жертвите на домашно насилие и сексуални посегателства и склонността на разследващите и съдебния състав да обвиняват жертвите за престъплението, което са претърпели, с презумпцията, че са го предизвикали (Eigenberg & Garland, 2008).

предизвиква едва ли не насилието... Има тая връзка на неравно отношение в двойката, когато служителят на МВР отиде на място” (Е7, ФГ НПО – 2).

„Даже може да чуеш коментар от типа: „Не го предизвиквай! Бъди кротка!” (ЖДНЗ, ФГ Димитровград).

На трето място идва **неизпълнението на задълженията и пренебрегването на закона** от страна на полицейските служители. Потърпевшите от престъплението съобщават за подценяване от страна на органите на МВР на съдебните заповеди за защита и заповеди за напускане на жилището от насилника. В един от тези случаи, станали дори публично известни поради взривяването на част от жилищен блок, респондентката описва:

„...трябваше до 3 дни да напусне жилището. Дойде кварталният и някаква устна уговорка са си направили и той вика: «Може ли поне една седмица?». ...За тази една седмица гръмна жилището... Днес можеше да не съм тук, ако бях отишла. И пак стигаме до полицията – полицията не си върши работата. Това е. Има ограничителна заповед, но за какво ми е?” (ЖДН4, ФГ Варна).

Всъщност, полицейските служители не отричат горните случаи и фактическото бездействие, но ги обясняват не с негативни нагласи, основани на пола, а с фактически законодателни ограничения на правомощията и липса на достатъчна социална инфраструктура по закрила и подкрепа на жертвите.

От една страна според полицаите са необходими промени в Наказателния кодекс, които да позволят на полицията да се самосезира по сигнал на всякакви свидетели, а не само на потърпевшата. Нуждата от такава промяна е свързана с факта, че когато няма преки физически доказателства за насилието, се получава ситуация от типа „дума срещу дума“, при която арестът на извършителя и извеждането му от жилището могат да се тълкуват като нарушаване на гражданските права. В основата на възможните ситуации стои именно липсата на единен национален механизъм и единен регистър на извършителите на домашно насилие. Така става възможно в един и същи момент жертвата и извършителят да подадат сигнали за домашно насилие от другата страна и полицеските служители нямат инструкция, нито социална алтернатива за приемливо действие. Всъщност описаните от полицаите пречки са типичен пример за структурни бариери и съответно структурна дискриминация:

„Жената първо отива и подава жалба в съда. И след половин час пристига определение със заповед за защита – този път в полза на

мъжа. И ние се чудим какво да правим. Извеждаме ги и двамата от съвместно обитаваното жилище и никой не живее там реално“ (П2, ФГ Бургас).

„А за мен отговорността на държавата трябва да е малко по-голяма. И ще ви кажа откъде изхождам: Някои престъпления, които се разглеждат по ЗЗДН като граждански закон, трябва да бъдат вмъкнати в Наказателния кодекс. За да може държавата сама да се сезира. Има случаи, например, обяснавам на една баба какво трябва да се случи с внука ѝ и тя казва: „Не е морално аз да съдя внука си“ (П1, ФГ Бургас).

„При първоначален сигнал за домашно насилие отиваш на сигнала. Оттам малко действията се развиват, защото това са дума срещу дума. Нали, говорим в случаите, когато няма физическо насилие, няма нищо видимо. Има напримерно един мъж и една жена. Жената казва: „Еди какво си и еди какво си, заплашва ме и така нататък“. И ние как да ги отделим. Няма специални кризисни центрове, където да отделим единия, а пък за другия няма достатъчно данни за извършено престъпление, за да го задържим. И тука става една сива зона, в която трябва да вземеш някакво решение, защото не можеш да ги оставиш и двамата вкъщи“ (П1, ФГ Бургас).

Очевидно е, че става дума за правила, норми и установени практики, които, представляват пречки пред жените жертви на домашно насилие да получат достъп до навременна закрила. В това отношение пример за институционален цинизъм и нежелание за промяна, т.е. типична проява на хабитуализирана структурна дискриминация е изказването на В. Радев (министър на МВР към 2018 г.), който казва: „Законът за защита от домашно насилие дава право на пострадали да се обърне към съда за защита. Ако има данни за опасност за живота или здравето му, той може да се обърне и към органите на МВР“. През същата 2018 г. 35 жени губят живота си при домашно насилие, т.е. една на всеки две седмици.

Дискусия и препоръки

Разбира се, теория на промяната изисква препоръки и тяхното обсъждане. За съжаление ограниченията в обема на една статия не позволяват да се представят в детайл всички данни и всички казуси от изследването до момента, а примерите по-горе са по-скоро илюстративни. Но изводите, направени от анализа на фокус групите с потърпевши, полицаи и социални

работници позволяват да се започне дискусия по необходимите спешни промени в институционалния отговор на домашното насилие. Под формата на водещи точки по-долу са обобщени предложенията от участниците в груповите дискусии, като към всяко е направена кратка академична аргументация от тяхната необходимост на база на съществуващите международни и национални изследвания и известните факти:

- **Изграждане на единен национален механизъм по закрила**, с който да са запознати всички патрулни полицаи от Охранителна полиция и служителите на телефон 112. Така ще стане невъзможно да има бездействие поради липса на разписани правила, а работата на спешните телефони, полицейските служители и социалните работници, свързана със незабавна реакция и отзоваване на сигнали, ще се координира и подобри. Международната практика в това отношение показва несъмнена ефективност на превенцията и намаляване на тежките инциденти (Krasnoff & Moscati, 2002; Chan, 2011).

- **Наказателно производство без инициатива на жертвата** – в момента жертвите са принудени сами да подават сигнали, защото делата по Закона за домашно насилие се водят по Гражданския процесуален кодекс. Тази законова уредба е най-силният пример, че става дума за структурна дискриминация, защото пренебрегва всичко, което е известно от психологията за фактическата ситуация в реалния живот. Т.е. пренебрегва факта, че жертвата може да изпитва перманентен обоснован страх (Burman, 2002; Moussion-Esteve, 2022), срам (Eisikovits, & Enosh, 1997; Baker, 2013) и/или любов към извършителя (Kearney, 2001a; Al-Adawi & Al-Bahlani, 2007; Roscock, Jackson & Bradbury-Jones, 2020), включително и т. нар. „Стокхолмски синдром“ (Wallace, 2007) и затова не подава сигнал; пренебрегва факта, че жертвата може да е поставена в ситуация на социална изолация – без телефон, интернет и с ограничена възможност да излиза от дома само когато е придружена от извършителя (Schaffer, 1999; Coohy, 2007; Lanier & Maume, 2009), особено когато потърпевщата е трудноподвижна жена или лице с други физически или интелектуални затруднения (Mays, 2006; Thiara, Hague & Mullender, 2011; Iudici, Antonello & Turchi, 2019); пренебрегва факта, че жертвата може да се намира в ситуация на подчиненост, икономическа или психологическа зависимост (Arthur & Clark, 2009; Basu & Famoye, 2004) и изобщо, че се намира в принудително съжителство поради ситуация на несигурност (Arenas Arroyo, Fernández-Kranz & Nollenberger, 2020; Gear, Koziol-McLain & Eppel, 2021). Ако домашното насилие получи ясен наказателен статут, а не както е сега – само утежняващо обстоятелство (Georgiev, 2016), то в такива случаи ще може полицията да се самосезира при сигнали

за шум или да реагират при сигнали за домашно насилие, подадени от трети лица: съседни, колеги, приятели на жертвата, които са станали свидетели на акта на насилие, без да е необходимо самата жертва да потвърждава и да подава лично сигнал (Kadriu, 2023).

• **Свидетелски показания от трети лица, независимо от желанието на жертвата** – именно допустимостта на свидетелските показания от трето лице могат да бъдат ключ за ефективно противодействие и превенция на домашното насилие, особено в ситуацията на институционална дискриминация, която създава допълнителна привилегия на мъжете извършители (Baker, 2011). На 12 март 2024 г. социалните мрежи и новинарските канали в България „пламнаха“ от видеоклип, записан от 13 годишно момиче в Бобов дол, на който се вижда как мъж пребива съпругата си, като ѝ блъска главата в стената⁵. Мъжът веднага беше задържан от полицията, но освободен скоро след това, защото жертвата не пожела да повдигне обвинение и няма образувано досъдебно производство. Добрата международна практика в такъв случай е, че се приема, че и детето – като свидетел на насилието – също е жертва на насилие и неговите показания са достатъчни, макар че е трета страна в дадения казус (Parkinson & Humphreys, 1998; Edleson, 1999; Kearney, 2001b; Kitzmann et al., 2003). ЗЗДН също разпознава детето, свидетел на насилие, като жертва (чл. 2, ал. 2), и то може да бъде изведено от жилището и поставено под незабавна полицейска защита (чл. 5, ал. 8), но на практика свидетелските му показания не се допускат самостоятелно от тези на майка му, което, разбира се, е още едни пример за структурна дискриминация.

• **Наказателно производство при адвокатска злоупотреба (лъжесвидетелство)** – Във всички полицейски фокус-групи като предизвикателство пред разследването и съответно източник на бездействие бяха посочвани злоупотреби със ЗЗДН, които възникват по съвет на адвоката на някоя от страните в бракоразводно делото или при имотен спор. В този случай единият или и двете страни биват посъветвани да подадат сигнал за домашно насилие, който впоследствие да окаже влияние при взимане на решение от съда относно попечителството над децата и/или относно правото да се обитава семейното жилище. Разбира се, този феномен не е специфично български, и дори има изследвания, които показват, че между 40% и 90% от сигналите за домашно насилие в САЩ са именно случаи на лъжесвидетелстване (Rutledge, 2009). Подобно на съобщаваното в България, изследвани-

⁵ БНТ, Дете записва клип, докато баща му пребива майка му, бабата разпространи видеото, 12.03.2024 г. <https://bntnews.bg/news/dete-zapisa-klip-dokato-bashta-mu-prebiva-maika-mu-babata-razprostrani-videoto-1270404news.html>.

ята в някои развити страни разкриват, че това е специфична, систематично използвана защитна стратегия от някои адвокати (Salomon, 1995; McKoski, 2012) и смятат, че трябва да се преследва с цялата суровост на закона, включително с отнемане на правото да се практикува юридическа професия (Harris, 1995; Stark, 2015; Taylor, 2002). Любопитно е, че Наказателният кодекс предвижда възможност вещите лица да бъдат лишавани от правото да практикуват професията си при изготвяне на невярно заключение (чл. 291, ал. 1), но няма такава санкция по отношение на адвокатите. Нещо повече, дори в Закона за адвокатурата подтикваването към лъжесвидетелстване не е изрично упоменато като дисциплинарно нарушение, а дори и някой съдебен състав да прецени, че става дума за нарушаване на професионалната етика (чл. 132, ал. 10), то отнемането на права е само временно, а санкцията може да се сведе само до „лично предупреждение“ (чл. 133, ал. 4), т.е. на адвоката изцяло ще му се размине – както се казва на разговорен език. Именно това е причината, да има консенсус сред полицейските служители за нуждата адвокатите да подлежат на наказателно преследване при лъжесвидетелстване, подобно на вещите лица.

• **Щадящо разпитване на жертвата** – Някои от потърпевшите разказват как им се е налагало да бъдат разпитвани многократно и да дават едни и същи показания четири или повече пъти: от патрул, от териториален полицай, от следовател, от прокурор и накрая в съда. След което при обжалване пред Окръжния съд отново да се мине през цикъл на разпити. Всъщност част от жертвите, а и част от полицаите съобщават за практиката „очна ставка“, т.е. събиране на жертвата и извършителя в едно помещение, лице-в-лице. В международната практика и многократното разпитване на жертвите на насилие, и организирането на очни ставки между потърпевшите от насилие (които по тази причина изпитват обоснован страх) и техните насилници се приема за „ревиктимизация“, т.е. допълнително психическо насилие, което усилва травмата на жертвите (Mears et al., 2001; de la Garza, 2020; Roque et al., 2014). Това освен, освен че е лоша правораздавателна практика, също е типичен пример за структурна дискриминация в случаите на насилие, основано на пола. Европейските стандарти показват, че има възможност за едно единствено разпитване пред съдия и показанията след това могат да бъдат използвани във всички останали етапи на наказателния процес (Рапова, 2004). Практиката от други съдебни системи предполага изготвянето на видеозапис в защитена среда, който след това да се „пуска“ или да се „гледа“ при разследването и съдебния процес, за да не се налага жертвата непрекъснато да се връща към травматичното преживяване или да се изправя публично в съда (Erpperson, 2020). Други автори предлагат поли-

цейските служители да минават обучения, повишаващи чувствителността и знанията им за насилието, основано на пола, което, съчетано с повече жени-полицаи, може да намали институционалната ревиктимизация (Smt, 2013; Keli, 2022).

• **Ефективни ограничителни мерки** – Българската правна система познава ограничителната заповед като инструмент на превенция и защита и тя често бива използвана като част от санкциите срещу насилниците. Разказите и на полицаите, и на потърпевшите от домашно насилие обаче са за системно нарушаване на тези мерки, което обаче е трудно да бъде доказано – или, че се е случило, или, че е било целенасочено. Т.е. извършителят обикновено претендира, че по случайност се оказал на една и съща опашка в супермаркета, в едно и също кафене, или в близост до работното място на жертвата. Това важи както за разказите за малките населени места, където така или иначе има едва няколко магазина или само едно кафене; така и за София и Бургас, където в анонимността на големия град извършителят може да се скрие „в тълпата“ и да отрича, че е налице състав на чл. 144а, т.е. да казва, че не следи жертвата. Разбира се, в международната практика също се наблюдава нарушаване на ограничителните заповеди, като един систематичен анализ показва, че те са по-ефективни, когато жертвата има по-малко връзки с извършителя и по-голяма независимост, но са по-малко ефективни при нарушители, рецидиви на други престъпления, предходно насилие или проблеми с психичното здраве (Dowling et al., 2018). Съпоставително изследване на практиката в няколко държави показва, че ефективността на ограничителната заповед се повишава, когато нейният обхват се разшири и включи децата, въпреки правото на попечителство, други роднини, както и новия интимен партньор на жертвата, защото понякога тормозът и продължаващото емоционално и психическо насилие биват осъществявани чрез тях (Schollenberg & Gibbons, 1991). Именно такива случаи бяха регистрирани и по време на фокус-групите с жертви в Димитровград и Варна. Потърпевшите от домашно насилие жени са успели да осъдят бившите си съпрузи и извършителите имат ограничителни заповеди. Жените са сменили местоживеенето си, местейки се в друг регион от страната. Но преследването и психическият тормоз продължават: извършителите намират новото им работно място и звънят или разпращат мейли с обидно съдържание; нанасят щети по личните автомобили на жертвите; звънят по телефона и заплашват близките роднини на жертвите; звънят на децата и заплашват, че ще направят нещо лошо на майката и т. н. Това пороци и предложението в тези две групи – в случаи на домашно насилие да не се премества жертвата в друг регион, а съдът да задължава извършителят да бъде преместен в друг

регион и не потърпевшите, а извършителите да трябва да започват отначало живота си: ново жилище, нова работа, задължително ежедневно явяване за подпис в районно управление на МВР, което да гарантира, че се намират на отделено от жертвата разстояние.

• **Защитени жилища за жертвите при необходимост** – Жертвите на домашно насилие често остават без покрив над главата след бягството си от жилището, в което са живели с извършителя. Опитът от редица страни по света показва, че успешното „ново начало“ на живота често е свързано не толкова с момента на кризисната интервенция, а с необходимостта от последваща дългосрочна подкрепа по отношение на жилищното настанване – така че от една страна да се гарантира физическата сигурност, а с това и психическият комфорт на жертвата, а от друга страна да се подпомогне социалната реинтеграция – особено в случаите на смяна на местожителството и местоработата, а и новата училищна среда – когато жената е получила закрила заедно с децата си (Mitcheltree & Sunikka-Blank, 2023; Ballan, Freyer & Romanelli, 2024). Българското законодателство към момента не съответства на добрата международна практика. Въпреки активните медийни изяви на министър Шалапатова и обещанието, че ще има защитени жилища за жертвите на домашно насилие⁶, всъщност Законът за социалните услуги, а съответно Националната карта на социалните услуги и Регистърът на социалните услуги към момента включват като защитено жилище единствено резидентни услуги за лица с психични разстройства, с умствена изостаналост и с физически увреждания. За жертвите на домашно насилие съществува единствено краткосрочната услуга „кризисен център“, като към юни 2024 г. в страната има 12 кризисни центъра с общ капацитет 151 места, което е изключително недостатъчно.

• **Субсидирана заетост за жертвите при необходимост** – Жертвите на домашно насилие често пъти имат специфични нужди по отношение на заетостта си. Част от потърпевшите са домакини с ограничавани от партньорите им социални контакти; друга част са претърпели физическа травма от такова естество, че към момента на извеждане от жилището имат намалена трудоспособност; трети са сменили региона на местоживеене, но в новото населено място няма подходяща работа, отговаряща на тяхното образование или квалификацията им. Това кара някои изследователи да подчертават нуждата от специализирани програми за консултиране и преквалификация,

⁶ <https://bntnews.bg/news/dete-zapisa-klip-dokato-bashta-mu-prebiva-maika-mu-babata-razprostrani-videoto-1270404news.html>.

начертани специално за жертви на домашно насилие (Lloyd, 1997). Нуждата от субсидиране на заетостта на жертвата от домашно насилие е най-голяма в малките предприятия до трима служители, защото работодателят не може да си позволи отсъствието на работник съответно временната му замяна и по този начин, част от потърпевшите от домашно насилие губят работата си (Henry, 2005). За да се избегне изпадането в бедност и да се подкрепи социалната интеграция на жените, пострадали от домашно насилие, някои изследователи препоръчват комбинирането на няколко вида социални услуги, свързано с държавно субсидиране: заетост, жилища и достъп до дневна грижа за децата (Cole & Buel, 2000). И в трите фокус-групи с жертви на домашно насилие се откриха тези проблеми: работодател уволнява или отказва да наеме жена на работа, защото се налага да излиза по-рано от работа, за да се грижи за детето си; или защото отсъства поради нуждата от лечение на физическа травма в резултат от домашно насилие; или – в град като Димитровград (където се намира кризисният център), няма подходяща работа по специалността за жени с висше образование и това налага преквалификацията им в други професии.

• **Автоматично финансово възмездяване на жертвата** – В рамките на сега съществуващото законодателство в Република България жертвите на домашно насилие имат право на обезщетение за имуществени или неимуществени вреди. Това може да стане от една страна, ако пострадалото лице може да поиска обезщетение по време на наказателно производство за телесна повреда. В този случай размерът на щетите трябва да бъде подкрепен от доказателства: касови бележки и фактури за лекарства, хоспитализация, или други медицински грижи. Т.е. има риск жената, останала без работа и доходи, да трябва да направи разходи, които след това ще ѝ бъдат възстановени по съдебен ред, което само по себе си – предвид периода на решаване на делата и процедурите по обжалване – може да отнеме няколко години. От друга страна, потърпевщата от домашно насилие може да заведе допълнителен граждански иск за физически или психически травми и/или за повредено или изгубено имущество. Но това отново е свързано със съдебни разходи и период на изчакване. Добрата практика в някои стране е създаването на специален публичен фонд, от който държавата веднага обезщетява потърпевшите от домашно насилие (Rutledge, 2011), защото бавното възмездяване и бавното правосъдие също са форма на структурна дискриминация, доколкото удължават психическото и емоционалното страдание на жертвата. Това се налага, защото частните застрахователни компании са

склонни да застраховат вещите в дома, както и човешкия живот, но не и в случаите на домашно насилие (Brown & Randall, 2004).

Вярвам се, че разгледаните в началото на статията примери са убедили читателската аудитория, че в България има случаи на структурна дискриминация, основана на пола – когато става дума за полицейското бездействие. Тя е свързана от една страна с липсата на единен национален механизъм за реакция при домашно насилие, с пренебрегването на законите разпоредби и с латентна мизогиния сред някои служители на МВР. От друга страна обаче бездействието се дължи на законодателни ограничения и институционални инфраструктурни липси. Надявам се, че дискусиата в края на статията е предложила решения на база на съществуващи добри примери в други държави и във връзка с направени предложения в хода на проведените фокус-групи. По този начин статията би могла да послужи като инструмент за застъпничество на гражданското общество и същевременно като основа за планиране на бъдещи политики от публичните институции в България.

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Неравенства на пазара на труда и мерки за противодействие на Европейския съюз

Стоил Моллов*

Докладът разглежда неравенството в заплащането на мъжете и жените на пазара на труда в Европейския съюз и в България и мерките и политиките за противодействие.

***Ключови думи:** труд, заплащане, неравенство, пол, политика, компании, Европейски съюз*



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Market Inequalities and European Union Countermeasures

Stoil Mollov

The report explores payment gap between men and women in European Union and Bulgaria and the counter measures and policies.

Keywords: *labour, payment, inequality, policy, companies, European Union*



Принципът на равенството е сред класическите постулати на европейския конституционализъм. Развитието му може да се проследи от идейно-политическата програма на Великата френска революция – Декларацията за правата на човека и гражданина (август 1789 г.), през Всеобщата декларация за правата на човека на ООН (декември 1948 г.) до Харта на основните права на европейския съюз (октомври 2000 г.). Неизменно част от разбирането за равенството между хората е равенството между мъжете и жените, описано в неформалната т. нар. Декларация за правата на жената и гражданката (септември 1791 г.).

Правото на труд е с изключително обширна регламентация в международното, европейското и националното законодателство. Значимостта му през XXI в. нараства в резултат както на демографски фактори (ниска раждаемост и миграция), така и на глобализацията, дигитализацията и нарастване на значението на интелектуалния потенциал.

Пресечна точка между принципа на равенството между половете и правото на труд е принципът за равенство на пазара на труда, изрично прогласен в чл. 23 от Хартата на основните права на Европейския съюз – „Равенството между жените и мъжете трябва да бъде гарантирано във всички области, включително заетостта, труда и възнаграждението.“. Негова производна е гаранцията за равенство в заплащането, изрично закрепена в чл. 157 от Договора за функционирането на Европейския съюз (ДФЕС) – „Всяка държава-членка осигурява прилагането на принципа за равно заплащане на мъжете и жените за равен труд или за труд с равна стойност.“.

От посочените текстове е видно, че неравенството между мъжете и жените е нежелан факт във всяка една област, особено при трудовите отношения и особено в заплащането за положен труд. Съществуването му противоречи на императивни правни норми и на изискването за фактическо прилагане на принципа за равното заплащане за равностоен труд.

1. Установяване и измерване на неравенствата между половете

Насрещната престация на положения труд обикновено се обозначава с понятието „заплата“. С този термин боравят нормативните актове и икономическата литература, тъй като значението му е ясно и общоприето. Приема се, че заплатата се състои от паричното възнаграждение за работата и от всички допълнителни социални придобивки като допълнителни осигуровки за сметка на работодателя, допълнителни почивки и платени отпуски, стойността на предоставяни ваучери и др.

ДФЕС разглежда неравенство в заплащането в две направления: за „равен труд“ и за „труд с равна стойност“. Първото предложение сравнява заплащането за един и същ вид труд, съответно заплащането за заемането на една и съща позиция (длъжност), упражняван, съответно заемана от различен пол работник. Обикновено в този случай жените и мъжете притежават еднаква квалификация и упражняват една и съща дейност при еквивалентни условия. Второто предложение сравнява заплащането на различен по вид труд (съответно заемана позиция или длъжност), но с „равна стойност“. Тази концепция е по-модерна и перспективна, тъй като има универсално приложение, т.е. тя покрива не само първия вариант, но е възможно да се прилага и в ситуации, при които жените и мъжете упражняват различен труд при условие, че той е с равна стойност. По този начин се идентифицират неравенства в заплащането на жените и мъжете в различни сфери и при различни условия.¹ Разлика в заплащането е налице, когато за еднакъв или сходен по вид или по стойност труд работник от единия пол получава повече или по-малко, отколкото работник от другия пол. Принципът на равенството се прилага чрез въвеждането на забрана за въвеждането на критерии за по-неблагоприятно третиране на определени субекти, докато равенството в заплащането е прокарано с пряка норма.

Неравенството в заплащането се идентифицира най-лесно, тъй като се основава на сравнително просто математическо изчисление на точни величини – време и пари. Значително по-сложно е определянето на неравенства при условията на труд или при т. нар. „безплатна грижа“ (*unpaid care*) или „неформален труд“ – свързан с домакинска работа, отглеждане на деца, грижи за възрастни или нуждаещи се от помощ членове на семейството и други домакински дейности.

С Регламент (ЕО) №1922/2006 на Европейския парламент и на Съвета от 20.12.2006 г. за създаване на Европейски институт за равенство между половете (European Institute for Gender Equality). Институтът е учреден независим подпомагащ орган на ЕС, базиран впоследствие във Вилнюс, Литва. Задачите му са да събира, анализира и разпространява обективна, надеждна и сравнима информация за равенството между мъжете и жените, да разработва подходящи инструменти за премахване на всякакви форми на дискриминация на основание на пола, да насърчава диалога между заинтересованите страни и да подпомага институциите на ЕС и държавите членки ефективно да насърчават и прилагат политика на равенство между половете.

От 2013 г. (с изключения през 2014 и 2018 г.) Институтът публикува ежегоден доклад за равенство между половете в съюза, изчислено чрез индекс с максимална стойност от 100 точки, които означават наличие на

¹ Women, gender and work, Geneva, JLO, 2001, p. 469.

пълно равенство. През октомври 2023 г. е публикуван текущият доклад, който почива и на данни от 2022 и 2021 г.² Генералният извод е, че неравенството между половете в ЕС намалява (индексът за съюза е 70.2 точки), като се изтъква, че първите 14 места в света по този критерий принадлежат на държави членки. Въпреки това напредъкът е незадоволителен, а в някои сфери има влошаване вследствие на пандемията от КОВИД-19, поради което Стратегията на ЕС за равенство между половете 2020 – 2025 г. (виж по-долу 2.2.1) няма да бъде изпълнена.³

Този доклад ще разгледа някои актуални тенденции, констатирани в доклада за 2023 г., ще се спре на причините за тях и на мерките, които ЕС предприема и планира за следващите десет години.⁴

Индексът се изчислява в шест основни и два допълнителни домейна (*domains*), като равенството се изчислява за всеки един от тях, а крайният индекс за всяка държава и за ЕС е равен на средното аритметично. Основните домейни са: работа, пари, знание, време, власт и здраве, а допълнителните – насилие над жени и пресечни точки на неравенствата. Резултатите от допълнителните сегменти не участват при пресмятането на крайния индекс за отделните държави.

1.1. Работа

Домейнът на работата измерва в каква степен жените и мъжете могат да се възползват от равен достъп до заетост и добри условия на труд. Изследват се показатели като ниво на заетост на пълно работно време, продължителност на работния живот и безработица. Качеството на работата се измерва чрез гъвкаво работно време и Индекса на възможностите за кариера на Еврофаунд (Eurofound's Career Prospects Index)⁵.

За 2023 г. домейнът на работата отчита подобрение и има третия най-висок резултат (73.8 точки) в Индекса. Въпреки това в ЕС остават

² PDF ISBN 978-92-9486-099-6 ISSN 2599-8935, © European Institute for Gender Equality, 2023.

³ Communication from the Commission to the European Parliament, the Council, the European economic and social committee, and the committee of the regions a Union of Equality: Gender Equality Strategy 2020 – 2025, Document 52020DC0152.

⁴ Gender Equality Index 2023, Publications Office of the European Union, European Institute for Gender Equality, 2023.

⁵ Еврофаунд (European Foundation for the Improvement of Living and Working Conditions) е тристранен орган на ЕС, чийто управителен борд се състои от представители на правителствата и социалните партньори (работодатели и синдикати) в държавите членки, представители на Европейската комисия и един независим експерт, назначен от Европейския парламент. Функциите му са да събира информация и да подпомага разработването на по-добри социални политики и политики за заетостта.

неравенства на пазара на труда и половата сегрегация продължава да бъде значително явление. Жените продължават да заемат работни места в сектори с по-ниски нива на възнаграждение, по-малко кариерни перспективи и по-малко възможности за повишаване на квалификацията.

Въпреки че нивата на заетост на пълно работно време са постоянно по-ниски за жените, съществуват съществени различията сред двойките с деца, самотните жени и мъже, лицата с ниско образование и родените в чужбина.

Зеленият преход е на път да насърчи иновациите и структурните промени към по-екологични икономики и общества. Печалбите и разходите за приспособяване обаче вероятно ще бъдат неравномерно разпределени, като се очаква повечето работни места да се създадат в сектори, които и в момента се доминират от мъже. Това може да увеличи неравенството между половете, ако не се предприемат мерки за по-справедлива и социално устойчива трансформация.

1.2. Пари

Домейнът на парите остава на второ място в класацията на Индекса за равенство между половете за 2023 г., с резултат от 82.6 точки. След години на застой, домейнът показва признаци за влошаване (намаление от 0.4 точки). Това може да се дължи на последиците от пандемията, може и да е предупреждение за по-дългосрочно увеличаване на полови неравенства в доходите. Големите различия в месечните брутни доходи показват, че жените не само са затруднени в достъпа до по-добре платен труд, но и печелят около 30% по-малко в сравнение с мъжете, като най-големи са разликите при високо образованите, лицата на възраст между 50 и 64 години и онези, които са в семейство с деца. Това отразява силното отрицателно влияние върху доходите от вертикалната полова сегрегация на пазара на труда, както и по-ниските доходи на жените поради поемане на значителна част от безплатните грижи за другите през целия живот.

Разликата в заплащането между мъжете и жените нараства с покачването на възрастта – тя е сравнително по-малка, когато жените навлизат на трудовия пазар, и се увеличава с поемането на повече семейни отговорности от тях. От това може да се направи извод, че жените нямат толкова големи спестявания и имат по-малки възможности да инвестират. В резултат те биват по-заstraшени от изпадане в състояние на бедност и социална изолация с напредването на възрастта. При пенсиите разликата през 2020 г. в ЕС била около 28%.

Разликите в доходите обуславят няколко други измерения на неравенството, като достъпа до транспорт. Ограниченият достъп до транспорт може да попречи на достъпа до заетост и образование, което от своя страна да доведе и до социално изключване. Половите стереотипи играят особено силна роля в по-добрия достъп на мъжете до автомобили и използването им, особено когато превозното средство се споделя в цялото домакинство. Жените използват обществените транспортни системи повече от мъжете, поради което ограниченият достъп до надежден обществен транспорт може да влоши значително възможностите за доходи, особено в селските и отдалечени райони.

1.3. Знание

Резултатът в домейна на знанието от 63.6 точки, остава стабилен, (увеличение с 1.1 точки) в сравнение с индекса за 2022 г., което се дължи изцяло на нарастването в поддомейна на участието и достъпа до образование (увеличение с 2.5 точки). Във всички възрастови групи жените са по-активни от мъжете в обучение и образование през целия живот. Участието във формално и неформално образование и обучение намалява с възрастта, като 74% от жените и 69% от мъжете на възраст между 15 и 24 години са заети с образование и обучение. Процентът спада до 15% за жените и 13% за мъже на възраст от 25 до 49 години и намалява още повече в по-късни години. Сред родените извън ЕС и двата пола са по-малко ангажирани с образование и обучение през целия живот (съответно 15% и 14%) в сравнение с родените в Европа.

Очаква се Зелената сделка да увеличи търсенето на лица с образование в областта на науката, технологиите, инженерството и математиката (STEM), тъй като иновациите и преходът към икономика без въглерод изискват високотехнологични умения. Жените все още са по-малко в тези образователни области, което намалява вероятността да се възползват от нарастващите възможности за работа във връзка със зеления преход.

1.4. Време

Домейнът на времето остава третият домейн с най-нисък резултат от 68.5 точки за 2023 г. Това се дължи до голяма степен на неравенството между половете в социалните дейности, както и на трайната разлика между половете във времето, посветено на домакинската работа. Въпреки това поддомейнът на дейностите по грижи показва подобрене от 9.6 точки главно поради намаляване на участието на жените в неплатени грижи и домакинска работа като цяло, а не поради по-голямото участие на мъжете

в такива дейности. Данните от проучването на Института за 2022 г. относно участието на жените и мъжете в неплатени грижи показват, че повече жени (34%), отколкото мъже (25%) са ангажирани в ежедневните грижи за другите. По-високи неравенства са видими при готвенето и домакинската работа, където 63% от жените и 36% от мъжете съобщават, че се занимават с такава работа всеки ден. Най-висок е делът на жените и мъжете с отговорности за грижи и домакинска работа във възрастовата група 25–49 години, т.е. групата, която най-вероятно има деца. Неравномерното разпределение на неплатените дейности по грижи и домакинска работа не само води до различни модели на потребление на енергия (оттам и различен въглероден отпечатък), но също така формира желание и капацитет за възприемане на по-екологосъобразно поведение. Според проучването на Института по-висок дял от жените (59%) в сравнение с мъжете (53%) посочват, че редовно избират по-екологични опции в своите домакински задачи, като рециклиране, използване на екологични почистващи продукти и използване на възобновяема енергия за намаляване на въглеродните емисии.

1.5. Власт

Домейнът на властта е постигнала най-голям напредък от всички от 2010 г. досега с повишение от 17.2 точки. Въпреки това той все още е с най-ниския резултат от 59.1 точки и с неравномерен напредък към равенство във вземането на властови решения. Жените остават значително по-малко представени в политическия живот (през 2023 г. 33% от членовете на еднокамерните или долните камари на националните парламенти в ЕС са жени). Въпреки подобрението, остават големи различия между държавите-членки, а в осем от тях индексът намалява. Неравенството на половете във властта не се ограничава само до вземането на властови решения, но и до по-широко участие в политическия живот.

Според данните за 2022 г. относно различията между половете в грижи, индивидуални и социални дейности мъжете са по-склонни от жените да участват в политически дейности (13% от мъжете срещу 10% жени), като принос към политическа кампания, подписване на петиция, протестиране или комуникация с длъжностно лице. Към 2022 г. жените в ЕС продължават да бъдат недостатъчно представени при вземане на решения по въпроси, засягащи околната среда и изменението на климата.

1.6. Здраве

Домейнът на здравето е начело на индекса с резултат от 88.5 точки, като намалението в сравнение с 2022 г. е незначително. Проблем тук е по-

скоро липсата на напредък в равенството между половете по отношение на здравето и достъпа до здравеопазване. Основен здравен проблем в ЕС е прекомерната консумация на алкохол и той засяга мъжете непропорционално повече от жените, независимо от възрастта и образованието. Като цяло 11% от жените и 26% от мъжете в ЕС са въввлечени във вредно пиене (*harmful drinking*). Разпространението е по-високо сред определени групи – 31% от мъжете на възраст от 15 до 24 години и 36% от мъжете на възраст от 25 до 34 години редовно консумират обилни количества алкохол. За жените вредното пиене е най-високо сред младите жени на възраст 15 до 24 години (19%). Изследванията показват, че пандемията от КОВИД-19 увеличава затвърдените модели на пиене.

Изменението на климата засяга негативно здравето на жените и мъжете пряко и косвено. Високите нива на градско и застаряващо население, устойчивите социално-икономически неравенства и високото разпространение на незаразните заболявания означават, че населението на ЕС е силно изложено на здравни рискове, причинени от повишаване на температурите и екстремни климатични явления. По-възрастните жени са изложени на особен риск от смърт при екстремни горещини. Горещите вълни се отразяват негативно на психичното здраве и на двата пола.

1.7. Насилие

През 2021 г. Евростат регистрира 720 жени жертви на убийство от член на семейството или интимен партньор в 17 държави членки на ЕС. Липсата на ясни, изчерпателни и систематични дефиниции на всички форми на насилие срещу жените и момичетата води до оскъдна информация, която не може да бъде сравнявана. През 2017 г. ЕС подписа Конвенция за предотвратяване и борба с насилието над жени и домашно насилие на Съвета на Европа (Истанбулската конвенция). След шест години на дискусии, ЕС официално се присъедини през юни 2023 г. ЕС като силен символичен ангажимент за подобряване на правната защита на жертвите на насилие. е от решаващо значение за информираността при вземане на решение. Изменението на климата засилва съществуването на структурни неравенства и действа като мултипликатор на риска – климатичната криза влошава всички видове насилие, основано на пола, включително физическо, сексуално, психологическо и икономическо, особено в контекста на трайни интимни партньорства и семейства.

2. Институции и мерки за противодействие на неравенствата между половете на пазара на труда

Въпреки обемната юридическа регламентация, включваща и актове от най-висш порядък, неравенства между половете и конкретно неравенства на пазара на труда в ЕС все още съществуват. Независимо от директната забрана за дискриминация, основана на пола, в заплащането за положен труд, работещите жени в Европейския съюз получават средно 12,7% по-малко на час от мъжете.⁶ Различията се дължат основно на нарушения на законодателството, на дефектни системи и критерии за остойностяване на труда и не на последно място на подценяване на женския труд и количеството на безплатния труд в бита. Може да се направи изводът, че неравенството между мъжете и жените в заплащането е по-скоро системен резултат, а не е вследствие на целенасочена дискриминация. В изпълнение на своята компетентност ЕС предприема активни мерки за прилагане на общностното право, които включват създаването на органи със специфични функции конкретно насочени срещу неравенствата – да ги установяват, да сигнализируют институциите на съюза за съществуването им и да предлагат мерки срещу тях. На следващо място в сферата на споделената компетентност ЕС и държавите членки непрестанно усъвършенстват и детайлизират правната регламентация в областта на труда и равенството.

2.1. Органи

Равенството между половете е част от европейския стълб на социалните права и общата политика на ЕС в социална сфера. Всички институции са ангажирани с тази проблематика, доколкото тя заема важно място в системата на общностния правен ред. Наред с това са създадени и органи, посветени изключително на борбата с неравенствата между половете:

2.1.1. Постоянна комисия по правата на жените и равенството между половете на Европейския парламент. Депутатите редовно приемат доклади с препоръки по въпроси, като за настоящия мандат те са обобщени в доклада за 2019 – 2024 г.⁷ Основни постижения на постоянната комисия са приносят към приемането на директивите за жените в управителните бордове и за прозрачността на заплащането. Също така всяка година Парламентът отбелязва

⁶ <https://www.europarl.europa.eu/topics/bg/article/20200109STO69925/zaplashchaneto-namzhete-i-zhenite-zashcho-ima-razlika>.

⁷ Достъпен на 2019–2024 Activity Report updated 16-5-2024 – FEMM.pdf (europa.eu).

Международния ден на жената (8 март) със събития, насочени към привличане на общественото внимание по тези теми.

- 2.1.2. Европейски институт по равенство на половете (European Institute of Gender Equality), посочен по-горе.

2.2. Норми

Действията на съюза срещу неравенствата на пазара на труда са обобщени от т. нар. Дейност на ЕС за равно заплащане (EU action for equal pay), чиято цел е ефективното прилагане на принципа на равенство чрез приемането на ефективно законодателство и контрол за прилагането му в няколко направления, като тук ще посочим някои от последните, приети през изтичащия мандат:

- 2.2.1. Стратегия за равенство между половете за периода 2020–2025 г.⁸, израз на ангажмента на Комисията за постигане на Съюз на равенство. В нея са представени политически цели и действия за постигането им до 2025 г., преди всичко изграждане на Съюз, в който жените и мъжете, момичетата и момчетата са свободни да следват пътя, който са избрали в живота си, разполагат с равни възможности за просперитет и възможности за участие в ръководството на европейското общество. Също така се цели премахване на насилието, основано на пола; борба със стереотипите, свързани с пола; преодоляване на неравенството между половете на пазара на труда; постигане на равнопоставено участие в различните сектори на икономиката; преодоляване на разликите в заплащането и в пенсиите на жените и мъжете; преодоляване на разликите между жените и мъжете по отношение на полагането на грижи и постигане на равновесие между половете в политиката и ръководните длъжности. Стратегията е съсредоточена върху действия в рамките на ЕС, но е съгласувана и с външната политика на Съюза за равенство между половете и овластяване на жените. Като едно от първите действия за изпълнение на стратегията на 4 март 2021 г. Комисията предложи задължителни мерки за прозрачност в заплащането.

- 2.2.2. Директива (ЕС) 2019/1158 на Европейския парламент и на Съвета от 20 юни 2019 година относно равновесието между

⁸ Достъпна на https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_bg.

професионалния и личния живот на родителите и лицата, полагащи грижи, и за отмяна на Директива 2010/18/ЕС на Съвета.

- 2.2.3. На 8 март 2022 г. Европейската комисия приема предложение за директива за борба с насилието над жени и домашното насилие. То цели въвеждането на минимални правила относно правата на тази група жертви на престъпления и криминализирането на най-тежките форми на насилие срещу жени, включително и на кибернасилието.
- 2.2.4. В изпълнение на стратегията на 10.05.2023 г. е приета Директива (ЕС) 2023/970 на европейския парламент и на съвета от за укрепване прилагането на принципа на равно заплащане на жените и мъжете за равен труд или за труд с равна стойност чрез прозрачност в заплащането и механизми за прилагане. Държавите членки разполагат с три години, за да я транспонират в националното законодателство. Отговорностите за грижа варират по време на жизнения цикъл, например когато хората имат деца или немощни възрастни родители. И жените, и мъжете трябва да имат възможността да съчетават личните и работните отговорности по еднакъв начин.
- 2.2.5. Важно постижение след дългогодишни преговори е постигането на съгласие между институциите по Директива относно жените в управителните съвети, която има за цел подобряване на баланса между половете на заемащите ръководни длъжности в най-големите дружества в ЕС, регистрирани за борсова търговия. Тя предвижда, че до 2026 г. най-малко 40% от позициите на директори без изпълнителни функции в дружества, допуснати до борсова търговия, следва да бъдат заемани от членове на по-слабо представения пол. Ако държавите-членки решат да прилагат новите правила както за изпълнителните директори, така и за директорите без изпълнителни функции, целта ще бъде 33% от всички директорски позиции до 2026 г. Дружествата, допуснати до борсова търговия, които не постигат целите, ще трябва да адаптират своя процес на подбор и да въведат справедливи и прозрачни процедури за подбор и назначаване на базата на сравнителна оценка на различните кандидати въз основа на ясни и неутрално формулирани критерии. Когато дружествата трябва да избират между кандидати с еднаква квалификация,

те следва да отдават приоритет на кандидата от по-слабо представения пол.⁹

2.2.6. Еднакво заплащане за еднакъв труд – основополагащият принцип, заложен в чл. 157 ДФЕС задължава държавите да премахнат дискриминацията, основана на пола във всички аспекти и условия на възнаграждение за една и съща работа или за работа с еднаква стойност. ЕС непрестанно наблюдава правилното транспониране и прилагане на Директива 2006/54/ЕО относно равното заплащане и подкрепя държавите членки в правилното ѝ прилагане. Директива 2006/54/ЕО консолидира съществуващите директиви относно равенството между половете в областта на заетостта заедно със съдебната практика на Съда на Европейския съюз. През март 2020 г. Комисията публикува доклад за изпълнението на плана за действие на ЕС за периода 2017 – 2019 г. за справяне с разликата в заплащането на жените и мъжете.¹⁰

1.2.7. Символично на 8 март 2023 г. Европейската комисия започва кампания за борба със стереотипите, свързани с пола. Тя е насочена към свързаните с пола стереотипи, които засягат както мъжете, така и жените, в различни области на живота, включително избор на професия, споделяне на отговорностите за полагане на грижи и вземане на решения. Това също е конкретен резултат от прилагането на стратегията.

Може да се обобщи, че усилията на ЕС срещу неравенствата на пазара на труда са значителни. Не може да не се признае напредъкът на държавите членки по пътя към по-справедливо общество. Категорично, пълното равенство между половете все още е далечна цел, но усилията за постигането ѝ със сигурност ще продължат. Не само поради повелителните правни норми и принципи на европейското право, но и поради чисто икономически парични, които биха били от полза за всички – равното заплащане за положен труд означава повече пари за потребление, което би довело до събиране на повече данъци и би намалило тежестта върху системите за социално подпомагане. Според оценки на Европейския парламент, всяко намаление с 1% на разлика-

⁹ <https://www.consilium.europa.eu/bg/press/press-releases/2022/10/17/council-approves-eu-law-to-improve-gender-balance-on-company-boards/>.

¹⁰ https://www.europarl.europa.eu/doceo/document/A-9-2022-0192_BG.html.

та в заплащането между половете би увеличило БВП с 0,1%.¹¹ На следващо място се счита, че намаляването на количеството на „безплатния труд“ и равномерното разпределяне на грижите за домакинството са първостепенни мерки за противодействие на най-негативните демографски тенденции – европейците избират да имат все по-малко деца на все по-голяма възраст.

¹¹ <https://www.europarl.europa.eu/topics/bg/article/20200109STO69925/zaplashchaneto-na-mzhete-i-zhenite-zashcho-ima-razlika>.

О бедности как формы дискриминации

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В статье рассмотрены авторские взгляды на возможные перспективы совершенствования государственно-правовой жизни общества по неприятию дискриминации бедных и незащищенных слоёв населения. Предметом исследования является проблема реализации принципа социальной справедливости в современном обществе с учетом оптимизации правосознания, правовой культуры, законодательства. Поэтому целью статьи является краткий анализ причин дискриминации по причине имущественного неравенства. Указанная цель достигается посредством применения диалектического и герменевтического методов, принципов восхождения от абстрактного к конкретному, историзма и других, а также сравнительно-правового метода. Сформулированы выводы, определены новые возможности реформирования законодательства по преодолению.

Ключевые слова: бедность; дискриминация; законодательство; справедливость; социальная справедливость; правовая культура; правосознание



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About poverty as a form of discrimination

Ivan Ivannikov Andreevich*

The article discusses the author's views on possible prospects for improving the state and legal life of society in terms of non-acceptance of discrimination against the poor and vulnerable segments of the population. The subject of the study is the problem of implementing the principle of social justice in modern society, taking into account the optimization of legal consciousness, legal culture, and legislation. Therefore, the purpose of the article is a brief analysis of the causes of discrimination due to wealth inequality. This goal is achieved through the use of dialectical and hermeneutic methods, the principles of ascent from the abstract to the concrete, historicism and others, as well as the comparative legal method. Conclusions are formulated and new opportunities for reforming legislation to overcome this are identified.

Keywords: *poverty; discrimination; legislation; justice; social justice; legal culture; legal consciousness*



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Проблема равенства в юридической и политической науке является вечной. История философско-правовой мысли со времен античности до наших дней предметом своего изучения имела справедливость в основе которой некоторым авторам виделось понятие равенства (Аристотель, И. Кант), а другим – неравенство (Платон, И. А. Ильин).

М. А. Бакунин стремился к реализации принципа социальной справедливости, под которой понимал не ту, которая закреплена в законах современных государств, а той, «...суть которой передается одним словом: *равенство*»¹.

Согласно статье 1 Всеобщей Декларации прав человека 1948 года «все люди рождаются свободными и равными в своем достоинстве и правах». Однако закрепление формального равенства в законодательстве, перераспределение доходов от богатых к бедным проблему неравенства не может решить.

Конституции многих передовых стран в вопросе построения правового и социального государства стран провозгласили равенство всех перед законом и судом, запрещают дискриминацию по признаку пола, вероисповедания, расы, языка, происхождения, политических взглядов, но не содержат норм, которые защищали бы человека от первичной дискриминации – дискриминации по причине бедности. В реальной жизни люди подвергаться дискриминации чаще всего именно по этой причине. Дискриминация по признаку бедности делает мешает людям быть активными участниками государственно-правовой жизни, ограничивает их передвижение, возможности повысить свой уровень образования, улучшить жилищные условия. Указанные причины образуют череду разных форм неравенства. Например, отсутствие образования ограничивает доступ к высокооплачиваемой работе.

В истории человечества проблема имущественного неравенства являлась причиной участия граждан в революционных и протестных акциях. Государственно-правовая жизнь в СССР, несмотря на то, что законодательство союзных республик во многом дублировали нормы Конституции СССР и союзного законодательства, была основана на принципах верховенства Советов, партийности, классового подхода, все же основывалась на принципе социальной справедливости. Всенародное обсуждение и принятие Конституций СССР 1936 и 1977 годов позволили создать законодательство не только с высоким уровнем юридической техники, но и с большим уровнем справедливости.

¹ Бакунин М.А. Философия. Социология. Политика. – Москва, 1989. – С. 39.

Проводимая в 1990-е годы в Российской Федерации конституционная реформа, осуществлялась без учета опыта и традиций советского времени. Указ Президента России № 1400 «О поэтапной конституционной реформе в Российской Федерации» от 21 сентября 1993 года прервал традицию развитие советского государства, так как согласно пункту 1 Указа была прекращалась деятельность Верховного Совета Российской Федерации [2]. После государственного переворота в России в октябре 1993 года разговоры о построении правового государства было глумлением над народом или глупостью. Факт того, что текст Конституции Российской Федерации 1993 года был одобрен Венецианской комиссией Совета Европы и не обсуждался в российском обществе, уже должен быть вызвать критику в среде сторонников теории правового и социального государства.

По утверждению болгарского профессора права Я. Стоилова самый низкий средний уровень дохода и самая низкая минимальная заработная плата в странах Европейского Союза в Болгарии, а в самом Европейском Союзе формируется периферия по неравенству доходам граждан. Он верно отмечает, что «право не должно оставаться равнодушным к огромной и все-быстрее растущей пропасти между самыми богатыми и самыми бедными». [4; с. 262–264].

Принятый в 1996 году Уголовный кодекс Российской Федерации (УК РФ) защитил новую правовую систему, которая в вопросе социальной справедливости существенно отличалась от советской. В УК РФ можно обнаружить неравенство богатых и бедных. Если в статье 30 Уголовного Кодекса РСФСР, например, закреплялось, что «замена штрафа лишением свободы и лишение свободы штрафом не допускается» [1], то в УК РФ 1996 года такой нормы уже не было. В Особенной части УК РФ появились альтернативные нормы, которые, за одно преступление, предусматривали разные санкции: лишение свободы, штраф, ограничение свободы и другие (смотрите статьи 159 (мошенничество), 290 (получение взятки), 291 (дача взятки) и другие).

Есть неравенство, можно считать дискриминация, по половому признаку. Статья 54 УК РФ, описывая арест в части второй закрепляет, что арест не применяется к лицам до 18 лет, беременным женщинам, к женщинам, имеющим детей до 14 лет. А если детей до 14 лет растит один мужчина? Статья 57 УК РФ предусматривает запрещает применять в отношении женщин наказание в виде пожизненного лишения свободы. Оно применяется только к мужчинам. Насколько это обосновано, если в России продолжительность жизни мужчин ниже, чем у женщин?

Конституционная реформа в России 2020 года существенно изменила деятельность органов публичной власти, судебную систему государства, но не решала проблему социальной справедливости.

В законодательстве стран мира необходимо учесть опыт конституционного правотворчества Швейцарии и некоторых других государств. В Конституции Швейцарской привлекательной является статья 112, согласно которой пенсии должны покрывать потребности существования, а максимальная пенсия не должна превышать минимальную пенсию в два раза.

В ряде стран необходимо закреплять институт народной инициативы, расширить количество субъектов законодательной инициативы.

Принятие всех законов, регулирующих права и свободы человека и гражданина на референдуме после, порой длящегося годами обсуждения, есть единственный путь борьбы с неравенством и дискриминацией. При всенародном обсуждении законов неизбежен учет мнения большинства населения и закрепление идеи социальной справедливости в юридических документах. Такая практика позволяет принимать законы не только на высоком уровне юридической техники, но и отразить в них идеи социальной справедливости, способствует гражданам принять самое активное участие в государственно-правовой жизни страны, повысит не только их уровень правосознания и правовой культуры, но и снизит в обществе уровень дискриминации бедных и незащищенных слоёв населения, повысит индекс счастья в стране.

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АНТИДИСКРИМИНАЦИОННОТО ПРАВО В СВЕТА





“Constituent Peoples” (Nations) in the Political System of Bosnia and Herzegovina – Consociation or Discrimination?

Marko Stanković*

The entire federal and political system of Bosnia and Herzegovina (BiH) is based on the existence of two territorial entities and three constituent peoples (nations). The basis for participation in the central organs of Bosnia and Herzegovina is the affiliation of the representatives to the constituent peoples. The main question is whether such constitutional provisions represent discrimination for those citizens who do not belong to three constituent peoples. Controversy about this is being conducted in BiH itself, but also before the European Court of Human Rights (ECtHR). The paper will try to give an answer to the question whether such a solution is an expression of consociative democracy or discrimination.

Keywords: *Federalism, Bosnia and Herzegovina, consociative democracy, discrimination, European Court of Human Rights*



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1. INTRODUCTION

Bosnia and Herzegovina (BiH) is a specific state union, which combines federal and confederal principles in its organization. Its current political system was created immediately after the civil war and was introduced by the Dayton Peace Agreement (1995), of which the current constitution is an integral part. The main foundation of that peace agreement, and therefore of the constitution and political system of Bosnia and Herzegovina, is the existence of two entities (Republika Srpska and Federation of Bosnia and Herzegovina) and three constituent peoples – nations (Serbs, Croats and Bosniaks – Muslims). The balance between two entities and three constituent peoples is the basis of the entire federal system. If this balance were to be disturbed, the federal system would be threatened to such an extent that it would most likely not be able to survive. The aforementioned form of consociative democracy is the very essence of the political system of Bosnia and Herzegovina and the only way for it to continue to exist.

A little more than a decade after the establishment of the federal system in Bosnia and Herzegovina based on the national-entity principle, it was shaken by the decision of the European Court of Human Rights (ECtHR) in the case *Sejdić and Finci v. Bosnia and Herzegovina* from 2006. That decision stated that the constitutional rules violated the passive right to vote of one Jew and one Roma regarding the elections for the Presidency and the House of Peoples of Bosnia and Herzegovina. After that, the ECtHR made five more decisions based on the same principle. At the end of 2023, the ECtHR found in the case of *Kovačević v. Bosnia and Herzegovina* that the constitutional norms according to which the constituent peoples are represented in the Presidency and the House of Peoples of Bosnia and Herzegovina violated the active voting right of the applicant, who declares himself not to be a member of the three constitutive peoples (although he is ethnically Croat).

The decisions of the European Court of Human Rights, which determined the discrimination of citizens of Bosnia and Herzegovina who do not declare themselves as members of the three constituent peoples, violated the fragile constitutional and political balance established in 1995, because it suggests the abolition of the constitutional rules on the representation of the constituent peoples as such. In this regard, it is important to answer the key question: is a federal system based on constituent peoples a form of consociative democracy or a form of discrimination? The analysis of this question is the main subject of consideration in this article. At the beginning, the specific legal nature of federalism and the content of the decisions of the European Court of Human Rights on voting rights in Bosnia and Herzegovina will be presented. After that, the complex na-

ture of the federal state in general, the principle of participation as its important element and the concept of participation based on the constituent peoples from the point of view of the constitution and human rights will be discussed. In the concluding remarks, there are possible solutions for problems in the political system of Bosnia and Herzegovina.¹

2. ON SPECIFIC LEGAL NATURE OF BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina is a state and political creation *sui generis*, which has no match among modern states, as well as among states that existed in the past. Its constitutional and political system adopts the elements of federation and confederation, combining them with certain mechanisms of consociative democracy, all with the aim of establishing a balance amongst three constituent peoples, between which a civil war was fought until the adoption of the current constitution. From a constitutional point of view, Bosnia and Herzegovina had accepted a large number of rules that existed in the Constitution of the Socialist Federal Republic of Yugoslavia of 1974, so it can be said that that Yugoslav constitution served as the main model in shaping the current constitution of Bosnia and Herzegovina, although in some areas there is an attempt to take a step forward (e.g. in the field of human rights).

2.1. The constitutional and political system of Bosnia and Herzegovina and its specific legal nature

Bosnia and Herzegovina is a specific constitutional creation, which established a unique model of federalism, based on equal number of elements of federation and confederation. Even when it was a federal unit within the SFR Yugoslavia, it was called “Yugoslavia in miniature” since its population consists of members of three nations – Serbian, Croatian and Bosniak (at the time of the SFRY, this third nation was referred to by a religious designation – Muslims). Nowadays, that former Yugoslav republic is the best example of a multinational state whose existence was imposed from outside and which is therefore com-

¹ In this paper, I used analyzes and results from my earlier scientific papers, since I have been continuously dealing with federalism in Bosnia and Herzegovina for two decades. In particular: Stanković M. (2016) Načelo federalne participacije protiv načela demokratije – Kroz prizmu slučaja Sejdić i Finci protiv BiH. *Pravni život*, No. 12, pp. 523–534; Stanković M. (2019) Uspostavljanje BiH federalizma: agregacija ili devolucija. *Sveske za javno pravo*, No. 38, pp. 37–43; Stanković M. (2020) Preobražaji federalne države – deset rasprava o promjenjenoj prirodi i suštini federalizma. *Pravni fakultet Univerziteta u Beogradu*.

pletely dysfunctional. Trying to summarize the features of the Constitution of Bosnia and Herzegovina, Giuseppe de Vergottini states that “the constitution follows the principles of liberal constitutionalism, provides for the separation of powers, a kind of constitutional court whose members are foreign judges elected at the international level, a regime of guarantees”, but also that all of the above is prescribed “in the absence of the will of the people or not giving importance to that will and under international protectorate”.²

Bosnia and Herzegovina in its current form was established in 1995 after a civil war fought on its territory. That is why the current constitutional system was established at the peace conference, by the Dayton Peace Agreement, of which the current Constitution of Bosnia and Herzegovina is an integral part. Due to the large number of originalities in the theory, it is often considered that Bosnia and Herzegovina is not a federation but a specific form of federalism with elements of a federation and a confederation. The usual constitutional rules and norms characteristic for classical federations were not adopted in the organization of Bosnia and Herzegovina. Its three main peculiarities are the specific nature of the constitutional act, the limited sovereignty of BiH, and the atypical position and characteristics of its constituent units (entities).

Firstly, Bosnia and Herzegovina has a specific constitution proven to be unchangeable in practice. Constitution of BiH has “dual character and consists, first, of appropriate provisions of international treaties or agreements which perform the function of the constitution in the material sense and, second, of constitutional provisions that largely derive their superiority from those international acts”.³ The fact that the constitution was adopted in the form of an international treaty led some authors to conclude that Bosnia and Herzegovina is a confederation. Such arguments, however, cannot be accepted because the Constitution of BiH, after it was adopted in the form of an international treaty, continued to exist as an act of internal public law and there is a constitutional procedure for its change, which does not imply the signatory states of the Dayton Agreement agree to the changes to the constitution.

Secondly, although the constitution states that Bosnia and Herzegovina is a “sovereign and independent state of equal citizens and peoples”, its external and internal sovereignty is limited. The limited sovereignty of Bosnia and Herzegovina stems primarily from the fact that there is an international military and police presence in that country, provided for by the Geneva Agreement of 1993. Both

² De Vergottini, Đ. (2015) Uopredno ustavno pravo. Službeni glasnik, p. 229.

³ Slavnić, Lj. (2000) Federalizam i ustavnosudska funkcija – slučaj Jugoslavije – pravna studija sa uporedno-pravnim elementima. Partenon, p. 86–87.

legally and factually, the territory of Bosnia and Herzegovina is under some kind of international protectorate with elements of occupation, and its legal system is developing under the crucial influence of the international community. Therefore, that constitutional creation does not satisfy one of the three basic criteria of a federal state because it lacks the principle of the supremacy of the federation, which is reflected in full internal and international sovereignty.

And thirdly, the entities of Bosnia and Herzegovina, (Republika Srpska and Federation of Bosnia and Herzegovina), have a specific position in the system, and the most interesting thing about that position is their right to establish “special parallel relations” with neighboring states – the Republika Srpska with the SR Yugoslavia (whose successor in the international law is the Republic of Serbia), and the Federation of BiH with the Republic of Croatia. At the same time, the entities received international recognition through the Dayton Peace Agreement. When it comes to an entity that is itself federally organized – the Federation of Bosnia and Herzegovina, there is another constitutional problem. Namely, the so-called Washington Constitution of 1994, which determined the composition of the federal, cantonal, and local authorities, is still in force. At the same time, it is still not entirely clear whether that constitution “establishes that it is a federation of cantons, as interpreted by the Muslim (Bosniak) side, or a federation of peoples, as interpreted by the Croatian side”.⁴

Bosnia and Herzegovina in its current form has both the elements of confederation and federation, which was also a feature of the SFR Yugoslavia according to the Constitution of 1974. According to Goran Marković, the Yugoslav “federal system, derived from the 1974 Constitution of the SFRY, contained significant elements of confederalism”.⁵ Many confederal elements of the SFRY are also found in the current organization of Bosnia and Herzegovina. The most significant confederal elements of BiH federalism are: 1) Bosnia and Herzegovina is based on an international agreement, 2) unanimous decision-making in the political bodies of Bosnia and Herzegovina (in federations, as a rule, the majority principle is applied, and mandatory consensus is a characteristic of the confederation), 3) the principle of participation taken to its extreme limits (including the organization of the head of state, which is a collegial body), 4) the autonomy of entities that exceeds the standards set in classic federations, 5) the absence of judicial authority at the BiH level (the characteristic of federations is that they have all three powers – legislative, executive and judicial), 6) special and parallel connections of entities with neighboring states, etc. On the other hand, it can-

⁴ Slavnić, Lj. Op. cit., p. 90.

⁵ Marković, G. (2012) Bosanskohercegovački federalizam. Službeni glasnik, p. 23.

not be said that Bosnia and Herzegovina is a confederation, for several reasons: 1) international legal subjectivity formally belongs to Bosnia and Herzegovina (not to its entities), 2) entities of Bosnia and Herzegovina in principle do not have the right to unilaterally withdraw from the union (they do not have the right of unilateral secession), 3) entities do not have the right of nullification and other rights that are characteristic of a confederation as a union of independent states.

Apart from the fact that it is located in the middle between a federation and a confederation, Bosnia and Herzegovina cannot even be considered an example of a successful multinational community. If it can be considered a federation at all, it is a classic example of a “forced-together federation” and therefore cannot be analyzed in the context of federalism as a “remedy” for multinational societies. It is a “hybrid” solution, with major shortcomings in terms of democracy, and community which represents a imposed solution for two of its three constituent peoples (Serbs and Croats). Back in the 19th century, John Stuart Mill wrote that in the emerging federation there must be “mutual sympathy between peoples”⁶, which was certainly not the case in Bosnia and Herzegovina at the time of the introduction of the current system, since its constituent peoples were burdened by mutual war conflicts. As Seizović states, “Bosnia and Herzegovina, legally, politically and ethnically torn apart, was subjected to an artificial state, legal and political resuscitation under the patronage of the international community, which, only ostensibly, reintegrated it, but this time in the form of a bizarre state creations – one state, two entities, three peoples, consisting of one ‘republic’ and one ‘federation’.”⁷

2.2. Human rights in the constitutional system of Bosnia and Herzegovina and the prohibition of discrimination

The Constitution of Bosnia and Herzegovina is specific in many ways, and one of its specificities is the way in which it guarantees human rights, which, as Maurice Hariou once said, represents a “social constitution”, because it regulates the position of citizens (as opposed to a “political constitution”, which regulates the position of government). Accepting the achievements of the civilized world, the catalog and standards of human rights and freedoms and the mechanisms of their protection, Bosnia and Herzegovina bases its institutional framework on the principles contained in international, regional and domestic legal and political acts and documents. Thus Article II/2 of the Constitution of Bosnia and Herzegovina

⁶ Mil, Dž. S. (1876) O predstavničkoj vladi, Državna štamparija, p. 270.

⁷ Seizović, Z. (2012) Etno-mobilizacija i institucionalna diskriminacija u Bosni i Hercegovini. – A. Aganović, S. Gavrić (eds) Politička participacija u Bosni i Hercegovini. Sarajevski otvoreni centar, 11–37, p. 30.

provides that the rights and freedoms provided for by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols are directly applied in Bosnia and Herzegovina, and that these acts have priority over all other laws. The European Convention has suprallegal, constitutional force, and it was applied in Bosnia and Herzegovina even before it became a member of the Council of Europe (2002).

A prerequisite for the enjoyment of all human rights guaranteed in every constitutional system, in addition to the citizenship of the respective state, is the prohibition of discrimination.⁸ The Constitution of Bosnia and Herzegovina (Article II/4) stipulates that the enjoyment of rights and freedoms is ensured to all persons in Bosnia and Herzegovina without discrimination on any basis such as gender, race, skin color, language, religion, political or other opinion, national and social origin or association with a national minority, property, birth or other status. However, the equality of citizens guaranteed in this way is practically unattainable in practice when it is connected with the concept of constituent peoples (nations), which represents one of the two pillars of federalism in Bosnia and Herzegovina. It is one of the biggest contradictions and, at the same time, the weakest points of the constitutional concept of Bosnia and Herzegovina.

2.3. “Constituent peoples” (nations) as the basis of federal participation in Bosnia and Herzegovina

The Constitution of Bosnia and Herzegovina already states in the preamble that Bosniaks, Serbs, and Croats are constituent peoples (nations), which is the main mechanism for protecting the national interests of the parties that were in conflict. “Constituent” means something that makes up the content, composition of something, in this case the state. Since those three peoples make up the “content” of the state union called Bosnia and Herzegovina, they are considered state-forming peoples, peoples from which the state is made up. Therefore, in the constitutional system of Bosnia and Herzegovina, a distinction is made between the collective identity of the constituent peoples and the individual identities of the citizens of Bosnia and Herzegovina. The Constitution of Bosnia and Herzegovina distinguishes between constituent peoples and the “others”, which include all those who do not declare themselves as members of one of the three constituent peoples, which can basically be seen as a form of discrimination. The Constitution thoroughly establishes the institutions that represent the constituent peoples, while the “others” are not even formally mentioned. In this way, the constituent peoples are protected on the basis of their belonging to a national group (collec-

⁸ Marković R. (2014) *Ustavno pravo*. Pravni fakultet Univerziteta u Beogradu, p. 468.

tivity). Such a rule somewhat excludes all those who are either not members of the constituent peoples or do not declare themselves as such on some other basis.

In other words, the Constitution of Bosnia and Herzegovina guarantees the equality of all citizens and the protection of human rights for all persons on the territory of Bosnia and Herzegovina, but to a certain extent political rights are excluded from this guarantee. It is about election on the basis of ethnicity, not citizenship, so “others” cannot be elected as a member of the Presidency and the House of Peoples of the Parliamentary Assembly of BiH, where only constituent peoples are represented, in order to protect national interests.

The Constitution of BiH (Article IV) prescribes that the Parliamentary Assembly of BiH consists of two chambers: the House of People and the House of Representatives. The House of Representatives consists of 42 members, of which two thirds are elected from the territory of the Federation of Bosnia and Herzegovina, and one third from the territory of the Republic of Srpska. Members are elected directly in accordance with entity election laws, adopted by the Parliamentary Assembly. According to the Constitution (Article IV/1), the House of Peoples consists of 15 delegates, of which two thirds are from the Federation (five Croats and five Bosniaks) and one third from the Republika Srpska (five Serbs). Croat and Bosniak delegates from the Federation are elected by Croatian and Bosniak delegates in the House of Peoples of the Federation, and delegates from Republika Srpska are elected by the National Assembly of Republika Srpska.

The Constitution of BiH (Article V) stipulates that the members of the Presidency are elected directly in accordance with the entity election laws, adopted by the Parliamentary Assembly, as well as that decisions are made by consensus. According to the Constitution (Article V/1), the Presidency of Bosnia and Herzegovina consists of three members: one Bosniak and one Croat, each of whom is directly elected from the territory of the Federation, and one Serb, who is directly elected from the territory of Republika Srpska.

The model established in this way, with a special emphasis on constituent peoples and the corresponding division of power, was the basis and the only sustainable concept of the constitutional system of Bosnia and Herzegovina at the time, and still today. But in this way, political freedom is simultaneously violated, since the passive voting right of citizens who are not members of the constituent peoples is curtailed.

3. DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DISCRIMINATION CASES IN BOSNIA AND HERZEGOVINA

The question of the existence of discrimination regarding the exercise of political rights in the political system of Bosnia and Herzegovina has also reached the European Court of Human Rights. Firstly, in 2006, the issue of discrimination related to passive voting rights was raised in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, and then in 2023, the issue of discrimination related to active voting rights was raised in the case of *Kovačević v. Bosnia and Herzegovina*.

3.1. Cases related to passive suffrage – Sejdić and Finci v. Bosnia and Herzegovina and other cases

In two separate appeals, filed on July 3 and August 18, 2006, two citizens of Bosnia and Herzegovina – Dervo Sejdić and Jakob Finci, addressed the European Court of Human Rights (Applications Nos. 27996/06 and 34836/06). They expressed dissatisfaction with the impossibility of running for office in the elections for the Presidency and the House of Peoples of Bosnia and Herzegovina (articles IV and V of the Constitution of Bosnia and Herzegovina) because of their Roma or Jewish origin. They referred to article 14 of the Convention for the protection of human rights and fundamental freedoms, and then article 3 of Protocol no. 1 and Article 1 of Protocol no. 12. Those provisions of the Convention and Protocol prescribe the prohibition of discrimination on any basis, as well as the obligation to hold direct and free elections with secret ballot, under conditions that ensure the free expression of the voters' opinion in the election of legislative bodies.

After bringing together the proceedings on the aforementioned complaints and carrying them out to the end, the European Court of Human Rights, at the session of the Grand Chamber held on November 25, 2009, made a decision in which it determined that the applicants' complaints were well-founded. The decision was made by the majority: regarding the impossibility of running in the elections for the House of People of Bosnia and Herzegovina – 14 “for” and three “against”, and regarding the candidacy for a member of the Presidency of Bosnia and Herzegovina – 16 “for” and one “against”.

In the decision, the Grand Chamber established that there was a violation of Article 14 of the Convention in connection with the application of Article 3 of Protocol No. 1 regarding the constitutional provisions on the House of Peoples, and violations of Article 1 of Protocol no. 12 regarding the constitutional provisions on the Presidency of Bosnia and Herzegovina. Explaining the violation of Article 14 of the Convention, the Court pointed out that the House of Peoples

has great jurisdiction in legislation, and that discrimination means different treatment of persons who are in a similar situation without objective and reasonable justification. In the explanation of the violation of Article 1 of Protocol no. 12 in relation to the constitutional provisions on the Presidency of Bosnia and Herzegovina, the Court found that there is no significant difference between the House of Peoples and the Presidency of BiH, from the aspect of discriminatory constitutional provisions. The court also pointed out that no type of differential treatment based exclusively or to a critical extent on the ethnic origin of an individual can be objectively justified in a modern democratic society.⁹

In order to implement the decision, in 2011 the Temporary Joint Commission for the Implementation of the Decision of the European Court of Human Rights was established in both houses of the Parliamentary Assembly of Bosnia and Herzegovina (consisting of 13 members). The tasks of the Commission were to prepare proposals for amendments to the Constitution of Bosnia and Herzegovina and to the Electoral Law of Bosnia and Herzegovina. In the additional conclusion, adopted by the House of Representatives during the formation of the Commission, it was suggested to the Temporary Commission to invite representatives of the Council of National Minorities of Bosnia and Herzegovina to its sessions, who took an active part in the ten sessions held by this Commission.

Regarding the solution presented by the representatives of Republika Srpska, the prevailing idea was to focus on the execution of the decision of the European Court. It was strongly opposed by the representatives from the Federation of Bosnia and Herzegovina, who saw the solution in radical changes to the Constitution of Bosnia and Herzegovina and the introduction of indirect election of the members of the Presidency of Bosnia and Herzegovina in the Parliamentary Assembly. During the work of the Commission, no common solutions were

⁹ The separate opinions of Judge Mijović, joined by Judge Hajiev, and the separate opinion of Judge Bonello are attached to the decision. In her separate opinion, Judge Mijović stated, *inter alia*: that the Grand Chamber failed in the analysis of the historical background and facts regarding the creation of the Constitution of Bosnia and Herzegovina; that the main political institutions of BiH were created with the aim of achieving a national balance between the constituent peoples, and that “other ethnic groups were not part of those solutions, given that they did not have the status of a party in the conflict”; that there are certain important differences between the Presidency of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly regarding the violation of Article 1 of Protocol no. 12; that she does not agree with the fact that the Grand Council, regarding the applicability of Article 3 of Protocol no. 1, when deciding, took the scope of the House of People’s legislative powers as a decisive factor. On the other hand, in his separate opinion, Judge Bonello explained his reservations regarding the admissibility of the lawsuit itself and stated that there is no violation of the Convention in this case.

found regarding the proposed amendment to the Constitution of Bosnia and Herzegovina, so the decision was returned to the political level.

Adequate solutions at the political level, conceived as an agreement of the ruling political parties in Bosnia and Herzegovina, have not been found either. In the Republika Srpska, the national features of the candidates were simply erased, so one member of the Presidency and five delegates to the House of Peoples of the Parliamentary Assembly are elected from the Republika Srpska. On the other hand, in the Federation of Bosnia and Herzegovina, there is still no agreement on a solution that would satisfy all sides. The most certain solution was the division of FBiH into two constituencies, from which one member of the Presidency would be elected, regardless of nationality. This approach opened the so-called Croatian question, bearing in mind that in practice it turned out that Croat representatives are elected by Bosniaks. In this way, the Croatian constituent people paradoxically became a national minority in their own entity. Finally, it should be pointed out that there were several attempts at constitutional reforms, which went beyond the scope of the decision, which only deepened the political crisis in the country, especially considering the political character of those attempts.

After the case *Sejdić and Finci v. Bosnia and Herzegovina*, the ECtHR has made several other similar decisions related to discrimination of particular social groups (constituent peoples or the others), the composition of particular political institutions (the Presidency of Bosnia and Herzegovina and the House of Peoples), and the existence and fulfilment of the passive voting right. These cases are *Pilav v. Bosnia and Herzegovina* (application no. 41939/07), *Zornić v. Bosnia and Herzegovina* (application no. 3681/06), *Šlaku v. Bosnia and Herzegovina* (application no. 56666/12), and *Pudarić v. Bosnia and Herzegovina* (application no. 55799/18). All the mentioned cases contain similar arguments as the case of *Sejdić and Finci*, and none of the decisions have been implemented in reality so far.

3.2. Kovačević v. Bosnia and Herzegovina – discrimination regarding active voting rights

Despite the fact that none of the five decisions of the ECtHR on discrimination with regard to passive suffrage has been implemented, a sixth was recently passed. It even went a step further, and in addition to the violation of the passive right to vote, it also found a violation of the active right to vote.

Namely, in the recently published judgment in the case of *Kovačević v. Bosnia and Herzegovina*, the ECtHR found a violation of Article 1 of Protocol No. 12 in connection with a complaint about the composition of the House of

Peoples of the Parliamentary Assembly, as well as in connection with a complaint to the elections for the Presidency of Bosnia and Herzegovina. This decision established discrimination against “others” and all citizens of BiH who do not declare affiliation to the constituent peoples. With that decision, the ECtHR takes over the role of a constitutional authority and provides precise guidelines for amending the Constitution. According to this decision, BiH must change the composition of the House of Peoples and the method of electing the members of the Presidency of BiH, that is, revise its Constitution.

The applicant, Slaven Kovačević, is a political adviser to a member of the Presidency of BiH. In the first request, the applicant complained that as a person who does not belong to any of the constituent peoples he was not represented in the House of Peoples, since its positions are exclusively reserved for Bosniaks, Serbs and Croats (Article IV of the Constitution of BiH). The concept of constituent peoples stipulates that only persons who belong to the constituent peoples can be elected to the Presidency of BiH and can be appointed to the House of Peoples. The ECtHR found a violation of the applicant’s right not to be discriminated against based on Article 1 of Protocol No. 12 (*Kovačević v. BiH*, paragraph 62).

In his complaint, he also stated that his choice of candidates in the elections of Presidency of BiH was limited, since he could only vote for a Bosniak or Croat member of the Presidency. He could not vote for the Serbian member of the Presidency because only citizens from the Republika Srpska have that option. This is a consequence of the combination of territorial and ethnic criteria provided by the Constitution of BiH, which is why citizens from the Federation of BiH can only vote for a Bosniak or Croat member of the Presidency, and citizens from the Republika Srpska can only vote for a Serb member of the BiH Presidency (Article V of the Constitution of BiH). Accordingly, the applicant’s choice was limited. The ECtHR stated in the decision that no one should be forced to vote only according to prescribed ethnic lines, regardless of their political views, and therefore concluded that the applicant’s right based on Article 1 of Protocol No. 12 was violated (*Kovačević v. BiH*, paragraph 74).

Thus, the ECtHR identified two forms of discrimination in this case. The first one is referred to the applicant’s right to be represented in the House of Peoples, and the second one is referred to his active right to vote for the Presidency of Bosnia and Herzegovina, where he is limited to only Bosniak and Croat candidates.

It is clear that the ECtHR in this case advocates the concept according to which each voter has an individual right to the candidates who “represent”

him (*Kovačević v. BiH*, minority opinion, paragraph 20). The ECtHR advocates the position that every citizen should be represented in a representative body. According to the ECtHR, all segments of society should have the chance to be represented in an institution (such as the House of Peoples) that confirms all laws. Therefore, according to the ECtHR, if the state authority affects lives of all citizens, then all of them should have the chance to be represented in that institution, regardless of ethnicity.

On October 5, 2023, Bosnia and Herzegovina submitted a request to the European Court of Human Rights for a review of the decision in the case of Slaven Kovačević, and the five-member court panel decided to forward the case to the Grand Chamber at its session on December 14, 2023.

4. THE COMPLEX LEGAL NATURE OF THE FEDERAL STATE AND THE SPECIFICITY OF THE FUNCTIONING OF THE DEMOCRATIC POLITICAL SYSTEM

In order to answer the question whether the concept of constituent peoples represents discrimination, it is necessary to analyze the specifics of democracy in multinational federations and the principle of participation in the federal state, as well as the concept of consociative democracy, significantly differs from the classic concept of majoritarian democracy.

4.1. Specificities of democracy in multinational federations

In multinational federations, the situation regarding democracy and representation is very complicated, because it is necessary to ensure equality and protection not only of citizens and federal units, but also of the peoples (nations) of the federation, especially those peoples who participated in the creation of the federation (constituent peoples). That is why multinational federations must provide adequate answers to two additional challenges – the first is preserving the identity of their peoples (nations), and the second is guaranteeing the special rights of peoples through the federal constitution.

The first challenge in multinational federations is the preservation and manifestation of the identity of the peoples (nations) who formed the federation. In this sense, the normative basis of the democratic state shifts the focus from individual to group rights because the multinational federation is formed by different peoples (nations), and not just one legitimizing *demos*.¹⁰ Therefore, the liberal values of equality and freedom, as important principles of democracy,

¹⁰ Keil, S. (2013) *Multinational Federalism in Bosnia and Herzegovina*. Routledge, p. 44.

must be reconsidered in a multinational context, where equality becomes the right to diversity. Therefore, both citizenship and national identity in a multinational federation should be regulated in such a way that it is possible for every citizen to have the citizenship of his/her federal unit and the entire federation and to have a dual identity, i.e. to identify himself/herself as a member of his/her own nation, but also as a citizen entire federation.¹¹

Another challenge in multinational federations is clearly defining the rights of the peoples who participated in the creation of the federation. The federal constitution should be the main pillar in that process. It is possible, and some consider it necessary, to define peoples, clearly divide competences between different levels of government and guarantee collective rights. Moreover, according to the understanding of some scholars, the constitutions of multinational federations should be relatively soft, so that they can easily follow the changes in these complex and fragmented societies.¹² Soeren Keil emphasizes the special importance of the flexibility of the federal constitution in asymmetric federations, in which asymmetry was introduced as a mechanism for achieving balance in federal relations. He points out that the asymmetric distribution of competences, as well as the peoples' right of veto in the central institutions on all issues concerning their identity lead to a legitimate agreement in the federation as a "partnership among equal peoples", whose main goal is to preserve and promote different national identities within the federation.¹³ According to this opinion, the key element of a democratic multinational federation is a form of democracy that, on the one hand, contains consociative mechanisms, such as large coalitions and minority veto rights, while, on the other hand, it promotes an asymmetric distribution of powers between the federation and federal units, as well as between the individuals themselves.¹⁴

4.2. The principle of participation as a *condicio sine qua non* of the federal state

The federation is a complex state, which consists, on the one hand, of all its citizens, and, on the other, of its constituent parts (federal units, constituent

¹¹ Maiz, R. (2000), *Democracy, Federalism and Nationalism in Multinational States*. – Safran, W., Maiz, R. (eds) *Identity and Territorial Autonomy in Plural Societies*. Routledge, 35–60, pp. 37–42.

¹² Requejo, F. (2006) *Federalism in Plurinational Societies: Rethinking the Ties between Catalonia, Spain and the European Union*, – D. Karmis, W. Norman (eds) *Theories of Federalism. A Reader*, 311–320, p. 312; R. Maiz. *Op. cit.*, p. 53.

¹³ S. Keil. *Op. cit.*, p. 45.

¹⁴ Smooha S. (2002) *Types of Democracy and Modes of Conflict Management in Ethnically Divided Societies*. *Nations and Nationalism*. Vol. 8, No. 4, 423–431, p. 425.

units, constituent nations, etc.). Citizens are represented in the central institutions of the federation as a single electorate, as well as its constituent parts. This actually reflects the complexity of the federal state, in contrast to the unitary state in which only citizens are represented in the collegial bodies. Therefore, it is inevitable that the constituent elements of the federal state are represented as such in its bodies. This is the essence of the principle of participation in the federal state, which is one of the three principles on which it is based. Without it, the federal state does not exist.

There is no uniform model of participation in federations, but each federal country has different mechanisms that, to a greater or lesser extent, satisfy that principle, which implies the participation and influence of federal units on decision-making on issues that are under the jurisdiction of the federal center.¹⁵ The participation of federal units has its institutional and procedural aspects – institutional are the bodies and mechanisms of representation of federal units at the federal level of government (second chamber of the federal parliament, federal executive, intergovernmental bodies etc.), and procedural are the functions performed by these institutions (amending of federal constitution, adoption of federal laws, territorial changes, appointment of officials etc.). Generally speaking, the only form of federal participation that can be considered constant in federations is the second chamber of the federal parliament.

In recent times, participation is also foreseen in organs of the federal executive and is often linked to language, religion or ethnicity, as is the case in developed democracies in Western Europe, such as Switzerland and Belgium. In Switzerland, there is so-called magic formula, so the seven-member Federal Council (government) always includes representatives of the largest political parties (so-called grand coalition is formed), and at least two members of the French-speaking community and one member of the Italian-speaking community. The Swiss magic formula ensures good political, linguistic and religious representation, and the Council decides by consensus, so there is no possibility of harming the interests of any community. On the other hand, in Belgium, all public services, diplomatic corps and the army are composed in such a way that they faithfully reflect the linguistic and national structure of the Belgian population (members of Dutch and French language groups, i.e. Flemish and Walloons). The most significant constitutional mechanisms for the protection of the Francophone minority at the federal level are the parity composition of the federal government, the “alarm bell procedure” (group veto) and the adoption of the so-called special laws, procedures in which linguistic (national) groups appear

¹⁵ R. Marković. *Op. cit.*, p. 373.

as subjects in legislative decision-making in federal parliament. As we can see, in both Switzerland and Belgium consociative democracy works very successfully, and very similar elements of which are incorporated into the constitutional and political system of Bosnia and Herzegovina.

4.3. Consociative democracy as an adequate model for post-conflict multinational societies

During the last few decades, consociative democracy¹⁶ has proven to be a good framework for the prevention and resolution of conflicts in fragmented societies in practice, especially multinational ones. This type of democracy, unlike the classical majoritarian democracy, respects the complexity of society and does not reduce it to a simple sum of inhabitants, but also recognizes the interests of certain social groups (national, linguistic, regional, cultural). In order to prevent the minorization of certain social groups, consociative democracy enables those groups to protect their vital interests through the highest state authorities. Mechanisms of consociative democracy exist today in several European democracies, such as the aforementioned examples of Belgium and Switzerland.

Arend Lijphart was the creator of the idea and the most significant proponent of consociative mechanisms in solving problems in heterogeneous, and above all in multinational federations. According to his opinion, consociative democracy is far from the abstract ideal of democracy, but it is the best type of democracy that can be expected in reality.¹⁷ He claims that there are two primary and two secondary features of the consociative approach to conflict resolution. The primary characteristics are the division of executive power (formation of the so-called grand coalition) and group autonomy, while the secondary ones are proportionality and mutual veto.¹⁸ The division of executive power implies that representatives of all ethnic groups and all relevant political parties have to be represented in the executive bodies in order to control each other, whereby stronger groups cannot decide to the detriment of the interests of weaker ones because each of them has the right of veto. Therefore, the executive conceived in this way makes decisions by consensus.¹⁹ On the other hand, group autonomy

¹⁶ More about consociative democracy in multinational federations: Stanković, M. (2020) *Preobražaji federalne države – deset rasprava o promjenjenoj prirodi i suštini federalizma*. Pravni fakultet Univerziteta u Beogradu, pp. 107–118.

¹⁷ Lijphart, A. (1977) *Democracy in Plural Societies (A Comparative Exploration)*. Yale University Press, p. 48.

¹⁸ Lijphart, A. (2002) *The Wave of Power-Sharing Democracy*, – Reynolds, A. (ed.) *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy*. Oxford University Press, 37–54, pp. 38–39.

¹⁹ Daniel Elazar harshly criticized that solution, reproaching it, first of all, for its lack of responsi-

implies giving the “highest possible” level of decision-making autonomy to different ethnic communities.²⁰ The third characteristic, proportionality, implies that public functions and fiscal resources are distributed in accordance with the number and strength of each individual group, which means that all ethnic groups are represented in public services in proportion to their number in the population. Finally, each group should have the right of veto, which represents the “negative rule of the minority” and refers to the protection of the vital interests of minority nations as a full guarantee of political protection.²¹ The consociative approach can be applied at the federal level, but also at the level of federal units, where it can also produce significant results. Consociative democracy, quite clearly, offers certain mechanisms for solving the problem of diversity in democratic societies. It is undeniable that one of the main elements of consociative mechanisms is decision-making by consensus. Different nations within a state must be included in the decision-making process at the central level and must have, where possible, territorial and cultural autonomy. Although some scholars believe that the ideas of federalism go hand in hand with consociative democracy in multinational states, it must be noted that decision-making by consensus is essentially characteristic of a confederation, regardless of the fact that such a right is not formally related to federal units rather than to national (minority) communities. This form of democracy has some other weaknesses, and it is most often contested due to the lack of democracy, instability of the government and elitism.

In short, consociative democracy in its pure form reduces a person to a member of only one social group and extends only one of his/her interests – the one that arises from belonging to the group. This is precisely why it is best to avoid pure consociative democracy in the constitutional system and combine it with representative democracy. That means that valid consociative mechanisms should be incorporated into the constitutional system, in order to achieve three results: 1) preventing the dominance of the majority social group (“tyranny of the majority”), 2) preventing the destabilization of institutions due to the constant use of vetoes by minority groups (“tyranny of the minority”), 3) avoiding the reduction of citizens exclusively to members of national, linguistic or religious groups.

bility and lack of legitimacy. (Elazar, D. (1985) *Federalism and Consociational Regimes*. Publius: The Journal of Federalism, Vol. 15, No. 2, 17–34, p. 32).

²⁰ Lijphart, A. (1977) *Democracy in Plural Societies (A Comparative Exploration)*..., p. 41.

²¹ Lijphart, A. *Op. cit.*, pp. 36–37. That element can be criticized because it brings the danger of blocking institutions, but Lijphart counters with the argument that the veto is mutual and that no group would use it recklessly, primarily out of “fear of revenge”.

5. THE CONCEPT OF PARTICIPATION BASED ON BELONGING TO THE CONSTITUENT PEOPLES – DEMOCRACY OR DISCRIMINATION?

Taking into account the complexity of the political system of Bosnia and Herzegovina, its constitutional norms based on entities and constituent peoples (nations), decisions of the European Court of Human Rights on discrimination in connection with voting rights in Bosnia and Herzegovina, but also the general principles of federal participation and consociative democracy, the concept of constituent peoples (nations) has to be analyzed from two aspects: from the constitutional-political (federal) aspect and from the aspect of human rights.

5.1. Constituent peoples as the basis of the federal concept

Since the constitutive elements in Bosnia and Herzegovina are two entities and three constituent peoples (nations), they must be represented in the composition of the central organs of Bosnia and Herzegovina, that is, in the House of Peoples of the Parliamentary Assembly and in the Presidency of BiH. Each of the three constituent peoples has a third of the total of 15 members in the House of Peoples (five representatives each) and one representative in the three-member Presidency of BiH. The principle of federal participation, which is the basis of every federal model, in Bosnia and Herzegovina is manifested through the representation of the constituent peoples in the central organs.

It should also be emphasized that Bosnia and Herzegovina is not a classic federation, and has many confederal elements in its system, so only by the criterion of predominance can it theoretically be characterized as a federation. In that political community, it is primary to represent its constitutive elements – entities and peoples (nations) – and secondarily to represent citizens as a single electorate. Simply, that fragmented society cannot function as a single state of all citizens, because the special identities of the constituent peoples are too dominant in relation to the feeling of belonging to a single community. In fact, if there was no equality of the three constituent peoples in the central organs of Bosnia and Herzegovina, it would lead to the dominance of the nation that is the most numerous (currently Bosniaks – Muslims), and to the discrimination of the other two constituent peoples, especially the one that has the smallest share in the total population (currently Croats). Furthermore, the implementation of the *Sejdić and Finci v. Bosnia and Herzegovina* decision led to the minorization of Croats, because in the last few election cycles the Croatian people did not have their representative in the Presidency, but a representative elected by the Bosniaks. It is because the Bosniaks in the Federation of Bosnia and Herzegovina are so much more numerous than Croats so they have the opportunity to decisively influ-

ence the election of both members of the Presidency of Bosnia and Herzegovina elected in the Federation of BiH. That is why, in practice, in the last few election cycles, the Presidency of BiH consists of one representative of the Serbian people (i.e. Republika Srpska) and two representatives of the Bosniak people (both representatives elected in the Federation of BiH), while the Croatian people have been without a representative in the highest executive body for a long time. The current member of the Presidency of Bosnia and Herzegovina, Željko Komšić, is the child of a Croat and a Serb, and he is married to a Bosniak-Muslim woman. Although he was elected as a representative of the Croatian people, it is known that he was elected by the votes of the Bosniaks, whose interests he represents the most, which causes great anger among the Croatian people. The President of the Republic of Croatia, Zoran Milanović, has said this several times, for example, at the session of the UN General Assembly in September 2021.²²

Bosnia and Herzegovina was an occupied and dependent territory for centuries (to a significant extent this is still the case today). In recent history, it was freed from foreign civil and military rule for the first time in the First World War, and during the Second World War the basic principle for its future arrangement was the determination that it is “neither Serbian nor Croatian nor Muslim, but is shared Serbian and Croatian and Muslim”. That principle, expressed more than eight decades ago, is the only principle for the survival of Bosnia and Herzegovina in its current form.

It is quite clear that the ECtHR in all its decisions grossly ignores the complex nature of the federal state, the degree of conflict in society in BiH and oversimplifies things. It resonates as if it is an ethnically homogeneous unitary state in which the concept of “one citizen – one vote” is applicable. In fragmented societies it is not always possible to apply such a simple norm, because equality does not always mean fairness. For the constituent peoples of Bosnia and Herzegovina, their national identity is much more important than belonging to the wider community, i.e. Bosnia and Herzegovina. Therefore, its preservation is primary in order for Bosnia and Herzegovina to function in general. That is why there is no discrimination in the representation of constituent peoples at the central level. Moreover, discrimination could occur if such representation were to be abolished! Because then there would immediately be a minorization of the Croatian people in the Federation of Bosnia and Herzegovina, and then at the

²² See: „Milanović: Ne znam sa kakvim mandatom je Komšić došao u UN i u čije ime govori“, https://www.glassrpske.com/lat/novosti/vijesti_dana/milanovic-ne-znam-sa-kakvim-mandatom-je-komsic-dosao-u-un-i-u-cije-ime-govori/377987, 09.02.2024.

level of Bosnia and Herzegovina. In this sense, the existing form of participation represents a mechanism of protection against discrimination.

5.2. Constituent peoples in the context of collective human rights

According to the subject of protection, human rights are divided into individual and collective. Individual rights protect individual persons, while collective rights protect groups of people. Individual rights belong to every person, i.e. citizen, regardless of his personal characteristics, and the bearer of others is the group, i.e. the members of the group. Collective rights, as a rule, serve to preserve the identity of a collectivity (ethnic, linguistic, religious, etc.). Such is, for example, the right of members of national minorities to use their native language, the right to information or education in their native language, and so on. That is why the basis of both categories of human rights is the protection of the individual, but in collective rights protection is realized in an indirect way.²³

Just as in most countries, national minorities must be “positively discriminated” in order to be equal (in terms of the use of language, preservation of identity, political representation, etc.), so in Bosnia and Herzegovina its constituent peoples must be adequately represented in central bodies in order to be equal. Political subjects in the fragmented society of Bosnia and Herzegovina are not only citizens, but also different parts of its society – social groups (constituent nations) and territorial units (entities). The special identities of the constituent peoples of Bosnia and Herzegovina are embedded in the foundations of that complex state union. Constituent peoples have special collective rights that cannot be revoked. But it is certainly necessary to find solutions according to which other citizens of Bosnia and Herzegovina, who do not belong to the three constituent peoples will be included in all political processes.

6. CONCLUSIONS

The institutions of Bosnia and Herzegovina have been constitutionally arranged as consociative institutions based on typical consociative principles – grand coalitions, parity or proportional representation of constituent peoples, mutual veto, qualified majorities or even consensus in the decision-making process, institutes of protection of vital interests of the constituent peoples or vital interests of the entities, etc. These constitutional provisions have arisen from the historical and political circumstances (civil war, 1992–1995), the nature of the society

²³ More about the division of human rights into individual and collective: Stanković, M. (2023) *Institucije političkog sistema*, Pravni fakultet Univerziteta u Beogradu, pp. 69–70.

(fragmented society), the relationship of political forces (balance of power of ethnic political elites which tended to and were able to check each other).

Bosnia and Herzegovina, as a post-conflict society based on the principles of consociative democracy, is a complex community of entities and constituent peoples. On the other hand, it is the only form in which it can exist. Therefore, it would be wrong to look for solutions that would lead to the abolition of consociative mechanisms. One of the possible solutions regarding the passive right to vote would be to delete the national affiliation when electing members of the House of Peoples and to bind it to the entities, which is already applied in the Republika Srpska. When it comes to the Federation of Bosnia and Herzegovina, a rational solution would be to divide it into two electoral units, one of which would consist of cantons with a Bosniak majority, and the other of cantons with a Croat majority. In that case, both active and passive voting rights would belong to all citizens of all constituencies and all would be represented in all central bodies of BiH, without any elements of discrimination. The aforementioned solution is easy to apply, and in the Republic of Srpska it was successfully applied in several election cycles.

Direct election of members of the Presidency and the House of Peoples in three constituencies, one of which would be the Republika Srpska, the second would be Bosniak cantons in the Federation of Bosnia and Herzegovina, and the third Croat cantons in the Federation of Bosnia and Herzegovina, would exclude any form of discrimination while preserving consociative democracy. Direct election of representatives would enable every citizen of Bosnia and Herzegovina to have fully active and passive voting rights. After all, Constitutional Court of Bosnia and Herzegovina concluded in the U 5/98 case that the members of the Presidency were representatives of all the citizens since they were elected directly. Therefore, it is a model to strive for in the near future, because it is easily applicable, democratic and excludes any form of discrimination.

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Actions, measures, and strategies to combat discrimination

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Discrimination includes a wide range of behaviors, as any different, unequal, unfair treatment, as opposed to equity, falls within the scope of this concept. However, it is essential that the spectrum of discrimination be delimited legislatively, not only to determine normatively and legally all discriminatory acts and practices, but also to be able to sanction them. In this way, a decrease in the incidence of discriminatory behaviors is to be expected. This paper addresses the topic of discrimination, providing a conceptual and analytical framework for this phenomenon, outlining the main forms of discrimination, and discussing various actions, strategies, and recommendations, including legal measures, such as norms and laws, to prevent and combat discrimination.

Keywords: *discrimination, inequity, stigmatization, harassment, anti-discrimination normative acts, anti-discrimination social strategies*



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Introduction

Although the Article 1 of the Universal Declaration of Human Rights (UNGA, 1948) proclaims that “all human beings are born free and equal in dignity and rights”¹, these ideals are not fully realized in practice. Freedom and equality in dignity and rights should mean that differences between people, across various dimensions, are accepted as an integral part of humanity. And yet, some individuals and groups are still subject to differential treatment based on characteristics such as race, nationality, ethnicity, gender, sexual orientation, age, social background, social class, religion, language, beliefs, health, or physical appearance. This unfair treatment is referred to as discrimination.

This paper addresses the concept of discrimination, discusses the forms of discrimination, and provides an outline of the main actions, measures, and strategies to prevent and combat discrimination.

Definitions

Discrimination is the unlawful practice of treating some people less favorably than others because they are different based on one or more characteristics. It refers to any difference, exclusion, restriction, or preference based on the criteria set out in legislation.

Etymologically, the term “discrimination” comes from the Latin word “discriminatio”, which means to be able to differentiate, or to distinguish between several elements. The initial meaning of the term was therefore neutral. In sociology, however, it acquired a critical meaning with a pejorative connotation. This is because it is a term that is closely associated with modern society, which places the principle of equal opportunities at the heart of its values. In this way, social discrimination can be defined as the unequal treatment of equal individuals.

Most laws define discrimination on the basis of the following criteria: race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, chronic non-contagious illness, HIV infection, belonging to a disadvantaged category, etc. To these criteria may be added any other criteria the purpose or effect of which is to limit or eliminate the recognition, enjoyment, or exercise, under conditions of equality, of the rights recognized by law in the political, economic, social, and cultural field or in any other field of public life².

¹ United Nations General Assembly (UNGA). (1948). *The Universal Declaration of Human Rights (UDHR)*. https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

² DPUS (Dezvoltarea programelor de studii universitare și extinderea oportunităților de învățare pentru studenți și piața muncii). (n.d.). *Discriminarea și strategii antidiscriminatorii*

Although some definitions mention, in addition to differentiation, restriction and exclusion, also the preferential treatment of some individuals or groups, that is, a ‘positive’ sense of discrimination (favoring some people on the basis of some criteria), most definitions include within the scope of this concept primarily negative meanings, as in these examples: a) discrimination is the unfair or prejudicial treatment of people and groups based on characteristics such as race, gender, age, or sexual orientation”³, b) “treating a person or particular group of people differently, especially in a worse way from the way in which you treat other people, because of their race, gender, sexuality, etc.”⁴, or c) “the unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age, or sex”⁵.

Discrimination involves a combination of two elements: on the one hand, the different treatment of persons in identical or comparable situations and, on the other hand, the absence of an objective justification for such treatment⁶. Discriminatory behavior, actions, decisions, and attitudes have no objective justification; they are based on and caused solely by prejudices related to one or more characteristics of the individual or group of individuals.

Romanian legislation on the prevention and penalization of discrimination

In Romania, the phenomenon of discrimination and its penalization has been legally regulated since 2000, with the adoption of Ordinance no. 137/2000 on the prevention and penalization of all forms of discrimination⁷. This Ordinance has been amended and supplemented by subsequent laws, the most recent

[Discrimination and anti-discrimination strategies]. POSDRU 156/1.2/G/133630. http://dpus.usv.ro/docs/A6/A6.4_continut_discriminarea_si_strategii_antidiscriminatorii-final.pdf, p. 5.

³ American Psychological Association (2024). *Discrimination: What it is and how to cope*. <https://www.apa.org/topics/racism-bias-discrimination/types-stress>

⁴ Cambridge Dictionary (2024). *Discrimination*. <https://dictionary.cambridge.org/dictionary/english/discrimination>

⁵ Oxford Dictionary (2013). *Discrimination*. <https://web.archive.org/web/20130511230449/http://oxforddictionaries.com/definition/english/discrimination>

⁶ Rodat, S. (2021), Discrimination: forms, consequences, and anti-discrimination strategies, *Handbook of Research on Policies, Protocols, and Practices for Social Work in the Digital World* (ed. Fahri Özsungur), pp. 487–507, IGI Global, Hershey, Pennsylvania, <https://doi.org/10.4018/978-1-7998-7772-1.ch027>, p. 490.

⁷ Ordonanța nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Ordinance no. 137/2000 on the prevention and penalization of all forms of discrimination]. <https://legislatie.just.ro/Public/DetaliiDocumentAfis/24129>

of which is Law no. 167/2020⁸ for the amendment and supplement of Government Ordinance no. 137/2000 on the prevention and penalization of all forms of discrimination, as well as for completing art. 6 of Law no. 202/2002 regarding equal opportunities and treatment of women and men.

Article 2 of the Law on the prevention and penalization of all forms of discrimination, which defines discrimination, was last amended by Law no. 324/2006⁹ for the amendment and supplement of Government Ordinance no. 137/2000. According to this modified article, the legal definition of discrimination in Romania is as follows: “Discrimination means any difference, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social category, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of a disadvantaged category, as well as any other criterion which has the purpose or effect of limiting, nullifying or eliminating the recognition, enjoyment or exercise, under conditions of equality, of human rights and fundamental freedoms or rights recognized by law, in the political, economic, social, cultural or other fields of public life”¹⁰. A new paragraph, (9), added to article 2 of the Law in 2006, provides that discriminatory behavior [...] shall be subject to civil, administrative, or criminal liability, as the case may be, in accordance with the law. The very same Law 324/2006 specifies the establishment of the National Council for Combating Discrimination¹¹ as an autonomous state authority in the field of discrimination, with legal personality, under parliamentary control, and at the same time guaranteeing the respect and application of the principle of non-discrimination, in accordance with the internal legislation in force and the documents of international agreements to which Romania is a party. Law no. 167/2020 added seven new paragraphs, which deal with moral harassment at work, to article 2. In these paragraphs, this form of harassment is defined, the forms of this behaviour are specified and the ways of punishing it are legally established.

Forms of discrimination

In various social contexts, discrimination can take many forms. *Direct discrimination* is the most clear-cut form, where differentiation, restriction,

⁸ Legea nr. 167/2020 [Law no. 167/2020]. https://www.cncd.ro/wp-content/uploads/2021/02/Legea_167_2020.pdf

⁹ Legea nr. 324/2006 [Law no. 324/2006]. <https://legislatie.just.ro/Public/DetaliiDocumentAfis/73606>

¹⁰ Ibid.

¹¹ Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination]. <https://www.cncd.ro/>

exclusion, etc. is overt. An example of this is when a potential employer openly refuses to hire someone based on a certain criterion, such as their sexual orientation. Other examples of direct discrimination include a customer being denied service in a store because of their ethnicity, a patient being denied hospitalization due to their age, and a landlord refusing to rent an apartment to a family because they are immigrants.

Indirect discrimination occurs when a person or group is denied a certain right or benefit through the use of seemingly neutral criteria. This type of discrimination happens when a provision, criterion, or practice that appears neutral in its application has the effect of disadvantaging certain individuals or groups based on criteria provided by the legislation in force. Such actions are only permissible if these provisions, criteria, or practices are objectively justified by a legitimate aim, and the methods of achieving that aim are appropriate and necessary. For instance, if a job advertisement requires a driver's license as a prerequisite for employment, even if the position does not involve driving or require driving skills, it indirectly discriminates against individuals who do not possess a driver's license.

Moreover, indirect discrimination refers to any active or passive behavior that results in unfair or degrading treatment, favors, or undue disadvantage for a person, group, or community compared to others in similar situations. For example, if children are given the freedom to form football teams of their choice during sports classes, some children may be excluded due to their financial situation and lack of necessary sports equipment. If the teacher does not intervene, this passive behavior can indirectly discriminate against the excluded children, under the seemingly neutral criterion of children's free choices.

Structural discrimination is a form of discrimination where the very structures and mechanisms of society function in a discriminatory way or contain elements that elusively, though clearly, disadvantage certain people or groups. An example of this is when white employers rely on job recommendations from their white colleagues, who are more likely to recommend white candidates, resulting in structural discrimination¹². A person's skin color should not be a factor in job selection. In the previous example, although the denial of a job to a person of color cannot be directly attributed to the color of their skin, discrimination towards non-white persons has certainly occurred.

Structural discrimination can also manifest when the inclusion of some people or groups, generally stigmatized in society, is denied in common groups

¹² Link, B. G., & Phelan, J. C. (2006). Stigma and its public health implications. *Lancet*, 367(9509), pp. 528–529, [https://doi.org/10.1016/S0140-6736\(06\)68184-1](https://doi.org/10.1016/S0140-6736(06)68184-1), PMID:16473129, p. 528.

and communities. For example, one can speak about structural discrimination when treatment facilities for stigmatized diseases like schizophrenia are refused in certain communities or districts. Such facilities are instead located in isolated settings, poor neighborhoods, or dangerous areas¹³.

Harassment is a type of discrimination that involves behaviors which create an intimidating, hostile or degrading environment, directed towards an individual or group of individuals based on a characteristic of that person or group. It is a repetitive behavior by the perpetrator.

Harassment encompasses a wide range of unwanted and unwelcome behaviors, from mildly unpleasant remarks to physical violence. For example, when an employer or colleague engages in offensive, repetitive behavior towards an employee or colleague from a different country or a certain region within the same country, one can speak about harassment. This repeated behavior, often adopted collectively, can take many forms, ranging from jokes, offensive remarks, or vexations related to alleged issues or defects of the inhabitants of a foreign country or a certain area of their own country, to sabotaging someone's professional career or even physically attacking them.

Sexual harassment is a common form of harassment, defined as "unwanted and undignified exposure to behavior ranging from sexism and unwanted sexual attention to sexual assault"¹⁴. According to the European Commission, Council, and Parliament, sexual harassment constitutes "a breach of the principle of equal treatment and an affront to the dignity of women and men at work"¹⁵. Sexual harassment can take three forms: verbal, non-verbal, and physical. *Verbal sexual harassment* includes making comments about someone's appearance or making sexual jokes or advances. *Non-verbal sexual harassment* consists for example of staring and whistling. *Physical sexual harassment* ranges from unsolicited physical contact to assault or rape¹⁶.

Bullying and *mobbing* are terms that largely convey similar meanings as that of 'harassment', being often used interchangeably. A definition of *bullying* is the following: "repeated or persistent exposure to negative acts over a pro-

¹³ Ibid.

¹⁴ Hoel, H., & Vartia, M. (2018). *Bullying and sexual harassment at the workplace, in public spaces, and in political life in the EU*. European Parliament's Committee on Women's Rights and Gender Equality (FEMM Committee), p. 11.

¹⁵ European Commission (1998). *Sexual harassment at the workplace in the European Union*. Directorate-General for Employment, Industrial Relations and Social Affairs. Unit, V/D. 5. <https://www.un.org/womenwatch/osagi/pdf/shworkpl.pdf>, p. 3.

¹⁶ Ibid., p. iii.

longed period of time, and perceived powerlessness of the targets”¹⁷. Bullying, like harassment, involves repetitive negative behavior over an extended period of time, rather than isolated incidents or events¹⁸.

Bullying at work involves repeated and regular harassment, offense, social exclusion, or negative impact on someone’s work¹⁹. The acts of bullying occur repeatedly and regularly (e.g., weekly) and over a period of time (e.g., about six months). The process of bullying is often escalating, the victim being subjected to direct or indirect negative acts, which are mainly non-violent, but resulting in an inferior position. It is important to note that isolated incidents, as well as the conflicts between parties of equal strength do not fall under the definition of bullying²⁰. Therefore, there must be an imbalance of power, whether real or perceived, between the bully and the target. The latter perceives themselves as incapable of neutralizing or stopping the negative behaviors and feels powerless in the situation²¹.

The term *mobbing*, which is commonly used in Germany, Austria, Switzerland, Italy, and Poland, has a similar meaning to the term ‘bullying’. According to Leymann (1990)²², mobbing or ‘psychological terror’ at the workplace refers to “hostile and unethical communication which is directed in a systematic way by one or a number of persons mainly toward one individual”. This negative behavior occurs frequently, at least once a week, and over a prolonged period of time, at least six months. The target of mobbing is forced into a helpless and defenseless position as a result of ongoing mobbing activities²³. In Italy, mobbing refers to consistent actions and behaviors that harm a worker’s productivity. The minimum duration for mobbing in Italy is specified as six months²⁴.

In France, the term ‘moral harassment’ is used instead of ‘mobbing’. *Moral harassment* refers to repeated actions that intentionally or unintentionally deteriorate employees’ working conditions and are “likely to violate their rights and

¹⁷ Hoel, H., & Vartia, M., Op. cit., p. 11.

¹⁸ Rodat, S., Op. cit., p. 491.

¹⁹ Einarsen, S. V., Hoel, H., Zapf, D., & Cooper, C. L. (2020). The Concept of Bullying and Harassment at Work: The European Tradition. In S. V. Einarsen, H. Hoel, D. Zapf, & C. L. Cooper (Eds.), *Bullying and Harassment in The Workplace. Theory, Research, and Practice* (3rd ed., pp. 5–56). Taylor and Francis Group. <https://doi.org/10.1201/9780429462528-2>

²⁰ Ibid.

²¹ Hoel, H., & Vartia, M., Op. cit., p. 12.

²² Leymann, H. (1990). Mobbing and Psychological Terror at Workplaces. *Violence and Victims*, 5(2), pp. 119–126, <https://doi.org/10.1891/0886-6708.5.2.119> PMID:2278952, p. 120.

²³ Ibid.

²⁴ Hoel, H., & Vartia, M., Op. cit., p. 72.

dignity, impair their physical or mental health, or jeopardize their professional future”²⁵.

As in workplaces, mobbing is a frequent occurrence in the school environment. In educational settings, the term ‘mobbing’ refers to a situation where an individual is subjected to increasing levels of hostility and mistreatment over an extended period of time, ranging from weeks to years²⁶. School mobbing are actions of a negative nature that are directed by one or more persons against a student, but also against a teacher, principal, secretary, caretaker, or parents, and vice versa, and that last over a longer period of time. Different types of mobbing can be identified in schools²⁷:

- Mobbing through physical violence such as beating, property damage, sexual harassment etc.
- Verbal mobbing where students are subjected to hurtful, caustic comments about their behavior, their appearance, their fashion ‘not being up-to-date’, their school performance, or other personal characteristics.
- Silent mobbing, such as being ignored or treated with silent contempt.

All these forms of mobbing are unfortunately common in school classrooms. The mildest method of mobbing is gossiping behind someone’s back. But a lot of things also happen directly and loudly. Statements from teachers like “You will never amount to anything!” also belong to mobbing, as do the whispering and exasperated groans of classmates when someone does not understand something and needs to have it explained several times.

Other terms used to describe forms of discrimination in the field of harassment include *racial harassment*, which is linked to skin color, race, or cultural background, and *sectarian harassment*, which is linked to religious beliefs or perceived religious origin or inclination of a person. The latter term is often used in countries with a sectarian tradition, such as Ireland.

The term *stalking* is used when the harassment involves regular following, watching, repeated unsolicited contact or gifts, and so on. Furthermore, if the harassment involves physical contact, the term *assault* is the most appropriate and should be used. In this case, the criminal law of assault should be applied.

²⁵ Ibid.

²⁶ BeratungslehrerInnen Vorarlberg (2004). *Themenheft Mobbing*. <https://hsv.snv.at/wp-content/uploads/2016/08/Themenheft-Mobbing.pdf>.

²⁷ Ibid.

Harassment and assault are typically the result of a small number of serious incidents, whereas bullying or mobbing is often the accumulation of many small incidents over a prolonged period. The danger with bullying or mobbing is that each incident may appear trivial and independently, and, when taken out of context, may not seem serious enough to justify disciplinary or grievance action. However, the impact on victims can be equally severe and harmful, similar to that of harassment and assault.

Harm to a person's dignity is a form of discrimination that is closely related to harassment and bullying. It can also be considered an integral part of harassment and/or bullying. Harm to a person's dignity refers to any public manifestation that results in offending the person and is motivated by that person's membership in a certain category. An example of this form of discrimination is when people refer to a person not using the person's name or an appropriate social/professional title, but derogatory terms, such as pejorative nicknames based on a characteristic of that person. For example, 'fatty' for an overweight individual, 'pansy', 'pussy', 'flit' or 'fag' for a male homosexual, or 'lezzy', 'lezzie' or 'lez' for a female homosexual²⁸.

The order to discriminate, that is, the act of discriminating against someone based on an order, is also considered a form of discrimination. An order to discriminate refers to a directive given by one person or group to another person or group to discriminate. This type of discrimination is closely linked to power dynamics, as only those in positions of power can give such orders. For instance, discrimination may occur when a superior instructs a subordinate to act in a discriminatory manner towards one or more employees, even if the superior does not directly discriminate against them.

The term *multiple discrimination* is also used in addition to these forms of discrimination. This occurs when a person or group is unfairly treated in an equal situation based cumulatively on two or more criteria of discrimination. People have multiple identities and may belong to several social groups simultaneously. This can increase their vulnerability to discrimination. For instance, an individual may experience multiple forms of discrimination simultaneously, due to factors such as gender, skin color, social class, physical disabilities, and more.

When researching multiple discrimination and the interdependence between the dimensions that generate discrimination, the *intersectional analysis* should be used. 'Intersectionality' is a way of understanding the interweaving of the dimensions that generate discrimination and their simultaneous and mutually

²⁸ Rodat, S., Op. cit., p. 493.

influential action. That is why the intersectional analysis of discrimination means that instead of addressing a single category, or at most adding the effects of two, three or more dimensions of oppression, it is analyzed how these categories are interconnected and how they influence each other²⁹. Intersectionality is a concept that emphasizes the importance of studying the dimensions of inequality not in isolation, but in relation to each other and how they intersect. When analysing discrimination from an intersectional perspective, it is crucial to consider how different categories of discrimination, oppression, or inequality intertwine, rather than simply listing them in isolation.

Anti-discrimination strategies

Intervention strategies can be implemented at the macro– and meso-social levels as well as at the micro-social level. At the societal and institutional level (macro), different strategies and measures can be developed, involving concerted efforts at the political and social level, such as legislative and normative changes and adaptations, institutional cooperation, stimulating the development of civil society at the local level, developing public-private partnerships to prevent and combat discrimination, public campaigns, information campaigns, protests, etc.

A macro-level strategy, which should be initiated by the central state authorities, is the synergy of the efforts of all public institutions existing at national and local level with a role in preventing and combating discrimination and its consequences. Genuine and effective *cooperation between institutions* with a role in reducing discrimination on the basis of different criteria will facilitate the development of support measures focused on groups at the intersection of two or more dimensions of discrimination and the reduction of the incidence of their specific forms of discrimination. In addition, *anti-discrimination legislation* must be clear and operational, and the prevention, combating and punishment of discrimination must be clearly defined in a specific law that can be applied without ambiguity or difficulty. At the same time, the cooperation of central and local institutions with a role in preventing and combating discrimination must be facilitated in order to better capitalize on the steps taken so far in this direction and on future institutional development.

An important anti-discrimination strategy is to develop mechanisms for the *representation of disadvantaged groups at decision-making and administrative*

²⁹ Rodat, S. (2017). Perspectives and Current Debates in Intersectional Analysis. In B. Covaci (Ed.), *Symposium: Perspectives on the Human Being and Society* (pp. 82–107). Editura Institutului Teologic Adventist, p. 84.

levels. This leads to a better justification and targeting of the policies and programs designed and increases the chances of successful implementation. Developing mechanisms to represent the diversity that exists within specific disadvantaged groups will lead to a better response to specific forms of discrimination³⁰.

In facilitating the implementation of anti-discrimination policies and measures, not only central and local authorities but also *civil society institutions* have a key role to play. They can also bring additional knowledge needed for specialized actions.

Another important aspect of preventing and combating discrimination at the macro societal level is to raise awareness and train public service staff and media representatives to promote and apply the principle of equal opportunities for all. A better understanding of this principle, together with a willingness to implement it in the day-to-day activities of public services, can reduce the incidence of acts of discrimination.

The media should also assume their social responsibility to combat discrimination against individuals and groups, regardless of the criteria of discrimination, to implement the principle of non-discrimination in the process of information and opinion-shaping, to combat negative stereotypes and prejudices associated with certain groups and to contribute to increasing tolerance among the population. The media can play an active role in raising public awareness through campaigns that draw attention to and provide information about the causes, incidence, and effects of forms and acts of discrimination. Greater awareness of the causes, different forms and short and long-term effects of discrimination can enable individuals to better recognize and deal with situations of discrimination.

Discrimination in the labor market has the effect of marginalizing individuals and increasing their vulnerability to discrimination in other areas of social life. In this context, *the empowerment of the social partners*, and *trade unions* in particular, to promote and implement the principle of equal opportunities for all, both in recruitment and in the workplace itself, is essential to prevent and combat discrimination. If we consider gender as a criterion or dimension of discrimination, given that women are more likely than men to be discriminated against in the labor market and that they are discriminated against by specific forms existing in the labor market, such as horizontal segregation or evaluative discrimination, or vertical segregation or hierarchical segregation³¹, special attention should be

³⁰ DPUS, Op. cit., pp. 29–30.

³¹ Rodat, S. (2020). Gender-based inequalities and discrimination in professional careers: An overview. *Sociology and Social Work Review*, 4(2), pp. 110–118. <https://globalresearchpub->

paid to strategies and measures to combat discrimination against women in the labor market.

Another effective macro-social strategy for drawing attention to the problems of discriminated individuals and groups is *protest*. This strategy includes all those public actions and manifestations that express strong disapproval of anything related to the discrimination of certain individuals and groups. Protests can range from simpler forms, such as letters complaining or pointing out unfair facts, to more complex forms, such as public demonstrations, rallies against repressive political decisions, empowerment and self-advocacy groups, or calls to boycott certain stigmatizing and discriminatory social representations, especially through the media. The aim of all these actions is to draw attention to the situation and interests of people who are discriminated against. However, while they can have a powerful impact when organized and publicized, research suggests that protests often have only short-term effects on attitude change³².

Intervention measures and strategies at the meso- and micro-social levels include organizing interactive contact with discriminated persons and groups to raise awareness of their problems, as well as education in the form of argumentation and transfer of knowledge and information. As much of social work involves meso- and micro-social interventions, that is, working with groups and individuals, many of the meso- and micro-social anti-discrimination strategies can be implemented through social work interventions. In particular, meso-social work, which deals with group issues, can be a key professional field in which small-scale institutional, social and cultural change can be promoted.

Organizing *interactive contact* with discriminated persons and groups is one of the most effective strategies for preventing and combating discrimination at the meso- and micro social levels. Contact is an intervention strategy that in many cases proves useful, particularly in reducing prejudice against certain individuals or minority groups. According to the contact hypothesis in psychology and other social sciences, intergroup contact can, under certain appropriate conditions, effectively reduce prejudice between members of the majority and

[ishing.com/wp-content/uploads/2021/01/Gender-based-inequalities-and-discrimination-in-professional-careers.-An-overview.pdf](https://www.ijerph.com/wp-content/uploads/2021/01/Gender-based-inequalities-and-discrimination-in-professional-careers.-An-overview.pdf), pp. 111–112.

³² Corrigan, P. W., Morris, S. B., Michaels, P. J., Rafacz, J. D., & Rüsch, N. (2012). Challenging the Public Stigma of Mental Illness: A Meta-Analysis of Outcome Studies. *Psychiatric Services (Washington, D.C.)*, 63(10), pp. 963–973. <https://doi.org/10.1176/appi.ps.201100529> PMID:23032675; Corrigan, P. W., & Penn, D. L. (2015). Lessons from social psychology on discrediting psychiatric stigma. *Stigma and Health*, 1(S), pp. 2–17. <https://doi.org/10.1037/2376-6972.1.S.2>

minority groups. Allport (1954)³³ saw intergroup contact as a means of reducing prejudice, provided that there is equality of status, shared goals, institutional support and a willingness to cooperate. The anti-discrimination strategy involving interpersonal contact with people who are often the subject of discrimination also proves to have considerable preventive potential, especially in relation to people with disabilities, as this type of intervention can be applied relatively uniformly and consistently across different types of disability³⁴. In particular, for people with intellectual disabilities, the contact strategy may contribute to clearer effects in terms of positive attributions about some conditions, such as depression and schizophrenia³⁵. Empirical research³⁶ confirms that contact with people with certain stigmatizing conditions is useful in reducing stigma and discrimination.

In addition to contact, *information/education*, which can take the form of training, tutoring, clarification and awareness-raising, is another effective anti-discrimination strategy. The information/education strategy involves *the generation and use of factual knowledge* to explain discrimination, its causes and its effects on those affected. This approach aims both to inform and educate the general population, especially children and young people, and to transfer knowledge to specific groups that are more likely to interact with stigmatized and discriminated against people and groups³⁷. The information and education strategy also includes *clarification* and *awareness-raising*, which may include an emotional dimension³⁸. The aim of such strategies is to raise awareness of existing stereotypes and prejudices, and to encourage empathy for individuals

³³ Allport, G. W. (1954). *The nature of prejudice*. Addison-Wesley.

³⁴ Corrigan, P. W., Michaels, P. J., & Morris, S. (2015). Do the Effects of Antistigma Programs Persist Over Time? Findings From a Meta-Analysis. *Psychiatric Services (Washington, D.C.)*, 66(5), pp. 543–546. <https://doi.org/10.1176/appi.ps.201400291> PMID:25686817.

³⁵ Corrigan, P. W., River, L. P., Lundin, R. K., Penn, D. L., Uphoff-Wasowski, K., Campion, J., Mathisen, J., Gagnon, C., Bergman, M., Goldstein, H., & Kubiak, M. A. (2001). Three Strategies for Changing Attributions about Severe Mental Illness. *Schizophrenia Bulletin*, 27(2), pp. 187–195. <https://doi.org/10.1093/oxford-journals.schbul.a006865> PMID:11354586.

³⁶ Kosyluk, K. A., Al-Khouja, M., Bink, A., Buchholz, B., Ellefson, S., Fokuo, K., Goldberg, D., Kraus, D., Leon, A., Michaels, P., Powell, K., Schmidt, A., & Corrigan, P. W. (2016). Challenging the Stigma of Mental Illness Among College Students. *The Journal of Adolescent Health*, 59(3), pp. 325–331. <https://doi.org/10.1016/j.jadohealth.2016.05.005> PMID:27324577.

³⁷ Sartorius, N. (2010). Short-lived campaigns are not enough. *Nature*, 468(7321), pp. 163–165. <https://doi.org/10.1038/468163a> PMID:21068806.

³⁸ Lincoln, T. M., Arens, E., Berger, C., & Rief, W. (2008). Can Antistigma Campaigns Be Improved? A Test of the Impact of Biogenetic Vs Psychosocial Causal Explanations on Implicit and Explicit Attitudes to Schizophrenia. *Schizophrenia Bulletin*, 34(5), pp. 984–994. <https://doi.org/10.1093/schbul/bml131> PMID:18056110.

and groups who are the subject of discriminatory acts, which they have to face and deal with on a regular basis. The information/education strategy can be implemented in a variety of ways, such as didactic and instructional units, training, tutoring, continuing education, cultural events, information events and campaigns, etc. Education in the form of *teaching units* is considered to be particularly effective, especially if it is carried out in a multifaceted way, that is, if in addition to lectures other components are used, such as videos, computer elements, both active and interactive³⁹. *Emotional education*, such as role-plays, films or books, can also increase empathy⁴⁰.

The media, both non-fictional and fictional, can also play a key role in implementing this type of intervention due to their enormous and varied potential to integrate information, education and clarification elements in order to combat discrimination. The media can carry out information and awareness-raising campaigns, providing the framework for diverse discussion and support groups, and targeting inclusive aspects that involve emotionalization, which have proven to be beneficial for understanding those affected by discrimination⁴¹. The great advantage of the media, in addition to the infinite variety of content, is that all these forms of education and information can reach a very large and diverse audience in a short time and without high costs.

Conclusion

Discrimination continues to be a significant social problem, although progress has been made recently both in terms of awareness and anti-discrimination actions and measures. Discrimination affects various areas of social life and

³⁹ Gaebel, W., Ahrens, W., & Schlamann, P. (2010). Konzeption und Umsetzung von Interventionen zur Entstigmatisierung seelischer Erkrankungen: Empfehlungen und Ergebnisse aus Forschung und Praxis [Conception and implementation of interventions to destigmatize mental illnesses: Recommendations and results from research and practice]. Aktionsbündnis Seelische Gesundheit. Im Rahmen des Antistigma-Projekts Entwicklung und Umsetzung einer Strategie zur Bekämpfung von Stigmatisierung und Diskriminierung psychisch erkrankter Menschen. <https://www.seelischegesundheit.net/images/stories/publikationen/konzeption-und-umsetzung-von-interventionen-zur-entstigmatisierung-seelischer-erkrankungen.pdf>

⁴⁰ Ibid.

⁴¹ Röhm, A. (2017). *Stigmatisierung und Entstigmatisierung von Menschen mit Behinderungen: Einfluss unterschiedlicher medialer Darstellungen auf Einstellungen und Handlungsintentionen* [Stigmatization and destigmatization of people with disabilities: Influence of different media representations on attitudes and action intentions]. Dissertation zur Erlangung des Grades eines Doktors der Philosophie, Fakultät Rehabilitationswissenschaften der Technischen Universität Dortmund. <https://doi.org/10.17877/DE290R-18180>

different groups and individuals. Despite the existence of legislation punishing discrimination in many parts of the world, certain categories of people continue to be treated differently on the basis of one or more of the dimensions that characterize them, such as race, nationality, ethnicity, gender, sexual orientation, age, social origin, social class, religion, language, beliefs, health, physical condition, etc.

Therefore, the issue of discrimination should be addressed more frequently and more deeply as a matter of public interest. More policies and changes should be introduced to prevent and combat discrimination. Normative changes and adaptations, the implementation of a clear and functional legal framework, institutional cooperation, strengthening the role of public institutions and stimulating the development of civil society at the local level, the development of public-private partnerships, as well as policies that give more rights to employees and more opportunities for them to report acts through which some of them are treated unfairly, differently and discriminatorily, are some of the possible practical directions to prevent and combat discrimination at the macro-societal level. To be functional and operational, these practices must become part of the structure of the state, public and private institutions and non-governmental organizations, and anti-discrimination laws and regulations must explicitly address the different systems, subsystems and levels of society.

As discrimination is also perpetuated through social interactions, more efforts should be made to bring about cultural and social change. More effective strategies are needed to combat stereotypes and prejudices, stigmatization, offensive attitudes and behavior towards different categories of people, marginalization and various forms of exclusion. Effective strategies at the meso- and micro-social level include interactive contact with discriminated persons and groups, and various forms of education and information transfer. Knowledge is often a major step forward in reducing prejudice and increasing empathy for people who are constantly discriminated against. This in turn can be an important step in reducing the incidence of discriminatory acts.

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The right to equality and non-discrimination between the Europeanization of gender equality

Hisham Jadallah Mansour Shakhatreh*

Racism goes straight to the core of human nature, excusing people because of who they are and what they believe. Discrimination is devastating and creates inequality. We all have the right to be treated equally, regardless of race, religion, creed, gender, language, gender identity, age, health condition or other factors. But we often hear sad stories about people being persecuted because they belong to a “different” group from those who have rights or power. Discrimination occurs when someone is prevented from enjoying human or other legal rights on an equal basis with others because of unfair legal or medical discrimination. Amnesty International’s work is based on the principle of non-discrimination. As we work with the international community, we reject discriminatory policies and practices to ensure that everyone enjoys their right to equality.

Keywords: *equality, non-discrimination, equal rights, equal opportunities, racial discrimination, sexual discrimination, human rights, social justice, equality at work, equality before the law*



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1. Introduction

Equality and non-discrimination are universally applicable rights and principles. The rights to equality before the law and the right to freedom from discrimination are the only human rights explicitly stated in the United Nations Charter. These rights also form the basis of much the same human rights treaties and the United Nations Charter of Fundamental Rights. European Union (Charter of the European Union). Similarly, national laws often, but not always, include equality and non-discrimination as fundamental rights or laws, depending on the language used in specific legal procedures. Equality and non-discrimination are fundamental to the enjoyment of rights and other human rights and are related to human dignity. Moreover, as stated in the Preamble and Article 2 of the Treaty on European Union, equality and non-discrimination are important values of the EU and its members. According to the European Commission for Democracy on the Rule of Law (Venice Commission), non-discrimination and equality before the law are also important principles of the rule of law and are linked to freedom. Equal and non-discriminatory community decision-making protects and enhances freedom by ensuring the equal participation of individuals in these decision-making processes without discrimination and by protecting minorities from the legal system. Part of it. The main purpose of this study is to provide an overview of equality and non-discrimination in European and international human rights conventions binding on five Scandinavian countries, namely Denmark, Finland, Iceland, Norway, and Sweden (3). In addition, the European Union constitution will be considered binding on the three Nordic EU member states (Denmark, Finland and Sweden) in terms of compliance with EU laws such as the EU Equality and Non-Discrimination Directive (4).

Human rights treaties set out non-discrimination and equality, what non-discrimination and equality mean, and when treating differences separately leads to discrimination. Additionally, the causes and forms of discrimination are discussed. The second aim of this chapter is to give a brief overview of how equality and non-discrimination are reflected in Scandinavian and international law, how human rights are reflected in national legislation for the protection of rights, including equality and non-discrimination. Unfortunately, given this goal, many important issues related to equality and non-discrimination have received little attention. In particular, since the focus of this chapter is on equality and non-discrimination as human rights and fundamental rights, there is no Discrimination in Northern European equality and the rule of law, and EU non-discrimination law is outside the scope of this chapter. The same applies to the different organizational arrangements that protect and promote equality and non-discrimination in

the Nordic countries. It should also be noted that, although language is expressed in treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination, the following purposes do not relate to gender equality: discrimination based on race or disability; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of Persons with Disabilities (CRPD), which has the specific aim of combating discrimination on grounds such as race, sex and disability. Based on these limitations, readers are first reminded that the effective protection and promotion of equality and non-discrimination does not depend on human rights laws and domestic legal regulations protecting rights. Most important is how legislators, public authorities and courts in the Nordic countries, as well as the private sector, respect *de facto* equality and non-discrimination in areas such as employment, education, supply of goods and services, security, and politics.

2. Equality and Non-discrimination in European and International Human Rights Treaties Binding upon the Nordic Countries

The right to equality before the law and the right to freedom from discrimination are central to the protection of human rights around the world; because these rights are necessary to ensure sufficient pressure on the rights of other people. As the United Nations Human Rights Committee says: “Non-discrimination and equality before all people”. Equal protection before the law and non-discrimination are important concepts and concepts related to the protection of human rights. (5) The importance of equality and non-discrimination is reinforced by certain non-severability clauses, such as non-statutory rights. Although Article 4(2) of the International Covenant on Civil and Political Rights allows a State to unilaterally and temporarily deviate from most treaty provisions in emergency situations, these measures do not apply to race, colour, sex, language, religion or marital status (6) Articles 1 and 2 of the Universal Declaration of Human Rights, adopted in 1948, stipulate that all people have the right to freedom of expression. Since then, equality and non-discrimination have become the basis of international human rights law. Today, equality and non-discrimination are fundamental principles for the protection of human rights. Almost all international and regional human rights laws include equality and non-discrimination at many levels. There are also conventions such as the International Convention on the Elimination of All Rights. Forms of racial discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities and focus

on areas where people are consistently denied equal rights due to discrimination on certain grounds of law and order to prevent discrimination. For example, non-discrimination (Article 2 CRC) is one of the fundamental principles of the CRC and therefore applies to all actions relating to children and their parents. (7)

Equality and non-discrimination can be seen as positive and negative aspects of the same principle and can, therefore, be said to be mutually exclusive and mutually exclusive. (8) However, it is still necessary to distinguish them from each other because the human rights convention considers equality and non-discrimination in different ways. Additionally, non-discrimination and equality have different functions, which are discussed in more detail below. While human rights treaties such as the European Convention on Human Rights (ECHR) do not explicitly provide for equality before the law, some treaties explicitly provide for equality and the absence of hatred. For example, Article 26 of the International Covenant on Civil and Political Rights provides for both equality and non-discrimination and declares: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Similarly, equality and non-discrimination are enshrined in tandem in Article 5 CRPD (9). Some treaties even include separate provisions on equality and non-discrimination. The International Covenant on Economic, Social and Cultural Rights (ICESCR), for instance, has distinct provisions on equality (Article 3) and non-discrimination (Article 2.2). Similarly, the EU Charter makes a distinction between equality before the law (Article 20) and non-discrimination (Article 21). However, these distinctions cannot lose sight of the complementarity of equality and non-discrimination. The Court of Justice of the European Union (CJEU), for instance, has emphasized that the principle of equal treatment ‘is a general principle of EU law, enshrined in Article 20 of the Charter, of which the principle of non-discrimination laid down in Article 21(1) of the Charter is a particular expression. (10)

2.1. Important features of equality and non-discrimination

Although almost all European and international human rights treaties contain non-discrimination provisions, they must differ from treaties that guarantee the right to non-discrimination as a right to freedom and individuality protection. On the one hand, there are representations regarding human rights, and on the other hand, treaty provisions prohibiting discrimination in the exercise of other

rights granted only by treaty. Article 26 of the International Covenant on Civil and Political Rights creates a non-discrimination treaty that gives people the right to be free from other laws. If developed, it must comply with the provisions of Article 26. Its content should not be discriminatory. (11) Independently of the rights and freedoms set forth in the ECHR, the court may nonetheless examine claims under Article 14 taken in conjunction with a substantive right even if there has been no violation of the substantive right itself. (12)

In recent decades, the tendency of international human rights law has been towards the adoption of independent and free-standing clauses on the prohibition of discrimination. The adoption of Article 1 of the ECHR Protocol No. 12 (general prohibition of discrimination) has rendered the prohibition of discrimination a freestanding human right within the framework of the ECHR. Similarly, Article 5 CRPD, as well as Article 21 EU Charter, enshrine the right to non-discrimination as an autonomous right independent from other provisions. However, the scope of application of the EU Charter, including equality before the law under its Article 20 and non-discrimination under Article 21, is limited to the extent that the EU Member States are bound to comply with the EU Charter only when implementing EU law within the meaning of its Article 51(1). According to the jurisprudence of the EU Court of Justice, Article 51(1) EU Charter means that where a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the EU Charter relied upon cannot, of themselves, form the basis for such jurisdiction. (13)

Several human rights treaties, such as the ICCPR (14) and CRPD (15), refer to equality and non-discrimination as both rights and principles. (16) As rights, the equality and non-discrimination provisions of human rights treaties are capable of being justifiable and, accordingly, can provide a legal basis for litigation at domestic, European and international levels to the extent that the human rights treaty concerned has a system for individual or collective complaints. From a historical point of view, it should be remembered in this context that the Human Rights Committee extended the justifiability of Article 26 ICCPR to the enjoyment of economic, social and cultural rights already in the 1980s. (17)

Human Rights Committee law protects people from discrimination based on various economic, social and cultural interests. This is crucial in situations where personal pressure for economic, social and cultural violations is not lacking. (18) It also provides translation tools for equality and non-discrimination sentences and all other principles and rights contained in human rights treaties, statutes and law. Like other human rights, equality and non-discrimination require legal obligations. (19) Fundamentally, state parties must respect, protect

and promote equality and non-discrimination as human rights. Moreover, these obligations have both positive and negative aspects. On the one hand, equality and non-discrimination obligations require states not to violate the principle of equality before the law and the right to non-discrimination. On the other hand, these rights also bring with them many legal obligations, such as the state's duty to protect these rights from the interference of others. In particular, States should modify or eliminate laws, regulations, customs and practices that may lead to inequality and discrimination and adopt other protections and supports, including adopting or accepting measures to accelerate or achieve this goal. In fact, everyone is equal. Moreover, human rights treaties and EU law impose an obligation on the state to establish various specialized institutions and organizations, including judicial and other proceedings⁽²⁰⁾ to monitor, protect and promote equality and non-discrimination. The best measures to achieve the right balance are discussed in detail below.

2.2. The Concepts of Non-discrimination and Equality

Despite the fact that the term 'non-discrimination' is contained in all human rights treaties, most human rights treaties, as well as the EU Charter, do not expressly define it. However, certain treaties aimed at eliminating discrimination on specific grounds include explicit definitions on discrimination. Article 1 ICERD provides that the term 'racial discrimination' means: any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Similarly, Article 1 CEDAW defines what 'discrimination against women' may include. These explicit definitions have paved the way for other UN treaty bodies when interpreting the concept of discrimination. For instance, the ICCPR neither defines discrimination nor indicates what may constitute discrimination. However, with reference to the definitions under CEDAW and ICERD, the Human Rights Committee has observed that the term 'discrimination' as used in the ICCPR should be understood to: [I]mply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁽²¹⁾

Accordingly, as with Article 1 ICERD and Article 1 CEDAW, this definition by the Human Rights Committee expressly refers to four types of such arbitrary treatment that may constitute discrimination by undermining equal enjoyment or exercise of human rights: 'distinction', 'exclusion', 'restriction' or 'preference'. The CRPD, which is designed for the protection of equality for and non-discrimination against persons with disabilities, defines in its Article 2 discrimination as meaning: [A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

While taking advantage of other legal definitions of discrimination in international human rights treaties, this definition transcends them by identifying 'denial of reasonable accommodation' as one specific form of disability-based discrimination. In addition, this definition includes phrase 'on an equal basis with others', essentially requiring that persons with disabilities are not to be granted more or fewer rights or benefits than the general population, as well as that States parties are obliged to take concrete specific measures for the purpose of achieving *de facto* equality for persons with disabilities to ensure that they can in fact enjoy all human rights and fundamental freedoms.⁽²²⁾ Articles 1 and 3 CEDAW include a similar but more limited phrase 'on a basis of equality of men and women'.⁽²³⁾

In the current state of evolution of international human rights law, the notion of 'equality' is related to a number of expressions that are used to cover particular dimensions or elements of equality. The most traditional is the term 'equality before the law' which serves to indicate that all individuals are subject to the same laws, with no individual or group having special legal privilege. Thus, equality before the law involves the idea of formal equality, to the extent that laws, however unjust in practice, should be equally applied, and consistently implemented. According to the CJEU, for example, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.⁽²⁴⁾ The Committee on the Rights of Persons with Disabilities, in turn, has defined the term 'equal before the law' as describing 'the entitlement of persons to equal treatment by and in the application of the law, as a field.' The Committee has added that, in order that this right may be fully realized, 'the judiciary and law enforcement officers must not, in the administration of justice, discriminate against persons with disabilities.'⁽²⁵⁾ The right to

equality before the law is also reflected in Article 15 CEDAW which guarantees women's equality before the law and requires the recognition of women's legal capacity on an equal basis with men, including with regard to concluding contracts, administering property and exercising their rights in the justice system.

However, these remarks on equality before the law do not exhaust the spectrum of 'equality' under international human rights law as several human rights treaties also embrace the expression 'equal protection of the law' in addition to 'equality before the law'. For instance, Article (26) ICCPR entitles all persons both to equality before the law and equal protection of the law. Similar expressions can be found in Article 5 CRPD (26). While both expressions refer to related and complementary ideas of equality and non-discrimination, they should also be kept distinct. 'Equality before the law' denotes to the entitlement of persons to equal treatment by and in the application of the law, whereas the phrase 'equal protection of the law' basically means that national legislatures must refrain from maintaining or establishing discrimination when enacting laws and policies.

The evolution in human rights law has also introduced new forms or dimensions of equality. Article 5 CRPD uses 'equality under the law' and 'equal benefit of the law' which are unique to that Convention. 'Equality under the law' denotes the possibility to engage in legal relationships, i.e., to the right to use the law for personal benefit. According to the Committee the Rights of Persons with Disabilities, persons with disabilities: [H]ave the right to be effectively protected and to positively engage. The law itself shall guarantee the substantive equality of all those within a given jurisdiction. Thus, the recognition that all persons with disabilities are equal under the law means that there should be no laws that allow for specific denial, restriction or limitation of the rights of persons with disabilities, and that disability should be mainstreamed in all legislation and policies.

In turn, the phrase 'equal benefit of the law' seeks to ensure equal opportunity for all persons with disabilities and, accordingly, essentially means that States parties must eliminate barriers to gaining access to all of the protections of the law and the benefits of equal access to the law and justice to assert rights. (27)

Moreover, Article 12 CRPD enshrines the right to 'equal recognition before the law' which further describes the content of equality before the law by focusing on the areas in which people with disabilities have traditionally been denied the right to equality before the law. Instead of setting out additional rights for people with disabilities, Article 12 describes the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others. (28)

2.3. Grounds of Discrimination

Typically, European and international treaty provisions on discrimination contain non-exhaustive lists of grounds, implied by such phrases in treaty provisions as ‘any ground such as’ or ‘any other status’. References here, for instance, can be made to Articles 2(1) and 26 ICCPR, Article 14 ECHR, including Article 1(1) ECHR Protocol 12, Article 5 CRDP and Article 2 CRC, which all prohibit discrimination on an open-ended list of grounds. Article 21(1) EU Charter also contains an open-ended list of grounds.

Since the grounds enumerated in human rights treaty provisions are not intended to be exhaustive, this effectively provides leeway for the courts, treaty bodies and other legal actors as regards the determination of grounds upon which discrimination may be prohibited. Moreover, such open-ended lists of prohibited grounds give room to keep the interpretation of the prohibition of discrimination contemporary and evolutive. For instance, the ECtHR has been able to read into Article 14 ECHR such grounds as age, disability, gender identity, sexualorientation, parental and marital status, immigration status and status related to employment, none of which are either enumerated in Article 14 ECHR or Article ECHR Protocol 12 that include identical open-ended lists of prohibited grounds. (29)

The case law by courts and international treaty-bodies of human rights on prohibited grounds, including whether there has been a difference of treatment for some other ground, is today vast in scope and rich in details. This body of cases covers a wide variety of discriminatory acts in a context of various situations and other rights, such as the right to private and family life, political rights, cultural, economic and social rights, property rights and access to justice. Given space constraints, it would be a mission impossible to provide more detail here concerning this very rich and dynamic jurisprudence. The reader is advised to familiarize herself with such comprehensive surveys as found in the FRA Handbook on European non-discrimination law in which the content regarding the various grounds is described in light of international and European interpretive practice.(30)

2.4. Forms of Discrimination

The primary forms of discrimination recognized under international human rights treaties have traditionally been direct and indirect discrimination, which also reflect the distinction between formal and substantive (factual) equality. While formal equality seeks to combat direct discrimination by treating persons in similar situations similarly, substantive equality addresses countering structural

and indirect discrimination as discrimination often originates in the structural barriers and power relations of society.

2.4.1. Direct and Indirect Discrimination

Direct discrimination is where a person is treated less favourably than other persons because of a different personal status in a similar situation. According to the ECtHR, for instance, there must exist ‘a difference in the treatment of persons in analogous, or relevantly similar, situations’ which is ‘based on an identifiable characteristics’. (31) Accordingly, direct discrimination can occur when one person is treated less favourably than another is in a comparable situation on such grounds as racial or ethnic origin. The motive or intention of discrimination is irrelevant to a determination of whether discrimination has occurred. For example, a school that refuses to admit a child with disabilities in order to avoid having to change the scholastic programmes does so just because of his or her disability, and this consequently is direct discrimination. (32)

The essential factor is thus the less favourable treatment of an individual which can be discerned by making a comparison to someone in a similar situation. (33) Hence, the essential questions revolve around the existence of a difference in treatment and the issue of the chosen comparators in an analogous situation to the individual’s situation. However, direct discrimination can also occur when two persons in different situations are treated in the same way. For instance, the ECtHR has ruled that ‘the right to not be discriminated against in the enjoyment of the rights guaranteed under the ECHR is also violated when states... fail to treat differently persons whose situations are significantly different’. (34)

Indirect discrimination occurs when *prima facie* neutral laws, policies or practices *de facto* disadvantage a person or a group sharing the same characteristics. (35) Hence, indirect discrimination is essentially constituted by the effects of a treatment on a person or a group with different characteristics. For instance, the ECtHR has defined indirect discrimination by stating that ‘a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group’. (36) According to the settled case-law by the CJEU relating to the concept of indirect discrimination: [U]nlike direct discrimination, indirect discrimination may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads, however, to the result that particularly persons possessing that characteristic are put at a disadvantage. (37)

The Committee on the Rights of Persons with Disabilities has given such examples of indirect discrimination as where a candidate with restricted mobility

has a job interview on a second floor office in a building without an elevator, that although allowed to sit the interview, the situation puts him/her in an unequal position.⁽³⁸⁾ Often, albeit not invariably, the key question on whether an apparently neutral practice in fact has an adverse impact upon a group sharing a protected characteristic is demonstrated by means of statistical evidence.

2.4.2. Multiple and Intersectional Discrimination, Discrimination by Association and Other Discriminatory Conduct

However, discrimination does not necessarily occur on the basis of a single characteristic, such as ethnic origin, disability or gender, and the direct and indirect discrimination division does not necessarily enable adequately recognize all forms of discrimination. For instance, children may be in a situation of double or multiple vulnerability where additional vulnerabilities can relate to such grounds, for instance, as their national, ethnic or social origin; gender; religion; disability; migration or residence status. In addition, discrimination against a child can be against those who are associated with a child, i.e., parents.

Hence, the evolution of European and international non-discrimination laws in recent decades has led to the emergence of such new forms of discrimination as multiple discrimination, intersectional discrimination and discrimination by association for the purpose of eradicating and combating more effectively all discriminatory situations and forms of discriminatory conduct. According to the Committee on the Rights of Persons with Disabilities, for example, multiple discrimination occurs in a situation ‘where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated’.⁽³⁹⁾ Intersectional discrimination, in turn, refers to ‘a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination’.⁽⁴⁰⁾ Hence, two or several grounds operate separately in the case of multiple discrimination while in intersectional discrimination several grounds interact with each other simultaneously and inseparably, thereby generating specific types of discrimination. Multiple and intersectional discrimination can occur as both direct or indirect discrimination. Discrimination by association occurs when discrimination takes place against persons who are associated with a person with protected characteristics such as disability. For instance, the CJEU has ruled that it constitutes discrimination on the grounds of the disability of a child if a mother is treated unfavourably at work because her child was disabled. ⁽⁴¹⁾

Moreover, European non-discrimination law nowadays recognizes such specific forms of discrimination as harassment and instruction to discrimination.

(42) Harassment is a form of discrimination when unwanted conduct related to some prohibited grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Instruction to discrimination occurs when there is an expressed instruction, recommendation, preference or an encouragement to treat individuals less favourably on the basis of some protected ground such as religion or sexual orientation.

Under the CRPD, the Committee on the Rights of Persons with Disabilities has identified such forms of discrimination as ‘denial of reasonable accommodation’, ‘discrimination on the basis of disability’ and protection against ‘discrimination on all grounds’, including equal and effective legal protection against discrimination. However, these forms of discrimination are quite unique to the CRPD and, accordingly, they are not necessarily generally recognized in European and international non-discrimination law.

2.5. Positive Measures

As human rights, equality and non-discrimination impose a variety of positive obligations for the purpose of protecting and promoting equality and non-discrimination rights, as well as accelerating or achieving factual equality in favour of some disadvantaged, under-represented or marginalized group. In practice, state parties have positive obligation to enact specific and comprehensive non-discrimination legislation, as well as are obliged to modify or abolish existing laws, regulations, customs and practices that constitute such discrimination.

However, positive duties may also include such measures as allocation and/or reallocation of resources, targeted recruitment, hiring and promotion, quota systems, advancement and empowerment measures, as well as technological aids. The terminology used to describe these kinds of measures designed for achieving factual equality and removing discrimination varies in European and international human rights law to include such notions as ‘positive measures’, ‘special measures’, ‘specific measures’, ‘positive actions’ or ‘affirmative action’. (42) Here, the notion of ‘positive measures’ is used.

Positive measures are expressly recognized in such human rights treaties as Article 1 (4) ICERD, Article 4 CEDAW and Article 5(4) CRPD. For instance, Article 1 (4) ICERD provides:

- Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and

- fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.
- Several human rights treaties, such as the ICCPR and the ECHR, as well as the EU Charter, are silent on positive measures, but their permissibility and even necessity have been acknowledged by their monitoring bodies. The Human Rights Committee, for instance, has pointed out under the ICCPR that ‘the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.’ According to the Committee, there may be a need for these measures, for example ‘in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.’⁽⁴³⁾ However, the Committee has also emphasized that such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. As long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the ICCPR. ⁽⁴⁴⁾ Likewise, the ECtHR has found that, in certain circumstances, Article 14 ECHR may include ‘positive measures’ that a state could or should adopt to correct factual inequalities.⁴⁶ Similarly, the CJEU has recognized the possibility of positive measures under EU law.⁽⁴⁵⁾
 - Differential treatment entailed by positive measures does not constitute a distinct form of discrimination but, instead, such measures feature as exceptions to the rule prohibiting discrimination. However, as such measures are needed to correct discrimination and unequal treatment in fact and they cannot be continued after their objectives have been achieved, positive measures are usually temporary in nature. As positive measures are usually designed for acceleration and achievement of factual equality, such measures also tend to entail the consideration of the collective dimension of discrimination, rather than the perspective of only one individual. Positive measures must also be consistent with such principles and provisions of the treaties as the principles of legitimacy, fairness and proportionality. The Committee on the Rights of Persons with Disabilities has also emphasized that positive measures

must not result in perpetuation of isolation, segregation, stereotyping, stigmatization. (46)

2.6. Justification of Differential Treatment

Differential treatment is an inherent part of everyday life of any human society. Hence, the ECtHR already in the 1960s adopted the position that Article 14 ECHR ‘does not forbid every difference in the exercise of the rights and freedoms recognised’.(49) Similarly, the Human Rights Committee has observed that not every differentiation of treatment will constitute discrimination, and that the right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory. (50) The Committee has also held that the enjoyment of rights and freedoms on an equal footing without discrimination does not mean identical treatment in every instance.(47)

Accordingly, the key question is how to establish whether a certain difference in treatment constitutes a violation or is justified. As with several other important questions of international human rights law, human rights treaty provisions remain quite silent on the justification of differential treatment with the outcome that the issue of justification has essentially been a matter of treaty interpretation by courts and treaty-bodies of international treaties.

Under the ECHR, the ECtHR already ruled in the famous 1968 Belgian Linguistic case that ‘the principle of equality of treatment is violated if the distinction has no objective and reasonable justification.’ According to the Court, the existence of such a justification: [M]ust be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. (48)

This justification test applies to both direct and indirect discrimination under Article 14 ECHR and Article 1 ECHR Protocol 12.⁵³ Similarly, the Human Rights Committee stated in 1989 that differentiation of treatment is permissible ‘if the goal is to achieve a legitimate purpose; and the criteria for such differentiation are reasonable and objective.’(49)

Under EU law, the CJEU has also largely adopted, if not exclusively, a similar justification test. Accordingly, the CJEU has consistently held in its case law that as regards the general principle of equal treatment in the context of

grounds such as age or sex, that a difference of treatment which is based on a characteristic related to such grounds does not constitute discrimination — that is to say, an infringement of Article 21(1) EU Charter — where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.⁽⁵⁰⁾

Accordingly, the difference in treatment must, first, pursue a legitimate aim. Second, there has to be a reasonable relationship of proportionality between the difference in treatment and the legitimate aim sought to be realized. It warrants emphasis that the requirements of ‘legitimate aim’ and ‘proportionality’ are cumulative tests that have an autonomous function to fulfil. Hence, a disproportionate differential treatment constitutes discrimination and is not allowed, even for the sake of achieving legitimate objectives, no matter how desirable. Given these criteria, the justification test of differential treatment bears many points of resemblance to the permissible limitations test relating to the justification of limitations of human rights. Under Articles 8–11 ECHR, for instance, the permissibility of restrictions is addressed through the following three distinct, yet cumulative criterion of (i) being prescribed by the law, i.e., having a proper legal basis; (ii) serving a legitimate aim; and (iii) being necessary in a democratic society.

While the criterion of legitimate aim is quite simple and straightforward, in practice the criterion of proportionality tends to be more demanding. In light of the case law of the ECtHR, it includes such elements as the choice of the least intrusive measures and the requirements of necessity and proportionality. Hence, the ECtHR must, among others, be satisfied that there is no other more lenient means of achieving the legitimate aim. As with other rights under the ECHR, the ECtHR also takes advantage of the margin of appreciation doctrine in the context of Article 14 ECHR and accordingly, tends to allow a sphere of discretion for the States for the purpose of determining whether a given differential treatment can be deemed to be justified. The wider the margin of discretion is, the lower the intensity of judicial review by the Court – and vice versa. However, the scope of the margin of discretion varies in casu according to the circumstances, the subject-matter and the background of the cases. For example, in cases involving racial discrimination, a particularly invidious form of discrimination with perilous consequences, the case law by the ECtHR actually shows that ‘no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures’.⁵⁶

The Court's reasoning strongly suggests that differences of treatment based on ethnic origin can scarcely ever be justified.

Under EU law, the justification test of differential treatment is largely similar to that under the ECHR. For example, the CJEU has often first noted that the principle of equal treatment requires the EU legislature 'to ensure, in accordance with Article 52(1) of the Charter, that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'.⁽⁵¹⁾ Next, the Court has continued that 'a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned'.⁽⁵²⁾

However, the justification test under EU law includes some notable differences. To start with, justification of differential treatment under EU law is primarily applicable to indirect discrimination, whereas justification of direct discrimination can only be justified in accordance with particular aims expressly set out in the EU non-discrimination directives. Furthermore, the CJEU does not apply the margin of discretion doctrine adopted by the ECtHR. It is a different thing that, as far as judicial review by the CJEU of the requirements of the principle of proportionality are concerned, the CJEU has acknowledged that the EU legislature has broad discretion as to the nature and scope of the measures to be adopted in the fields of action of the European Union. As a result, judicial review of the proportionality by the CJEU Court is limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion.⁽⁵³⁾ Yet, the Court has also emphasised that in cases involving such discretion, the EU legislature must base its choice on objective criteria, as well as it must ensure that fundamental rights are observed. In observance of the principle of proportionality, this requires that limitations on rights under the EU Charter, including Articles 20 and 21 on equality and non-discrimination, may only be made if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, as laid down in Article 52(1) EU Charter 60.

Under European non-discrimination law, the application of the objective justification test usually includes the shifting the burden of proof so that the state authorities, or the plaintiffs in general in domestic litigations, must provide an acceptable and convincing explanation for differential treatment.⁶¹ This is because it often can be extremely difficult for the individual subject to differential treat-

ment to prove that the differential treatment received has been based on a certain prohibited characteristic, such as ethnic origin, gender origin, or disability. Both European Courts (54) have recognized the need for the reversal of the burden of proof, which equally applies in cases of both direct and indirect discrimination. Under EU law, such a shifting of the burden of proof is also regulated in the EU equality directives.

Finally, it must be recalled in this context that the right to non-discrimination is non-derogable to the extent that derogation measures cannot involve differential treatment solely on the ground of race, colour, sex, language, religion or social origin under Article 4(1) ICCPR. In addition, differential treatment on the basis of such grounds as race and national and ethnic origin is subject to a strict level of scrutiny. For example, the ECtHR has held in *Timishev*, in which a Chechen lawyer was refused registration in another part of Russia on account of his ethnic background, that ‘no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures’. (55) This statement by the ECtHR seems to exclude that any difference in treatment based on ethnicity may be justified, where this leads to imposing disadvantages on the basis of this criterion alone or to a decisive extent.

3. Equality and Non-discrimination in Nordic Constitutions: Setting the Scene

Nordic constitutions are characterized by certain traditional idiosyncrasies and dualities that also shape the protection and promotion of equality and non-discrimination in the Nordic countries.⁶⁴ The Nordic countries have had a long tradition of written constitutions with a range of constitutional rights. All five countries are also strong democracies based on the rule of law, as well as being amongst the wealthiest countries in the world. In addition, the Nordic countries are still relatively homogeneous in ethnic, religious and linguistic terms despite recent waves of immigration.

All these characteristics combine to foster the ability of the Nordic countries to de facto uphold and respect their constitutional and international human rights obligations, including those related to equality and non-discrimination. The Nordic countries have a tradition of strong commitment to equality, in particular to gender equality, where they have carved out a worldwide reputation. However, this naturally does not mean that the Nordic countries are free from all problems with respect to equality and non-discrimination. In light of the observa-

tions by the international treaty bodies, principal matters of concern encompass the human rights problems of domestic violence against women and children, and various deficiencies regarding legal frameworks of non-discrimination and equality, including human trafficking and the rights of migrants, refugees and asylum seekers.

While the Nordic countries can be applauded in many ways as ‘model’ countries in human rights, including those pertaining to equality and non-discrimination, it is somewhat paradoxical to note at the same time that the traditional Nordic constitutional position regarding fundamental and human rights has been quite reserved and even reluctant, particularly concerning any strong judicial safeguards for these rights. Indeed, Nordic constitutional law has traditionally been agonistic towards ‘rights talk’ and ‘strong courts’ due to long-lived adherence to constitutional legislative supremacy and ideas about democracy as majoritarian rule, as well as the influence of Scandinavian legal realism which is renowned for its almost nihilist approach to rights and courts. Although Nordic constitutionalism has witnessed a remarkable shift from the legislative sovereignty paradigm to one in which domestic legislation and other legal measures are increasingly subordinated to rights-based judicial review, both by domestic courts and such European courts as the ECtHR and the Court of Justice of the European Union, the Nordic hesitance vis-a-vis human rights and strong courts is still tacitly and by implication shaping the Nordic constitutional systems of rights protection. With the exception of Norway, where the Supreme Court has for a long time exercised the power of judicial review,⁶⁵ the Nordic constitutions still adhere to various forms of weak judicial review within which the courts are inclined to exercise their powers against a backdrop of judicial self-restraint. (56)

3.1. The Domestic Status and Effects of International Human Rights Treaties

Dualities also characterize the ratification and incorporation of international human rights treaties by the Nordic countries, which have traditionally adhered to dualism insofar as the domestic status of international treaties are concerned. Hence, international treaties cannot enter part of domestic law only by ratification. A separate domestic enactment is also necessary for all the Nordic countries for the purpose of giving the treaty provisions domestic legal validity and direct applicability. (57)

On the one hand, the Nordic countries have actively and systematically promoted the protection and promotion of human rights on European and international levels. Denmark, Norway and Sweden were among those ten European states that founded the Council of Europe (COE) in 1949, as well as signed

and ratified the ECHR in the early 1950s. Today, all five Nordic countries have signed and ratified almost without exception⁶⁸ all human rights treaties adopted by COE, the UN and the International Labour Organization (ILO), including all those thematic international and regional human rights treaties that are designed for countering discrimination on specific grounds. Reservations to international human rights treaties by the Nordic countries have also remained relatively minor and small in number.

On the other hand, with the exception of Finland, which has traditionally incorporated all international human rights treaties into domestic law, the other four Nordic countries have traditionally pursued a very cautious approach to incorporation. To be sure, while Denmark, Iceland, Norway and Sweden already ratified the ECHR in the 1950s, it was not until the 1990s that the ECHR was incorporated into their domestic law; the ECHR was incorporated into Danish law in 1992, Icelandic law in 1994 and Swedish law in 1995.

Norway enacted the Human Rights Act in 1999 for the purpose of strengthening the position of human rights in the Norwegian legal order. The Human Rights Act has not only incorporated the ECHR, but also the ICCPR, including its the two optional Protocols, and the ICESCR. In 2003, Norway also incorporated the CRC, and took a further step of incorporation in 2009 by inserting CEDAW in the Humans Rights Act, following the recommendations by the CEDAW Committee. However, Denmark, Iceland and Sweden have continued to follow a reserved, even reluctant, approach to incorporation although monitoring bodies of international human rights treaties, such as the UN Human Rights Committee, have continuously criticised the lack of incorporation of human rights treaties by them.⁶⁹ According to this criticism, certain areas of Danish, Icelandic and Swedish law are not entirely aligned with international human rights norms due to the lack of incorporation which induces domestic courts to give judicial effect to human rights treaties predominantly indirectly, through the human rights-oriented interpretation of domestic law. For instance, the UN Human Rights Committee noted in 2016 as a principal matter of concern as regards Denmark that ‘the State party does not intend to incorporate the Covenant in the domestic legal order, which results in a situation in which the national legislation may not be in full accordance with the Covenant (art. 2).’ Thus, the Committee called upon Denmark ‘to review its position and consider incorporating the provisions of the Covenant in order to give full effect to them in its domestic legislation.’⁽⁵⁸⁾

Yet, the ECHR is still the only human rights treaty incorporated into domestic law in Denmark. Iceland has incorporated the CRC in 2013, but it is still to incorporate several other UN human rights treaties whereas Sweden is yet

to incorporate other human rights treaties beyond the ECHR and the CRC, the latter of which Sweden incorporated in 2020. Given the lack of incorporation by Denmark, Iceland and Sweden, it follows that the ICCPR and ICESCR with their provisions on equality and non-discrimination, as well as such human rights treaties adopted specifically to counter discrimination on such grounds as race (ICERD), gender (CEDAW) and disability (CRPD), are not formally part of the domestic law in these Nordic countries. As incorporation warrants direct applicability of international treaties by domestic courts and authorities, the lack of incorporation somewhat inhibits the effective domestic implementation and protection of equality and non-discrimination in these three Nordic countries.

However, incorporation is not the only way of giving domestic effect to human rights treaty norms on equality and non-discrimination. The Nordic countries have usually taken advantage of the method of transformation and, accordingly, have amended their domestic legislation so as to achieve harmony with the treaty in question. Some Nordic countries have even amended their constitutions so as to enhance the domestic status and applicability of international human rights treaties. In Iceland, for instance, the 1995 amendments made to the human rights provisions of the Icelandic Constitution have also enhanced the status of those unincorporated international human rights conventions in Icelandic law. One can also find in the Nordic constitutions special clauses that oblige State organs or public authorities in general to respect and ensure human rights. Such clauses can be found in the Finnish Constitution (Chapter 2, section 22), the Norwegian Constitution (Part E, Article 92) and the Swedish Constitution (Chapter 2, section 23). In Finland and Sweden, such constitutional provisions on human rights have been regarded as giving semi-constitutional status to international human rights norms, thereby rendering them constitutionally special among international treaty obligations.

Moreover, Nordic courts are in the habit of giving judicial effect to international human rights norms indirectly, through a human rights-oriented interpretation of constitutional provisions on fundamental rights and domestic law in general. There is today an embarrassment of riches in terms of human rights case law from the Nordic courts. As an interpretive effect of international human rights norms can also extend to cover non-incorporated human rights treaties, the interpretive effect has diminished those obstacles to the effective domestic implementation of human rights that originate in the absence of incorporation. For instance, Danish, Icelandic and Swedish courts have made references to the ICCPR even if these countries have still yet to incorporate it.

Accordingly, the tendency in Nordic countries has increasingly been towards the harmonisation of the constitutional and international protection of human rights, partly through the significant impact of international human rights treaties on domestic constitutional reforms and partly through the influence of international human rights norms on the interpretation of domestic legislation, as well as domestic principles and doctrines pertaining to rights, including equality and non-discrimination. This tendency, as well as the above remarks on the domestic effects of international human rights treaties, should be kept in mind below, offering an overview on equality and non-discrimination clauses in the Nordic constitutions.

3.2. Equality and Non-discrimination in Nordic Constitutions

All five Nordic countries have written constitutions with provisions on human rights. Some Nordic constitutional systems of rights protection are even fairly broad and progressive as a result of constitutional reforms since the 1990s. In 1995, for instance, Finland and Iceland made profound changes to their constitutional chapters on fundamental rights. In Norway, several rights already guaranteed by international human rights treaties binding upon Norway were included in the new Part E of the Constitution in 2014. Yet, the Nordic constitutions are far from uniform insofar as constitutional provisions on equality and non-discrimination are concerned. (59)

The Constitution of Denmark stands out as most silent and opaque in so far as equality and non-discrimination are concerned. One looks in vain for general clauses that would expressly enshrine equality and non-discrimination as fundamental rights guaranteed by the Danish Constitution. The plausible explanation for this absence is probably the age of the Danish constitution, combined with the fact that the Danish Constitution is extremely difficult, if not impossible, to amend. However, some provisions of the Danish constitution can be seen as lifting into attention specific dimensions of equality and non-discrimination in the fields of religion and conscientiousness. The impact of international human rights treaties and EU law insofar as the domestic protection and promotion of equality and non-discrimination are concerned in Denmark must also be highlighted.

The Constitution of Finland includes separate, yet intertwined, general provisions on both equality and non-discrimination that are greatly inspired by human rights treaties binding Finland. Section 6, 'Equality', first provides in its paragraph 1 that everyone is equal before the law, while paragraph 2 enshrines the prohibition of non-discrimination as follows: 'No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason

that concerns his or her person.’ As seen by the expression ‘or other reason’, the list of prohibited grounds is non-exhaustive even if the grounds explicitly mentioned in Section 6(2) are intended to be subject to stricter scrutiny insofar as the justification of differential treatment on the basis of those grounds is concerned. Moreover, the language ‘without an acceptable reason’ neatly communicates that not every difference in treatment will amount to discrimination. Separate provisions on the equality of children and gender equality also can be found in Section 6 of the Finnish Constitution.

The Constitution of Iceland contains a general clause on equality and non-discrimination, providing that everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion ethnic origin, race, colour, property, or birth or other status (Article 65). As indicated by the words ‘other status’, the grounds enumerated in this provision are non-exhaustive with the outcome that several grounds not explicitly mentioned, such as age, disability and sexual orientation may also be regarded as prohibited grounds.

The Constitution of Norway includes a general clause that enshrines both equality and non-discrimination as follows: ‘All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment.’ What warrants notice is that the provision is framed in a broad, open-textured manner without specifying any particular grounds, thereby leaving relatively much latitude for the legislator and courts to decide what exactly may constitute discrimination. At the same time, however, the words ‘unfair’ and ‘disproportional’ convey that differential treatment does not constitute discrimination if that treatment can be regarded as being fair and proportionate. In this context, Article 92 of the Norwegian Constitution features as a general human rights clause that obliges authorities to enforce human rights conventions binding upon Norway at the level they are implemented in Norwegian law, and that the Human Rights Act incorporates such human rights treaties as the ICCPR, ICESCR and CEDAW with their provisions on equality and non-discrimination. The Constitution of Sweden includes four distinct enactments enjoying the status of a constitution. Of them, the most important for present purposes is the Instrument of Government which contains the following general clause on discrimination: ‘The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance affecting the individual’. As with the Finnish and Icelandic constitutional provisions on the prohibition of discrimination, this provision also addresses discrimination on a non-exhaustive number of grounds as the expression ‘other circumstance’ displays. The Swedish Constitution also includes specific clauses that prohibit laws or other provisions

entailing discrimination in relation to those who belong to a minority group due to ethnicity, colour or other similar circumstances or due to sexual orientation, on one hand (Chapter 2, Section 12), or prohibit laws or other provisions that entail discrimination due to sex, while on the other hand at the same time creating an exception for positive action as well as concerning military service (Chapter 2, Section 13). There are also separate provisions that require the state to use only objective criteria when hiring employees (Chapter 12, Section 5), as well as oblige the courts to set aside parliamentary acts that violate the ECHR, thereby also strengthening the domestic status of Article 14 ECHR and ECHR Protocol 12 on the prohibition of discrimination (Chapter 2, Section 19).

3.3. The Significance of Domestic Legislation and Institutional Arrangements

While constitutional provisions play a role in the establishment of rights to equality and non-discrimination, the foregoing observations on Nordic constitutions do not exhaust the spectrum of the legal framework of equality and non-discrimination in the Nordic legal orders. As already noted, human rights treaties, as well as EU law and European Economic Area (EEA) law, basically oblige the Nordic states to respect, protect and fulfil the right of individuals to equality and non-discrimination. In this respect, on one hand, States must refrain from any actions that discriminates against persons. On the other hand, States are obliged to take positive actions, such as modify or abolish existing laws, regulations, customs and practices that constitute such discrimination. Moreover, the effective enjoyment of the rights to equality and non-discrimination calls for the adoption of a variety of enforcement measures and institutional arrangements designed for supervising and promoting the effective implementation and progress of equality and non-discrimination laws and policies at the national level. (60)

Accordingly, it is important to note that in addition to constitutional provisions, the Nordic legal framework is essentially constituted by equality and non-discrimination legislation that implements at the national level the EU equality and non-discrimination directives, as well as State's obligations under human rights treaties to enact legislation forbidding discrimination. For instance, such human rights treaties as ICERD and ICCPR expressly require the states to penalize racial discrimination. Moreover, as the direct horizontal effect (also often referred to as *Drittwirkung*) of fundamental and human rights tends to be limited, and the principle of legality under the Nordic constitutions also requires that legal obligations and liabilities may only be imposed on the individuals and other private parties by Acts of Parliament, the enactment of this ordinary legislation is of utmost importance for the purpose of ensuring that non-discrimination

and equality norms extend to the private sphere, as well as appropriately cover such important areas of Nordic societies as education, employment, goods and services. Hence, a comprehensive picture of the Nordic legal frameworks of the protection and promotion of equality and non-discrimination also requires an in-depth analysis of these legislative measures, as seen in light of their interpretive practice by Nordic courts and authorities. Such an analysis falls, however, outside scope of this chapter. (61)

A range of specific bodies and institutions designed for the enforcement and promotion of equality and non-discrimination laws and policies can be found in all the Nordic countries. Finland, for instance, has the Non-Discrimination Ombudsman (62) and the Ombudsman for Equality⁷⁵ that are both autonomous and independent authorities charged with the tasks of promoting equality and non-discrimination and preventing discrimination. Sweden has the Equality Ombudsman (63) with a broad mandate to promote equal rights and opportunities and to combat discrimination. The Danish Institute for Human Rights is to further the equal treatment of all people regardless of gender, race or ethnic origin, as well as has the tasks of monitoring, promoting and protecting the implementation of the CRPD in Denmark. (64)

Moreover, there are such independent, quasi-judicial institutions such as the Board of Equal Treatment⁷⁸, the National Non-Discrimination and Equality Tribunal in Finland(65), the Equality Complaints Committee in Iceland and the Anti-Discrimination Tribunal in Norway.(66) Aside from these special bodies and institutions charged with a variety of tasks of supervision and promotion, the legislatures, all branches of government and public authorities in general, as well as courts contribute to the protection and promotion of non-discrimination and equality in Nordic countries.

4. Concluding Remarks

Equality and non-discrimination are at the heart of European and international human rights law, as well as Nordic constitutions. Aside from being central to the enjoyment of all other fundamental and human rights, equality and non-discrimination feature as independent and self-standing principles and rights. They are also an indispensable and integral part of the development of society as a whole and within a democratic framework based on the rule of law. Despite all the progress at national, European and international levels in enhancing the protection of individuals and groups of individuals against discrimination, various forms of inequalities and discrimination are still commonplace and remain

anything but a memory from the past in all parts of Europe and the world, including the Nordic countries.

As with other European countries, all five Nordic countries have also witnessed in recent years the rise of populism, including neo-nazi and anti-immigration movements. These may at their worst even mutate into such authoritarian and illiberal forms of government that can start to erode the very foundations of the domestic constitutions based on democracy, rule of law and the protection of human rights, including such overarching rights and principles as equality and non-discrimination. In addition, climate change and digitalization introduce entirely new and unprecedented forms of discrimination and harmful impacts on equality. Accordingly, non-discrimination and equality must be evergreens, and their protection and promotion is a never-ending and burning issue of concern at national, European and international levels for the years to come.

References:

1. The term ‘human rights’ in this chapter denotes those rights guaranteed by European and international human rights treaties such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The notion of ‘fundamental rights’ refers to rights as enshrined in the domestic constitutions, as well as the EU Charter of Fundamental Rights.
2. European Commission for Democracy through Law, CDL-AD (2011)003rev, Report on the rule of law – Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25–26 March 2011), paras. 41 and 62–65. See also European Commission for Democracy through Law, Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), pp. 30–32.
3. For a useful overview, see European Agency for Fundamental Rights (FRA), European Court of Human Rights and Council of Europe, Handbook on European non-discrimination law, 2018 edition, pp. 155–226 also available at: <https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition>. See also European Court of Human Rights, Guide on Article 14 European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, updated on 31 August 2021, pp. 23–42, available at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.
4. The EU equality and non-discrimination directives include Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000, pp. 0022–0026; Council Directive 2000/78/EC of 27 November

- 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22.
5. UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, para. 1.
6. UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 8.
7. See Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 12.
8. AF. Bayefsky, *The Principle of Equality or Non-discrimination in International Law*, 11 Human Rights Quarterly, 1990, p. 5.
9. See Committee on the Rights of Persons with Disabilities, Article 5: Equality and non-discrimination (Adopted 9 March 2018).
10. 10. See Case C-356/12, Wolfgang Glatzel v. Freistaat Bayern, EU:C:2014:350, para. 43. See also Case C-550/07 P Akzo Nobel Chemicals and Akcros Chemicals v. Commission EU:C:2010:512, paras. 54 and 55 and the case-law cited.
11. UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, para. 12.
12. See e.g., Sommerfeld v. Germany, No. 31871/96, 8 July 2003. For an overview of the scope of application of Article 14 ECHR, see Council of Europe/European Court of Human Rights, Guide on Article 14 European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, updated on 31 August 2021, 6–10, available at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.
13. See e.g., Case C-617/10, Åkerberg Fransson, EU:C:2013:105, para. 22.
14. See UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination.
15. See also Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6.
16. On human rights as rights and principles, see M. Scheinin, *Characteristics of Human Rights Norms*, in Krause and Scheinin (eds.), *International Protection of Human Rights: A Textbook*, Åbo Akademi University Institute for Human Rights, Åbo, 2009, p. 32.
17. The landmark cases are Zwaan-de Vries v. The Netherlands and Broeks v. the Netherlands in which the Committee held that the right to employment benefits is subject to subject to the individual petition procedure available under the IC-CPR where their domestic implementation includes forms of discrimination. See F. H. Zwaan-de Vries v. the Netherlands, Communication No. 182/1984 (9 April

- 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 160 (1987); and *S. W. M. Broeks v. The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 (1990) p. 196. Similar case law extending Article 14 ECHR to social rights and providing social rights with possibilities of becoming justifiable can be found from the ECtHR. For overview of the case law of the ECtHR on the protection against discrimination in the context of a variety of social benefits, see European Court of Human Rights, Guide on Article 14 European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, updated on 31 August 2021, pp. 46–48.
18. The Optional Protocol to the ICESCR was opened for signature in March 2009. Together with the framework of the European Social Charter, the 1995 Additional Protocol to the European Social Charter establishes a system of Collective Complaints which is meant for cases of non-compliance in a State's law or practice with provisions of the European Social Charter. However, the collective complaint procedure does not establish a system of individual complaints; instead, it mainly allows trade unions or their international organisations to file collective complaints with the European Committee of Social Rights in relation to non-compliance with the Charter. Of the Nordic countries, Finland, Norway and Sweden have ratified the collective complaint procedure.
 19. For the typology of state's obligations under human rights treaties, see Oliver de Schutter, *International Human Rights Law, Cases, Materials, Commentary*, Cambridge University Press, 2010, pp. 241–364.
 20. According to Article 26 ICCPR, for instance, states parties are obliged to establish judicial remedies in the case of discrimination occurring in the public and even in the private sphere. See also *Nahlik et al. v. Austria*, Communication No. 608/1995, U.N. Doc. CCPR/C/57/D/608/1995 (1996).
 21. General comment No. 18: Non-discrimination, para. 7.
 22. See also Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, para. 17.
 23. For an overview of definitions of discrimination in European non-discrimination law, see Handbook on European non-discrimination law, pp. 39–90.
 24. See Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR, para. 33 and the case-law cited.
 25. Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, para. 14.
 26. See Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para. 16.
 27. Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, paras. 14–16.

28. See Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014), Article 12: Equal recognition before the law, CRPD/C/GC/1 in which the Committee comments in detail the normative content of Article 12 CRPD on ‘equal recognition before the law’.
29. For an overview of the application of ‘other status’ by the ECtHR, see Guide on Article 14 European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, pp. 34–43.
30. See Handbook on European non-discrimination law, 2018 edition, pp. 155–227. See also e.g., European Court of Human Rights, Guide on Article 14 European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, Updated on 31. August 2021, pp. 23–42, available at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.
31. See e.g., Biao v. Denmark – 38590/10, Judgment 25.3.2014, para. 89. For direct discrimination under European non-discrimination law, see Handbook on European non-discrimination law, pp. 43–52.
32. See Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para. 18.
33. See on the criterion of a comparator, Handbook on European non-discrimination law, pp. 44–48.
34. Thlimmenos v. Greece, No. 34369/97, 6 April 2000, para. 44.
35. On indirect discrimination in light of European and international interpretive practice, see Handbook on European non-discrimination law, pp. 53–59.
36. Biao v. Denmark, No. 38590/10, 24 May 2016, para. 103.
37. See to this effect, in particular, judgment in Z., C-363/12, EU:C:2014:159, para. 53 and the case-law cited.
38. Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para. 18b.
39. Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para. 19.
40. Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para. 19. For multiple and intersectional discrimination in European non-discrimination law, see Handbook on European non-discrimination law, pp. 59–63.
41. See Case C-303/06 Coleman [2008] ECR I-5603. See also see Handbook on European non-discrimination law, pp. 51–52.
42. See in more detail, Handbook on European non-discrimination law, pp. 67–69.
43. See Handbook on European non-discrimination law, p. 71.

44. UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, para. 10.
45. UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, para. 10.
46. For overview of the case law by the ECtHR on ‘positive measures’, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, pp. 13–14.
47. See, to that effect, e.g., cases C-450/93 Kalanke [1995] ECR I-3051 and C-407/98 Abrahamsson and Anderson [2000] ECR I-5539. See also on ‘special or specific measures’ Handbook on European non-discrimination law, pp. 69–80.
48. Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para 29.
49. Case ‘relating to certain aspects of the laws on the use of languages in education in Belgium’ (Merits), judgment of 23 July 1968, Series A, No. 6, p. 33, para. 10.
50. UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, paras. 8 and 13. See also Communication No. 172/1984, S. W. M. Broeks v. the Netherlands (Views adopted on 9 April 1987), in UN doc. GAOR, A/42/40, p. 150, para. 13.
51. UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, para 8.
52. Case ‘relating to certain aspects of the laws on the use of languages in education in Belgium’ (Merits), judgment of 23 July 1968, Series A, No. 6, p. 33, para. 10.
53. For a detailed overview of the justification test under the ECHR, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, pp. 13–14 and 16–20.
54. UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, para. 13.
55. See, e.g., cases C-356/12, Wolfgang Gatzel v. Freistaat Bayern, para. 49; C-229/08 Wolf EU:C:2010:3, para. 35; C-447/09 Prigge and Others EU:C:2011:573, para. 66; and, as regards discrimination based on sex, cases C-222/84 Johnston EU:C:1986:206, para. 40; and C-273/97 Sirdar EU:C:1999:523, para. 25. For justification of differential treatment under European non-discrimination law, see in detail Handbook on European non-discrimination law, pp. 91–108.
56. Timishev v. Russia (Appl. nos. 55762/00 and 55974/00), judgment of 13 December 2005, para. 58.
57. See, to that effect, Case C-550/07 P Akzo Nobel Chemicals and Akcros Chemicals v. Commission EU:C:2010:512, paragraphs 54 and 55 and the case-law cited.
58. Case C-127/07 Arcelor Atlantique and Lorraine and Others EU:C:2008:728, paragraph 47, and Case C-101/12 Schaible EU:C:2013:661, para. 77.

59. See to that effect, cases C-425/08 *Enviro Tech* (Europe) EU:C:2009:635, para. 47; C-343/09 *Afton Chemical* EU:C:2010:419, para. 28; and C-15/10 *Etimine* EU:C:2011:504, para. 60.
60. See, to that effect, Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* EU:C:2010:662, paragraph 46; and Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* EU:C:2011:100, para. 17.
61. See in detail Handbook on European non-discrimination law, pp. 231–239.
62. For case law by the ECtHR, see Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, pp. 21–23.
63. *Timishev v. Russia* (Appl. nos. 55762/00 and 55974/00), judgment of 13 December 2005 (final on 13 March 2006), § 58.
64. For characteristics of Nordic constitutions, see R. Hirschl, ‘The Nordic Counter-narrative: Democracy, Human Development and Judicial Review’, *International Journal of Constitutional Law*, Vol. 9, 2011, pp. 449–469; T. Ojanen, *Human Rights in Nordic Constitutions and the Impact of International Obligations*, In Krunke and Thorarensen eds., *The Nordic Constitutions – a Comparative and Contextual Study*, Hart 2018, pp. 133–166; E. Smith, ‘Judicial Review of Legislation’, in H. Krunke & B. Thorarensen (eds.), *The Nordic Constitutions: A Comparative and Contextual Study*, Hart Publishing, 2018, pp. 107–132; J. Lavapuro, T. Ojanen & M. Scheinin, ‘Rights-based Constitutionalism in Finland and the Development of Pluralist Constitutionalist Review’, *International Journal of Constitutional Law*, Vol. 9, 2011, pp. 505–531; and J. O. Rytter & M. Wind, ‘In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms’, *International Journal of Constitutional Law*, Vol. 9, 2011, pp. 470–504. See also J. Nergelius, ‘The Nordic States and Continental Europe: A Two-Fold Story’, in J. Nergelius (ed.), *Nordic and Other European Constitutional Traditions*, Leiden, Martinus Nijhoff, 2006, pp. 3–4.
65. See E. Smith, ‘Judicial Review of Legislation’, in H. Krunke & B. Thorarensen (eds.), *The Nordic Constitutions: A Comparative and Contextual Study*, Hart Publishing, 2018, pp. 107–132.
66. See J. Nergelius, ‘The Nordic States and Continental Europe: A Two-Fold Story’ in J. Nergelius (ed.), *Nordic and Other European Constitutional Traditions* (Leiden, Martinus Nijhoff, 2006) pp. 3–4. See also E. Smith, ‘The Legitimacy of Judicial Review of legislation: A Comparative Approach’ in E. Smith (ed.), *Constitutional Justice under Old Constitutions* (The Hague, Kluwer Law International, 1995); and J. Lavapuro, T. Ojanen and M. Scheinin, ‘Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review’ (2011) 9(2) *ICON* 511.

Protection against discrimination in Poland. Selected historical and contemporary aspects compared to legal solutions in other European countries

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The article concerns selected aspects of legal protection against discrimination in Poland. The authors have attempted to present the evolution of forms of preventing and responding to the institution of discrimination, starting from the interwar period, through the post-war years (after 1945), ending with contemporary legal norms and institutions that are currently in force in Poland. The authors have compared the forms of preventing discrimination in Poland and compared them to the legislation of other European countries. The considerations include, among others: women's voting rights (1918), the possibility of reclaiming ownership rights to real estate lost by participants in the fight for freedom (1932) and the development of law preventing discrimination after 1989.

Keywords: *anti-discrimination law, women's voting rights, protection of property rights, equality of treatment, Constitution of the Republic of Poland, equality of rights, discrimination in labor law*



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1. Introduction

The Polish-Lithuanian Commonwealth, an electoral federal monarchy consisting of two constituent parts: The Crown of the Kingdom of Poland and the Grand Duchy of Lithuania, finally collapsed in 1795. As a result of the partitions of this state (in 1772, 1793 and 1795), the Russian Empire annexed the Lithuanian, Belarusian and Ukrainian lands. Austria annexed southern Lesser Poland with Cracow and the northern part with Lublin, and seized the former Ruthenian provinces with Lviv and Halicz. Prussia, in turn, took a large part of Mazovia with Warsaw (which in subsequent years, in 1815, came under the Russian rule), as well as Greater Poland and Royal Prussia. One of the long-term consequences of the Partitions of Poland, as well as other events in the 19th century, including the Napoleonic Wars, was the gradual extension of mainly Prussian, Austrian, Russian and French legislation¹ to various parts of the former Polish-Lithuanian Commonwealth. Legal acts of foreign origin thus determined the formation of the legal status of the inhabitants of these multiethnic lands, including their political and electoral rights or rights based on civil law, in particular ownership of land and other property². In 1918, as a result of the settlement of the First World War, when the Republic of Poland, which had been liquidated by the neighboring states, was being reborn in a new form of a republic based on the 1921 Constitution, five legal systems (referred to as provisional district law) were in force on its territory, together with the main legal acts, mainly, of code rank³.

2. Demands on women's political rights in the 19th and early 20th centuries and the granting of suffrage to women in 1918 in Poland

It is assumed, on the basis of general legal history, that women first gained a substitute for suffrage in the United States in 1867 (only in a part of the US territory – the Wyoming Territory). Full suffrage in that country was granted to women in 1920 (19th Amendment to the US Constitution). New Zealand, on

¹ Bardach, J. (2005) *Historia ustroju i prawa polskiego*. LexisNexis, p. 343.

² Kutrzeba, S. (1917) *Historia ustroju Polski w zarysie. Po rozbiorach, cz. III. B. Połoniecki*, p. 5, 99–10 i 235; Mazurkiewicz, M. (2002) *Historia Polski 1492–1795*. Wydawnictwo Literackie, p. 718.

³ Among them, for example, in the area of civil law, depending on the district: the II. and III. Book of the Napoleonic Code, the Mortgage Acts 1818 and 1825, the Civil Code of the Kingdom of Poland of 1825, the Marriage Decree 1836; the German Civil Code (BGB) 1896; Vol. X. of the Collection of Laws of the Russian Empire 1832; Austrian Civil Code (ABGB) 1811; see: Korobowicz, A., W. Witkowski (2003), *Historia ustroju i prawa polskiego*. Zakamycze, p. 292; see also: Helmin, M., H. Rafałowski (2023) *X tom Zbioru Praw Cesarstwa Rosyjskiego w województwach wschodnich Rzeczypospolitej Polskiej w dwudziestoleciu międzywojennym*. –Prawo i Więź, no 1, 73–97, p. 74.

the other hand, granted active suffrage to women in parliamentary elections in 1893. In Europe, the Scandinavian countries were the earliest to grant women's suffrage, considering the age, education and wealth censuses (Finland – 1906, Norway – 1907 and Denmark – 1908). After the end of the First World War in Europe, countries that had granted suffrage to women included: in 1918 only min. Estonia, Lithuania, Latvia, Germany, Austria and Ireland. In the subsequent years, for example, it was Belgium, the Netherlands and Sweden⁴.

Women in the Polish lands, on the basis of the legislation of the partitioning states, in the second half of the 19th century and the first years of the 20th century (until 1918) did not have electoral rights (neither active nor passive). Consequently, in various parts of the Polish lands remaining under the partitions, mainly in the press, discussions were held postulating the need for women to enjoy equality in the area of electoral rights, including the local government (land) elections. One of the social activists raising the issue in 1906 was Konstancja Skirmuntt⁵, a native of Pinsk (Vilnius Governorate, Russian Empire). The reason for presenting this type of concept were the elections to the 1st Russian Duma⁶. In this context, in addition to the aforementioned Konstancja Skirmuntt, the Polish writers Eliza Orzeszkowa, Emma Jeleńska-Dmochowska and Alina Wilejsziszowa emphasized that the lack of free access to political rights and their non-awarding in the legal sphere (*de iure*), despite women performing “civic tasks” and achieving “historical merits”, was discriminatory in terms of gender⁷.

After Poland had regained its independence in 1918, a legal framework was established in which the electoral rights of both men and women, both active and passive, could be implemented. The most important legal acts in the interwar Poland period, which regulated the possibility of participation in elections on universal basis, for every citizen of the Republic, regardless of their sex (after

⁴ Urbaniak, K. (2015) Płeć a realizacja praw wyborczych. – Wrocławskie Studia Erazmiańskie, vol. IX, 15–62, p. 23–25.

⁵ Szpoper, D. (2009) Gente Lithuana, natione Lithuana. Myśl polityczna i działalność Konstancji Skirmuntt (1851–1934). Arche, p. 280.

⁶ Niewiadomska-Cudak, M. (2013) Walka o prawa wyborcze kobiet w Polsce. – Pedagogika Rodziny, no 3, 55–64, p. 58; see also: Szpoper, D., P. Dąbrowski (2009) Konserwatyści i narodowi demokraci byłego Wielkiego Księstwa Litewskiego podczas wyborów do rosyjskiej Dumy Państwowej (1906–1917). – Tarasiuk, K. Latawiec, M. Korzeniowski (ed.) Kompromis czy konfrontacja? Studia z dziejów parlamentaryzmu rosyjskiego początku XX wieku. Wydawnictwo UMCS, p. 21–41, p. 22.

⁷ Orzeszkowa, E., A. Wilejsziszowa, E. Jeleńska-Dmochowska, K. Skirmuntt (2020) Do wyborców i wybrańców naszych miast. – Borkowska G., Publicystyka społeczna Myślenie obywatelskie. Żydzi. Kwestia kobieca, PiW, 949–954, p. 952–953; see also: Dąbrowski, P. (2011) Siła w kulturze, jedność w narodzie. Wileńska działalność społeczno-polityczna Michała, Witolda i Emilii Węslawskich w końcu XIX wieku i pierwszej połowie XX stulecia (do 1930 roku). Arche, p. 165–166.

meeting the legally established prerequisites: mainly the age census), were the electoral ordinances for the Sejm⁸, as well as two ordinances for the Senate⁹: 1922 and 1935 (in this case with the proviso that active and passive electoral rights were granted to citizens who were part of the so-called elite)¹⁰, established successively in: 1918, 1922 and 1935. The provisions of the electoral ordinances were in line with the provisions of the Polish Constitution of 1921 and 1935¹¹. By way of example, on the basis of the provisions of the Decree on the Electoral Law for the Sejm of 28th November 1918, in line with the pro-democratic solutions, active and passive electoral rights were available to both women and men upon reaching the age of 21¹².

In turn, according to the legal norms of the Constitution of 1921, in elections to the Sejm (the lower house of the Polish Parliament) based on the principles of universality, secrecy, directness, equality and proportionality, the active right to vote was granted to women and men (citizens) who had reached the age of 21, while the passive right to vote was granted upon reaching the age of 25¹³.

It should also be emphasized that in Poland suffrage rights were granted to women in 1918 and confirmed by constitutional norms in 1921, which is rather quickly compared to other European countries¹⁴. Nevertheless, the legislator did this in a manner described by lawyers, constitutionalists, such as Waław Komarnicki, as a process without transitional stages, implemented in contrast to the evolutionary powers of this type shaped in Western European states. It was a

⁸ Dz. P. P. P. 1918, No. 18, poz. 46, Dekret z 28 XI 1918 r. o ordynacji wyborczej do Sejmu, Warszawa 1918, p. 109 (art. 1); zob. też: Dz. U. 1922, No. 66, poz. 590, Ustawa z 28 VII 1922 r. Ordynacja wyborcza do Sejmu, Warszawa 1922, p. 1155 (art. 1); Dz. U. 1935, No. 47, poz. 319, Ustawa z 8 VII 1935 r. Ordynacja wyborcza do Sejmu, Warszawa 1935, p. 795 (art. 2).

⁹ Dz. U. 1922, No. 66, poz. 591, Ustawa z 28 VII 1922 r. Ordynacja wyborcza do Senatu, Warszawa 1922, p. 1171 (art. 1); zob. też: Dz. U. 1935, No. 47, poz. 320, Ustawa z 8 VII 1935 r. Ordynacja wyborcza do Senatu, Warszawa 1935, p. 810–811 (art. 2–4).

¹⁰ Gapski, M. (2013) Prawo wyborcze.–Guz T., J. Głuchowski, M. Pałubka (ed.) Synteza prawa polskiego 1918–1939, 235–260. C.H. Beck, p. 235.

¹¹ Dz. U. 1921, No. 44, poz. 267, Ustawa z 17 III 1921 r. Konstytucja Rzeczypospolitej Polskiej, Warszawa 1921, p. 635 (art. 12); zob. też: Dz. U. 1921, No. 50, poz. 227, Ustawa z 23 IV 1935 r. Konstytucja Rzeczypospolitej Polskiej, Warszawa 1935, p. 501 (art. 33 i 47).

¹² Krukowski, S. (2001) Mała konstytucja z 1919 r.–M. Kallas (ed.) Konstytucje Polski. Studia monograficzne z dziejów polskiego konstytucjonalizmu, vol. 2. PWN, 7–19, p. 9; zob. też: Ajnenkiel, A. (2001) Konstytucje Polski w rozwoju dziejowym 1791–1997. Rytm, p. 156.

¹³ Gwiżdż, A. (1997) Sejm i senat w latach 1918–1939.–Bardach, J. Dzieje Sejmu Polskiego. Wydawnictwo Sejmowe, 147–202, p. 166.

¹⁴ Mycielski, A. (1947) Polskie prawo polityczne (Konstytucja z 17 III 1921 r.). Przełom, p. 58.

process which resulted in the creation of an “ultra-democratic” system of electoral rights in Poland in a very fast (even “at once”) manner¹⁵.

It seems that such reasons can be regarded as one of the manifestations (besides social and cultural conditions and different political traditions¹⁶) of a problem which existed in the interwar period in Polish parliamentarism, i.e. the low activity of women who actually exercised their electoral rights (both active and passive). This state of affairs was evidenced by individual examples of female parliamentary deputies sitting in the praesidium of the Sejm and in the Sejm committees of its successive terms¹⁷.

3. Revindication processes in Poland (1918–1939), as an attempt to protect the rights of private property owners from unequal treatment

After the suppression of the January Uprising, which lasted from 1863 to 1864 and was targeted at the Russian government authorities in the Kingdom of Poland and in the western governorates of the Russian Empire (the lands of the former Grand Duchy of Lithuania), repressive measures were taken against its participants. One of their manifestations was the actions of confiscation of private landed estates by the state authorities. As a consequence of these events, the government authorities launched a policy in the nine western governorates of the Russian Empire (Vilnius, Grodno, Minsk, Kaunas, Mogilev, Vitebsk, Podolia, Kiev and Volhynia governorates) aimed at bringing a population of Russian origin loyal to the throne into the territories engulfed by the rebellion. This type of settlement operation was supported by the issuing of various legal acts. In addition to the “Ukaz” [Decree] of 10th December 1865 (*On prohibiting persons of Polish descent from re-acquiring landed estates in the nine western governorates*¹⁸), Alexander II issued an Instruction of 23rd July 1865 *on the sale of treasury land and estates confiscated in the western governorates to persons of Russian nationality serving in the country or wishing to settle there*¹⁹.

¹⁵ Komarnicki, W. (1937) *Ustrój państwowy Polski współczesnej. Geneza i system*. [s.n.], p. 10.

¹⁶ Łysko, M. (2015) *Udział kobiet w życiu publicznym II Rzeczypospolitej*.–*Miscellanea Historico-Iuridica*, vol. XIX, no.1, p. 387; see also: Hartman, S. (1937) *Sam piszę podania*. Podręczny zbiór podań w sprawach najczęściej w życiu spotykanych. Księgarnia Popularna, p. 64.

¹⁷ Ajnenkiel, A. (1989) *Historia Sejmu Polskiego*. II Rzeczypospolita, vol. II, cz. II. PWN, p. 310, 312, 319 i 322; see also: Smogorzewska, M. (2000) *Maria Jaworska*.–Kunert, A. (ed.) *Posłowie i senatorowie Rzeczypospolitej Polskiej 1919–1939. Słownik biograficzny*, vol.. II E-J. Wydawnictwo Sejmowe, 314–315, p. 315.

¹⁸ Tarkowski, M. (2018) *Polacy na Litwie i Białorusi pod rządami Aleksandra II (1855–1881)*. Studium historyczno-prawne. Arche, p. 351.

¹⁹ Schmidt, W. (1923) *Geneza prywatnej rosyjskiej własności ziemskiej w b. guberniach wileń-*

The norms of *The Instruction* allowed certain social groups, excluding Poles, to acquire, on concessionary terms, the property belonging, prior to the government authorities' act of confiscation, to persons who had taken part in the January uprising in 1863. The forms of acquisition of this type of landed property were donations and deeds of sale to persons of Russian origin²⁰. Confiscations and operations for the acquisition of property rights to real estates, by the persons entering the group of officials in the state service and Russians of merit for state activities²¹, were possible due to important public interest and state security. Notwithstanding the fact that in the Russian Empire there were provisions – Vol. X of the Collection of Laws of the Russian Empire of 1832 – defining the right to property as the substantive law effective against all (*erga omnes*), including the treasury of the monarchy (Art. 420)²².

After Poland had regained its independence in 1918 and its state structures, in particular court structures had been established, a significant social and legal problem emerged related to the revindication claims of the persons who were legal successors (heirs) of those who, as a result of the uprising confiscations, had lost the ownership title to landed estates (often constituting ancestral property). Court decisions in such cases became one of the instruments to counteract the discrimination applied to legal successors claiming their titles to landed estates lost in result of politically motivated decisions taken after the January Uprising of 1863 by the Russian governmental authorities. The arguments of those filing revindication lawsuits for the recognition of the property rights of the heirs of those who had taken part in the struggles for freedom and independence were met with rebuttals by the Polish General Prosecutor's Office, which represented the Polish treasury in the lawsuits. Both landowners' associations, land societies, parliamentary deputies and senators, as well as the legal authorities in the field of civil, administrative and constitutional law criticized the position of the General Prosecutor's Office. This body, in the lawsuits, emphasized the wrongfulness of actions that were to result in the return of once confiscated real estate, which in its opinion had passed after the rebirth of the Polish Republic in 1918, to the State Treasury. The legal circles

skiej, grodzieńskiej i mińskiej (1793–1875). Z dodatkiem skorowidza majątków. GUS, p. 20.

²⁰ Kaczkowski, J. (1918) Konfiskaty na ziemiach polskich pod zaborem rosyjskim po powstaniach roku 1831 i 1863. Skład Główny w Księgarni Gebethnera i Wolfa, p. 283.

²¹ Danieluk, J. (2019) Instrukcja z 23 lipca 1865 roku oraz jej zastosowanie na terenie byłego obwodu białostockiego w latach 1867–1878. – *Czasopismo Prawno-Historyczne* 2019, vol. LXXI, no. 1, 127–166, p. 149.

²² Rymowicz, Z., W. Świącicki (ed.), (1933), *Prawo Cywilne Ziem Wschodnich*, tom X. cz. 1 *Zwodu praw rosyjskich: tekst podług wydania urzędowego z roku 1914 z uwzględnieniem zmian wprowadzonych przez ustawodawcę polskiego oraz ustawy związkowe, tudzież judykaturę Sądu Najwyższego i b. Senatu*, vol. I. Księgarnia F. Hoesicka, p. 419–420.

protesting against such an interpretation of the legal effects of the *Instruction* of 23rd July 1865 and the subsequent legal decisions of the Russian courts in the proceedings for entry in the “*krepostnoe knigi*” (quasi land registers), emphasized that the acts of sale or donation of confiscated property contradicted the general provisions of the civil law (Vol. X. of the Collection of Laws of 1832, as amended after 1918), which recognized the right of the owners to dispose of their property. The same bodies, in turn, equated the individual acts of confiscation with “acts of violence and abuse”, committed for political reasons²³.

The view that Poland, having come into being as a new state, had originally acquired all those properties which had hitherto been the property of the Russian Treasury for whatever reason, including by virtue of the acts of confiscation was negated in the first place. This critical thesis was in fact based on the basic premise that a restitution, not creation of the Polish State, had taken place in 1918²⁴.

Both the ongoing legal discussion and the Supreme Court rulings recognizing the effectiveness of restitution claims made by heirs, prompted the Polish legislature to act. Indeed, in March 1932, the Parliament passed a law whose norms could be attributed *sui generis* anti-discrimination character. Its provisions granted the right to return the property confiscated by the former partitioning governments to “the participants in the fights to regain independence”, which took place between 1863 and 1864. However, the same legal act should only be regarded as an attempt to counteract discrimination, as its norms were constructed in such a way that they did not make it easier for the owners and their heirs to take effective legal action²⁵.

4. The issue of equality and discrimination in the period of People's Poland from 1944 to 1989

The progressive warfare on the territories within the borders of the Republic of Poland before 1939 and their occupation by the Red Army troops heralded the establishment of a state authority in these areas entirely dependent on Moscow. The period of 45 years stretched between the end of the war and the fall of the Berlin Wall represented a time of inconsistency between the façade “paper” law

²³ Suligowski, A. (1928) Bezprawia i konfiskaty pod rządami rosyjskimi. Skład Główny Księgarnia M. Arcta, p. 47 i 52–53.

²⁴ Szyszczowski, W. (ed.), (1930) Konfiskaty powojenne w Sądzie Najwyższym. Sprawy przeciwko skarbowi państwa. Księgarnia F. Hoesicka, p. 52.

²⁵ Dz. U. 1932, No. 24, poz. 189, Ustawa z 18 III 1932 r. o dobrach skonfiskowanych przez byłe rządy zaborcze uczestnikom walk o niepodległość, Warszawa 1932, p. 384; see also Drewnicz, M. (2010) Wyłączenia polskich majątków pod zaborem rosyjskim jako „status quo” w II i III Rzeczypospolitej. –Saeculum Christianum: pismo historyczno-społeczne, no. 1, p. 245–246.

and the brutal reality in which the discriminatory practices were used as political instruments. Inspired by Joseph Stalin, the Polish Committee for National Liberation declared in its Manifesto issued in July 1944 that it would “rebuild Polish statehood” and introduce appropriate mechanisms to counteract all manifestations of discrimination and unequal treatment²⁶. Similar assurances were given by the new political center linked to the Kremlin²⁷, which was taking shape in Poland. The repeated declarations and assurances did not inspire confidence among Polish citizens, and it soon turned out that they were not confirmed by the political and social reality.

The first parliamentary elections held in January 1947 revealed the enormous scale of discrimination against the authorities on the basis of political views. It was directed against the Catholic Church and legally operating subjects of the law (e.g. social organizations, political parties) and took various forms, in particular against their members. Increased discriminatory pressure was put on activists of a peasant grouping – the Polish People’s Party (PSL), which at the time became a symbol and a synonym for an organization representing that part of society expressing anti-communist views and opposing Soviet influence in public life²⁸. Discrimination against peasant activists took the form of deprivation of liberty, removal from occupied farms, but also removal from work, unlawful searches, and attacks on the premises of organizations and party meetings. A significant manifestation of inequality on the basis of political views was the restriction of the freedom of press published by the PSL²⁹. The discrepancy between reality and actual discriminatory actions against political opponents did not prevent the facade of declarations of political as well as legal nature from being maintained. The Legislative Sejm, dominated by the Communist parties, adopted a declaration on the implementation of civil rights and freedoms on 22nd February 1947. The legislature, elected in fraudulent elections, “solemnly” assured that “it will continue to implement the fundamental civil rights and freedoms in its constitutional and legislative work and in exercising control over the activities of the

²⁶ See: Manifest Polskiego Komitetu Wyzwolenia Narodowego (1961) *Ustrój Polskiej Rzeczypospolitej Ludowej. Wybór materiałów*, A. Gwiżdż, Z. Jarosz. W. Popkowski (ed.), p. 25–31. Państwowe Zakłady Wydawnictw Szkolnych, p. 27–28.

²⁷ See: *Exposé premiera obywatela Edwarda Osóbki-Morawskiego wygłoszone na posiedzeniu Krajowej Rady narodowej 2 stycznia 1945 roku (1945) Ukonstytuowanie Rządu Tymczasowego Rzeczypospolitej Polskiej (dokumenty)*, p. 19–28. Ministerstwo Informacji i Propagandy, p. 25–26.

²⁸ Buczek R., *Wstęp* (1996) s. XXIX. R. Buczek, Stanisław Mikołajczyk. Tom I, Toronto 1996, Century Publishing Company Ltd.

²⁹ Adamczyk M., Gmitruk J, *Dokumenty fałszerstw wyborczych w Polsce w roku 1947* (2000), Muzeum Historii Polskiego Ruchu Ludowego w Warszawie Wszechnica Świętokrzyska w Kielcach, p. 15–24.

government and in determining the fundamental direction of the State policy”. The first assurance was that the guarantees of non-discrimination and equality “before the law” on the basis of nationality, race, religion, sex, origin position or education would be introduced³⁰.

The Constitution of the People’s Republic of Poland (PRL), adopted in 1952, maintained a state of declarativeness by enshrining the principle of non-discrimination and equality before the law in the content of this Basic Law. According to its Article 69, the citizens, regardless of their nationality, race and religion, had “equal rights in all areas of state, economic, social and cultural life”.

Discrimination (“favoritism” *verba legis*) directly or indirectly on the basis of nationality, race or religion was to be punished. “Spreading hatred or contempt, causing feuds or humiliating a person” on the basis of the above discriminatory criteria was “prohibited³¹”. The Constitutional Act emphasized, in a particular manner, the prohibition of gender discrimination in the area of employment, but also of participation in public life in all its dimensions³².

Later amendments to the Constitutional Act expanded the catalogue of criteria covered by the prohibition of discrimination. Under Article 67, Section 2, citizens had equal rights regardless of their sex, education, occupation, nationality, race, religion and social origin and position. The communist state also ensured formal non-discrimination on the basis of gender in the activities in all areas of state and political life including the occupation of public positions, and, moreover, economic, social and cultural life (Article 78, Par. 1)³³, as well as in the determination of the right to work and related rights, such as the right to remuneration, to leisure, to social security, but also the right to education, dignity and distinction (Article 78, Par 2). In 1961, the People’s Republic of Poland also signed Convention No. 111 of 1958 of the International Labor Organization on the prevention and elimination of discrimination in employment³⁴.

³⁰ Deklaracja Sejmu Ustawodawczego w przedmiocie realizacji praw i wolności obywatelskich z dnia 22 lutego 1947 roku] (1961) – Gwiżdż, A., Jarosz, Z., Popkowski, W. (ed.) Ustrój Polskiej Rzeczypospolitej Ludowej. Wybór materiałów, p. 63. Państwowe Zakłady Wydawnictw Szkolnych, p. 63.

³¹ Dz. U. 1952, No. 33, poz. 232, art. 69 Konstytucja Polskiej Rzeczypospolitej Ludowej z dnia 22 lipca 1952 roku.

³² Dz. U. 1952, No. 33, poz. 232, art. 66 Konstytucja Polskiej Rzeczypospolitej Ludowej z dnia 22 lipca 1952 roku.

³³ Dz. U. 1976, No. 7, poz. 36, art. 67 ust. 2, Konstytucja Polskiej Rzeczypospolitej Ludowej z dnia 22 lipca 1952 roku.

³⁴ Boruta, I. (1996) Dyskryminacja w zatrudnieniu zawodu w świetle dokumentów MOP. – Praca i zabezpieczenie społeczne, No. 11, 1996, 17–23, p. 17.

Despite the existing provisions of constitutional rank, which ensured the prohibition of unequal treatment, discriminatory actions against peasants³⁵ as well as Catholics³⁶ did not cease. It is worth noting that the criterion of religion or belief as a discriminatory feature experienced a weakening even under the conditions of the formally valid principle of non-discrimination. For, in accordance with Article 70, Par. 3 of the Constitution³⁷, the abuse of freedom of conscience and religion for the purposes detrimental to the interests of the Polish People's Republic³⁸ was considered punishable ("shall be punished" *verba legis*).

Discrimination against Catholics took on all dimensions and was targeted at both lay people and clergy, including those concentrated in monastic assemblies. In 1961, conventuals were removed from the possibility of teaching religion to children and young people, not only in public schools, but also in the form of extracurricular classes in catechetical points³⁹. This was because Wiesław Gomułka, the First Secretary of the Central Committee of the Polish United Workers' Party (PZPR Central Committee) at that time, regarded consecrated persons remaining in religious congregations as people of lower category, saying of them "a conventual is a different human"⁴⁰.

The period of Wiesław Gomułka's rule from 1956 to 1970, as well as that of Edward Gierek, his political successor who served as the First Secretary of the Central Committee of the Polish United Workers' Party (PZPR) until 1980, also constituted a continuation of discriminatory policies against the political opposition, but also against social groups, including the peasantry. In the latter case, it consisted of limiting the activities carried out and imposing economic mechanisms that made profitable agricultural production impossible⁴¹.

³⁵ Lewandowski S. *Dyskryminacja chłopów przez komunistów w Polsce ludowej* (2008), Wydawnictwo Akademickie „Żak”, p. 233.

³⁶ Wiśniewska, J. (2014) *Dyskryminacja katechetów zakonnych w prawie oświatowym okresu gomułkowskiego* p. 209 – *Studia z prawa wyznaniowego* Tom 17 – 2014, Wydawnictwo KUL, Lublin, p. 209–232.

³⁷ Dz. U. 1952, No. 33, poz. 232, art. 70 ust. 3 Konstytucja Polskiej Rzeczypospolitej Ludowej z dnia 22 lipca 1952 roku.

³⁸ Przepis ten został uchylony na początku 1976 roku, see: Dz.U. 1976, No. 5, poz. 29, art. 1.

³⁹ Dz. Urz. Ministerstwa Oświaty No. 10, poz. 124.

⁴⁰ See: Wiśniewska, J. (2014) *Dyskryminacja katechetów zakonnych w prawie oświatowym okresu gomułkowskiego* p. 209 – *Studia z prawa wyznaniowego* Tom 17 – 2014, Wydawnictwo KUL, Lublin, p. 209–232, p. 214–215.

⁴¹ Lewandowski S. (2008) *Dyskryminacja chłopów przez komunistów w Polsce ludowej*, Wydawnictwo Akademickie „Żak”, p. 231–259.

5. The concept of discrimination and equal treatment in legislation, jurisprudence and science after 1989

The political changes initiated by the Round Table Agreements in 1989 have been described as a “historic turn”⁴², a reconciliation that avoided a bloody scenario. The assessment of these events in this respect is not clear-cut. The agreements reached between the political forces that participated the talks were intended to enable a transition to a democratic system and a free market economy⁴³.

Since the beginning of the 1990s, the legal academia has been interested in anti-discrimination issues expressed in international acts, such as the European Social Charter adopted in Turin in 1961 and the Additional Protocol to the Charter of 5th May 1988⁴⁴. The existing phenomenon of inequalities in the labor market in the reconstruction of the economic model from a command economy to a free market economy was also beginning to be recognized and described as discrimination. Attempts have also been made to describe this phenomenon based on the experience and research of other countries, pointing out that it arises “when it is possible to distinguish groups of people who experience difficulties in getting a job, getting a promotion or getting an appropriate salary because of a particular characteristic”⁴⁵.

In December 1991, the Republic of Poland acceded to the Association Agreement with the European Communities. As a result of this accession, national regulations on the provision of labor could not be incompatible with the European as well as the global law. In particular, there was a developing interest in international regulations for protection against discrimination such as the 1948 Declaration of Human Rights, the 1966 UN Covenant on Economic, Social and Cultural Rights. Reference was also made to the experience and achievements of the International Labor Organization, in particular Conventions No. 100 of 1950, No. 111 of 1958 or No. 156 of 1981⁴⁶.

The interest in anti-discrimination issues arose, among other things, from the observed increase in inequality among the employees in the Eastern and Central European countries during their systemic transformation. In Poland, between

⁴² Porozumienia Okrągłego Stołu (1989), NSZZ „Solidarność” Region Warmińsko-Mazurski, p. 3.

⁴³ Dudek, A. (2002) Pierwsze lata III Rzeczypospolitej 1989–2001, Wydawnictwo Arkana Historii, p. 33–37; Hall, A. (2011) Osobista historia III Rzeczypospolitej, Rosner & Wspólnicy, p. 41.

⁴⁴ Skulimowska B. (1992) Wprowadzenie do Europejskiej Karty Społecznej. – Praca i zabezpieczenie społeczne, No. 5–6, 1–14, p. 5.

⁴⁵ Kotowska I., (1993) Dyskryminacja na rynku pracy w Polsce. – Praca i zabezpieczenie społeczne, No. 4, 1993, 14–26. p. 15.

⁴⁶ Kołczek, B. (1993) Praca zawodowa kobiet w prawie międzynarodowym. – Praca i zabezpieczenie społeczne, No. 7, 25–29, p. 25–29.

1989 and 1992, strong manifestations of gender discrimination emerged, aimed at women in the labor market regardless of their age, place of residence and education. Although professional deactivation resulting from the fall in demand affected both sexes, the difficulties of resuming work were mainly experienced by women. Another criterion which interested legal researchers in the context of the phenomenon of discrimination in employment, in particular unequal treatment, was the health status, including disability⁴⁷.

The entry of the new Constitution of the Republic of Poland (RP) into force in 1997⁴⁸ provided a new benchmark for the issue of discrimination⁴⁹. Article 32 of the Polish Constitution introduced the principle of equality as a norm of law in the material sense, according to which everyone is equal before the law. Everyone has the right to equal treatment by public authorities (Par. 1). No one may be discriminated against in political, social or economic life for any reason (Par. 2). This principle is detailed in Article 33 of the Basic Law. According to it: a woman and a man in the Republic of Poland have equal rights in family, political, social and economic life (Par. 1).

In particular, a woman and a man have an equal right to education, employment and promotion, to equal remuneration for work of equal value, to social security and to occupy positions, perform functions and obtain public dignities and distinctions. The principle of equality has also been emphasized in the context of the protection of the right to property (Article 64 Par. 2), as well as the equal right of access to public service (Article 60). The jurisprudence of the Constitutional Tribunal defines the principle of equality as a “particular kind of subjective right” derived from the principle of equality as a right to equal treatment. This particular, the peculiar character of this right consists in the fact that “ascertaining its infringement is not possible by making a “simple” juxtaposition of the constitutional benchmark and the challenged subconstitutional norm”, but requires also to reach to other addressees of statutory norms defining the legal situation of subjects which is of similar nature or the same⁵⁰. At the same time, the Tribunal considered the principle of equality to be a constitutional right of an individual having the nature of a “second degree” right, i.e. it is vested in relation to the validity of specific legal norms and not on its own. For this reason, it “does not fully have a constitutional right” and it cannot be an independent

⁴⁷ Boruta, I. (1996) *Dyskryminacja w zatrudnieniu zawodu w świetle dokumentów MOP. – Praca i zabezpieczenie społeczne* 1996, No. 11, 17–23, p. 21.

⁴⁸ Dz.U. No. 78, poz. 483, *Konstytucja Rzeczypospolitej Polskiej* z dnia 2 kwietnia 1997 roku.

⁴⁹ Bosek, L. Wild, M. (2014) *Kontrola konstytucyjności prawa. Komentarz praktyczny dla sędziów i pełnomocników procesowych. Wzory pism procesowych*. C.H. Beck, p. 281.

⁵⁰ *Postanowienie Trybunału Konstytucyjnego z dnia 24 października 2021 roku sygn. akt SK 10/01*, Legalis No. 50925.

benchmark of control by means of a constitutional complaint, but only acts as a related benchmark⁵¹.

The Tribunal also formulated the content of the principle of equality. In its view, it consists in the fact that all subjects of the law characterized by a given essential feature to an equal degree should be treated equally, i.e. without any differentiation either favorable or discriminatory⁵². However, it is accepted that the principle of equality is not absolute. The Tribunal jurisprudence has formulated conditions for the permissibility of a derogation from this principle by the legislator. The differentiation should be based on constitutional values, principles or norms. Such a procedure must be justified by the purpose of the provisions in which the controlled norm is contained (relevance test). Finally, the importance of the interest to be served by the differentiation should be in appropriate proportion to the importance of the interests infringed by the different treatment of similar subjects (proportionality test)⁵³.

6. Conclusions

The issue of discrimination has been present in Polish legal discourse for over 100 years. Initially, the subject of research in this area were the issues of women's voting rights, as well as the return of confiscated real estate. In the period of the People's Republic of Poland, the phenomenon of discrimination was not noticed in practice, although the legal system included regulations on discrimination, but only as a declaration. A significant change in this field occurred after 1989, when research on qualified inequality was launched.

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⁵¹ Bosek, L., Wild, M. (2014) Kontrola konstytucyjności prawa. Komentarz praktyczny dla sędziów i pełnomocników procesowych. Wzory pism procesowych, C. H. Beck, p. 283.

⁵² Wyrok Trybunału Konstytucyjnego z dnia 23 czerwca 2009 roku, sygn. akt K 54/07, Legalis No. 142036.

⁵³ Wyrok Trybunału Konstytucyjnego z dnia 5 lipca 2011 roku, sygn. akt P 14/10, Legalis No. 339174.

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Advancements in Anti-discrimination Efforts in Post-apartheid South Africa

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South Africa has made significant strides in the protection against discrimination, anchored in its post-apartheid constitution. The country's legal framework, notably the Promotion of Equality and Prevention of Unfair Discrimination Act, prohibits discrimination based on race, gender, and other grounds. Affirmative action policies aim to redress historical imbalances, fostering inclusive opportunities. The Human Rights Commission plays a vital role in monitoring and addressing discrimination cases. While progress has been notable, challenges persist, particularly in addressing intersectional discrimination and ensuring effective implementation. South Africa continues to navigate the complex journey towards a truly egalitarian society, with ongoing efforts to fortify anti-discrimination measures.

Keywords: *South Africa, Post-apartheid, Promotion of Equality, Prevention of Unfair Discrimination Act, Affirmative action, Human Rights Commission, Intersectional discrimination, Egalitarianism, Inclusivity, Anti-discrimination measures*



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INTRODUCTION

The post-apartheid era in South Africa marks a critical period in the nation's history, characterized by a determined commitment to dismantling discriminatory practices and fostering equality within its diverse population. Emerging from the shadows of apartheid,¹ a system that institutionalized racial segregation and oppression, South Africa embarked on a transformative journey to build a society founded on principles of inclusivity and justice. Central to these efforts are key legislative measures, including the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),² which has played a pivotal role in shaping the country's anti-discrimination landscape.

The dismantling of apartheid, marked by the release of Nelson Mandela in 1990 and subsequent democratic elections in 1994,³ ushered in an era of hope and change. South Africa faced the formidable task of addressing historical injustices, healing social divisions, and creating a foundation for a society where all citizens, regardless of their background, could enjoy equal rights and opportunities.

At the forefront of this transformative process was the enactment of legislative measures aimed at combating discrimination and promoting equality. The Promotion of Equality and Prevention of Unfair Discrimination Act, commonly known as the Equality Act, stands out as a cornerstone in this legislative framework. Enacted in 2000, the Act represents a comprehensive and forward-looking approach to addressing various forms of discrimination, including those based on race, gender, disability, religion, and other protected grounds.⁴

The Equality Act establishes a legal framework to prevent and prohibit unfair discrimination and to promote equal opportunities and fair treatment for all South Africans. It places a strong emphasis on fostering a culture of tolerance, understanding, and respect within society. By delineating specific grounds of discrimination,⁵ the Act provides a robust foundation for individuals to challenge discriminatory practices and seek redress for violations of their rights.

¹ Apartheid was a 20th-century policy in South Africa that enforced racial segregation by the white minority government. Instituted around 1948, it controlled where people could live and work, their education, and voting rights based on race. Although legislated apartheid ended in the early 1990s, its social and economic impacts persisted.

² Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2004.

³ In South Africa, general elections were held between April 26 and April 29, 1994. This was a special vote because for the first time, people of all races could vote. It was the first time everyone could vote in the country.

⁴ Section 6 of the Employment Equity Act 55 of 1998 (hereafter EEA).

⁵ Ibid.

Moreover, the Act has empowered institutions such as the South African Human Rights Commission (SAHRC)⁶ to play a crucial role in monitoring and enforcing compliance with anti-discrimination measures. This collaborative approach involves not only legal interventions but also educational initiatives and public awareness campaigns to promote a broader societal understanding of the importance of equality.

The impact of PEPUDA extends beyond legal frameworks. It has contributed to a cultural shift, encouraging businesses, educational institutions, and other organizations to adopt inclusive policies and practices.⁷ The Act has become a catalyst for social change, influencing attitudes and behaviors to align with the principles of equality and non-discrimination.

Against this backdrop, this report examines the post-apartheid era in South Africa characterized by a commitment to eradicating discrimination and fostering equality.

Legislative measures, notably the Promotion of Equality and Prevention of Unfair Discrimination Act, also known as the Equality Act, have played a pivotal role in shaping the anti-discrimination landscape and the role of SAHRC. As South Africa continues on its journey of transformation, these legislative foundations serve as a testament to the nation's dedication to building a more just and inclusive society for all its citizens.

LEGAL FRAMEWORK

Since the beginning of democracy in South Africa, the government has worked hard to tackle the historical issues of unequal distribution of resources, wealth, and power⁸ stemming from colonialism and Apartheid.

The South African Constitution was created in response to the country's history of colonial conquest and, later, the legal enforcement of racial segregation during the apartheid era. The Constitutional Court in South Africa supports this perspective and frequently refers to the country's apartheid past when interpret-

⁶ The South African Human Rights Commission Act 40 of 2013 (SAHRC).

⁷ PEPUDA Round Table Dialogue Report available at <https://www.sahrc.org.za/home/21/files/Equality%20also%20known%20as%20the%20Roundtable%20Dialogue%20Report.pdf> (accessed 7 March 2024).

⁸ The following Acts have been passed, among others: The Restitution of Land Rights Act 22 of 1994, the Land Administration Act 2 of 1995, the Development Facilitation Act 67 of 1995, the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997, the Housing Act 107 of 1997, the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998, the National Water Act 36 of 1998, the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.

ing the Constitution. The court emphasizes that the Constitution is designed to prevent the repetition of previous unjust practices.⁹

Section 9(3) of the Constitution prohibits “unfair discrimination” against anyone, including based on “race.” This rule applies not only to the government but also to private individuals and groups. It acknowledges that racism and racial discrimination can persist even after discriminatory laws and policies have been abolished. Some critics of South Africa’s constitutional project go a step further, arguing that racism and white supremacy are deeply embedded in the foundation of “Western constitutionalism.”¹⁰

Some argue that if the Constitution does not mention “race” it could lead to a lack of attention to racism, especially when it comes to actions by private individuals or groups. This absence might hide the harmful impact of racism. Critics say that not acknowledging “race” in the Constitution might benefit the socially and economically dominant group, often “white” people, by giving the false impression that ignoring “race” would fight against racism, while actually, it might just hide the issue.

The rule against racial discrimination in section 9(3) of the Constitution needs to be considered together with section 9(2). The second section allows the government to implement corrective actions aimed at safeguarding or advancing individuals or groups who have faced unfair discrimination. These measures may involve practices known as “affirmative action,” which can take into account factors like “race”.

The people who wrote the Constitution made sure to include this provision to make sure the Constitution does not stop the government and others from dealing with the impact of past and ongoing racial discrimination and racism. Section 9(2) is built on the idea that getting rid of racial discrimination does not automatically get rid of racism, both by the government and private individuals. This is evident in global protests like “Black Lives Matter”, showing that informal or private racism against black people continues worldwide, even without discriminatory laws or policies.

Sections 9(3) and 9(2) should also be considered together with section 9(1), which states that “Everyone is equal before the law and has the right to equal protection and benefit of the law.” In the case of *Minister of Finance v Van*

⁹ De Vos, P. (2001) ‘Race and the Constitution: A South African Perspective’ available at <https://verfassungsblog.de/race-and-the-constitution-a-south-african-perspective/> (accessed 7 March 2024).

¹⁰ Modiri, J. M. (2018) Conquest and constitutionalism: First thoughts on an alternative jurisprudence. – South African Journal on Human Rights, Vol. 34, No. 3, pp. 300–325, p. 306.

Heerden,¹¹ South Africa's Constitutional Court clarified that there is no conflict between the general idea of equality before the law and the implementation of race-based corrective measures. The court argued that these measures are not a type of "reverse discrimination" or "positive discrimination" as some critics suggest. Instead, they are necessary to achieve the goal of equality before the law. According to this perspective, recognizing the concept of "race" is crucial to addressing the effects of past and ongoing racism and racial discrimination. The Constitutional Court explained in *Minister of Finance v Van Heerden* that:

"the provisions of section 9(1) and section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure "full and equal enjoyment of all rights"... Equality before the law protection in section 9(1) and measures to promote equality in section 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes."

One significant measure taken since 1994 to address the impact of centuries of racially based oppression is the PEPUDA or the Equality Act. This Act is considered highly important, second only to the Constitution, emphasizing its crucial role in the new order. Specifically, the Equality Act aims to address the consequences of past discrimination, which is believed to be a major factor contributing to the significant disparities in wealth, income, and resources in South Africa. This law goes beyond what similar laws in other countries typically cover, often called 'anti-discrimination legislation'.¹² The law is quite extensive, as it forbids unfair discrimination¹³ in nearly every aspect of society. This includes areas like work, education, healthcare, housing, land and property, insurance, pensions, partnerships, professions, goods and services, clubs, associations, and sports. Additionally, the law works to prevent and prohibit¹⁴ harassment and hate speech.¹⁵

To comply with section 9(4) of the Constitution which places a duty on the state to pass national legislation to prevent or prohibit unfair discrimination and promote and promote the achievement of equity) PEPUDA was enacted. The PEPUDA stands as a crucial component within South Africa's legal arsenal, designed to dismantle the vestiges of discrimination that lingered in the aftermath of the apartheid era. Enacted in the pursuit of fostering a just and equitable

¹¹ Minister of finance v Van Heerden 2004 (6) SA 121 (CC).

¹² See the Minister of Justice's speech at the second reading debate of the Act, 26 January 2000, as reproduced in Gutto, S. B. O. (2001) Equality and non-discrimination in South Africa: The political economy of law and law making. Claremont: New Africa Books, p. 25.

¹³ Section 6 read with sections 13 and 14 and the definitions of 'discrimination' and 'prohibited grounds'.

¹⁴ Section 11 read with the definition of 'harassment' in sections 1 (xiii).

¹⁵ Section 10.

society, PEPUDA plays a pivotal role in shaping the country's legal framework, articulating a comprehensive approach to addressing discriminatory practices. The PEPUDA was assented two years after the EEA¹⁶ in the year 2000 to give greater effect to Chapter 2, Section 9 of the Constitution and covers issues non-related to work further facilitating compliance with internationally ratified Conventions.

Following Chapter I, Section 5 (1), the PEPUDA is binding on the State and applicable to all persons. Furthermore, Chapter II, Section 6 provides that neither the State nor any person may unfairly discriminate against any person. While attention is placed upon the prohibition of unfair discrimination on grounds of race, gender, and disability, all of the following are expressly prohibited grounds for discrimination: race, gender, sex, pregnancy, family responsibility or status, marital status, ethnic or social origin, HIV/AIDS status, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

Within the PEPUDA, discrimination is defined as any act or omission, including a policy, law, rule practice, condition, or situation which directly or indirectly (a) imposes burdens, obligations, or disadvantages; or (b) withholds benefits, opportunities, or advantages from, any person on one or more of the prohibited grounds. Furthermore, hate speech, harassment and dissemination, and publication of information that unfairly discriminates are prohibited.

To eliminate discrimination, Chapter V of the PEPUDA outlines Affirmative Action Measures. Additional legal obligations are specified under Sections 26 and 28.

One of the primary tenets of PEPUDA is its explicit prohibition of discriminatory practices on various grounds, notably including race and gender.¹⁷ By legally proscribing discriminatory behavior, the Act establishes a firm foundation for promoting equality and safeguarding the rights of individuals from unjust treatment.¹⁸ This prohibition not only addresses overt forms of discrimination but also encompasses subtler, systemic biases that may persist within two different spheres of society. However Affirmative action in South Africa is defined in the Employment Equity Act¹⁹:

‘Measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.’²⁰

¹⁶ EEA, Op. Cit., 4.

¹⁷ EEA, Op. cit., 4.

¹⁸ EEA, Op. cit., 4.

¹⁹ EEA, Op. cit., 4.

²⁰ EEA, Op. cit., 4.

Designated groups refer to black people, women, and people with disabilities. Section 6(2) of the Act also states that it is not unfair discrimination to take affirmative action measures consistent with the purposes of the Act. Affirmative action is a policy designed to permit a measure of discrimination in favor of employees disadvantaged by discrimination in the past. Although the Constitution of South Africa and the EEA prohibit it, both expressly state that measures designed to remove the effects of past discrimination are not in themselves unfair. The acid test for unfair discrimination is when it ceases to be unfair.²¹

Chapter 3 III requires designated employers to do the following:

- Implement affirmative action measures (section 15);
- Ensure equitable representation of black people, women, and people with disabilities (the so-called 'designated groups' defined in section 1);
- Consult with employees on a range of matters about employment equity (sections 16 and 17);
- Analyze employment policies, practices, procedures, and the working environment to identify employment barriers (section 19);
- Prepare an employment equity plan (section 20); and report either annually or bi-annually to the Director-General of the Department of Labor on the progress made in implementing the employment equity plan (section 21).

Affirmative action mechanisms, another integral aspect of PEPUDA, are instrumental in redressing historical imbalances that have disproportionately affected certain groups,²² particularly in the context of apartheid. These mechanisms go beyond mere prohibition, actively seeking to rectify historical injustices by implementing policies that provide preferential treatment to groups that were historically marginalized. The aim is to level the playing field, ensuring that opportunities and resources are distributed more equitably among the diverse population of South Africa.

The implementation of affirmative action under PEPUDA is a proactive step toward building a society that acknowledges and rectifies the deep-seated disparities resulting from historical discrimination. By addressing imbalances in employment, education, and other key areas, these mechanisms contribute

²¹ Grogan, J. (2014) Workplace Law. Cape Town, p. 139.

²² According to the South African Constitution the goal of affirmative action measures is to ensure that qualified people from designated (black people, women, and people with disabilities) groups have equal opportunities in the workplace.

to the creation of a more inclusive environment, fostering social cohesion and shared opportunities.

Moreover, PEPUDA reflects a commitment to the principles of substantive equality, recognizing that true equality requires more than just the absence of discriminatory practices. It underscores the importance of actively dismantling barriers and creating conditions that enable all individuals, regardless of their background, to participate fully in society. This nuanced approach aligns with the broader goals of post-apartheid South Africa, seeking not only legal equality but also the realization of a genuinely just and inclusive society.

However, the implementation of PEPUDA and affirmative action measures is not without its challenges. Ensuring the effective enforcement of these laws, overcoming resistance, and addressing unintended consequences are ongoing tasks that require continuous attention and refinement. Striking the right balance between rectifying historical injustices and promoting equal opportunities for all remains a complex and evolving process.

The Promotion of Equality and Prevention of Unfair Discrimination Act serves as a cornerstone in South Africa's legal framework, embodying the nation's commitment to eliminating discrimination and building a just society. Through explicit prohibitions on discriminatory practices and the implementation of affirmative action, PEPUDA contributes to the ongoing journey toward genuine egalitarianism, acknowledging the complexities of historical imbalances and striving for a more equitable and inclusive future.

Further, the EEA is another important legislation whose main purpose is to achieve equity in the workplace by

- (a) Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and levels of the workforce (section 2).²³

The question of unfair discrimination against applicants for work and employees by Chapter 2 of the EEA applies to all players and employees, except those employees also excluded from the ambit of the LRA (namely members of the National Defense Force, the National Intelligence Agency, or the South African Secret Service).²⁴ Section 5 of the EEA enjoins every employer to eliminate unfair discrimination in its employment policy and practices. 'Employment policies'

²³ Chapter 1 of the EEA.

²⁴ Dupper, O., Garbers, C., Landman, A., Christianson, M., and Basson, A. C. (2007) *Essential Employment Discrimination law*. Cape Town: Juta, p. 24.

in turn, is defined in section 1. Section 6(1) prohibits unfair discrimination on the following terms:

‘No person may unfairly discriminate directly or indirectly, against an employee, in in any employment policy or practice, on one or more of grounds, including race, gender, or sex pregnancy, material status, family responsibility, ethnic or social origin, color, sexual orientation, age, disability, religion, HIV status, conscious, belief, political opinion, culture, language and birth’.²⁵

The prohibition against unfair discrimination mirrors the wording of the equality provision of the Constitution. In addition to the sixteen grounds listed in the Constitution, the EEA also includes family responsibility, political opinion, and HIV status. However similar to the Constitution and the Labor Relations Act²⁶ (LRA), the list is not exhaustive in that the word ‘including’ appears before it. The two justification grounds contained in Schedule 7 item 2(2) of the LRA, namely affirmative action and an inherent requirement of a job, have been retained. In addition, the chapter specifically addresses the issues of harassment,²⁷ medical testing,²⁸ psychological testing,²⁹ and the burden of proof in discrimination cases,³⁰ The chapter does not apply to dismissal on discriminatory grounds.

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

South Africa’s Constitution, established in 1996, emphasizes the importance of the Constitution and the rule of law. In South Africa, everyone, including the government, must adhere to and follow the Constitution. The Constitution includes the Bill of Rights, considered the ‘cornerstone of democracy in South Africa’, which obligates the State to ‘respect, protect, promote, and fulfil the rights in the Bill of Rights’. To ensure the safeguarding and advancement of human rights, Chapter 9³¹ of the Constitution establishes independent national institutions. These institutions, accountable only to the Constitution and the law,

²⁵ Section 6(1) of the EEA.

²⁶ Labour Relations Act 66 of 1995.

²⁷ Section 6(3).

²⁸ Section 7.

²⁹ Section 10.

³⁰ Section 11.

³¹ Chapter 9 of the Constitution mandates the creation of Institutions designed to protect and support democracy. These institutions are the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; the Electoral Commission and the Independent Authority to Regulate Broadcasting. These institutions are separate from government and independent from political parties or other interest groups.

aim to transform society from its unjust past and guarantee fundamental rights to all in South Africa. One such institution is the South African Human Rights Commission (SAHRC), deriving its authority from the Constitution and the Human Rights Commission Act of 1994. It also possesses additional powers and responsibilities granted by other national legislation.

The SAHRC is an essential institution established to protect and promote fundamental human rights within a given jurisdiction. These commissions operate at various levels, such as national, regional, or international, depending on the scope of their mandate. The primary purpose of an SAHRC is to ensure that individuals within its jurisdiction are treated fairly and equally, free from discrimination and human rights abuses.³²

One of the crucial functions of the SAHRC is to monitor and address cases of discrimination. Discrimination can manifest in various forms, including but not limited to race, gender, ethnicity, religion, sexual orientation, disability, and socio-economic status.³³ The commission investigates complaints, conducts inquiries, and takes necessary actions to rectify human rights violations. Its proactive stance is aimed at fostering a society that respects and upholds the dignity of every individual.

Despite the commendable efforts of the SAHRC, challenges persist in the realm of human rights protection. One prominent challenge is the need to address intersectional discrimination. Intersectionality refers to the interconnected nature of social categories such as race, gender, and class, which create overlapping and interdependent systems of discrimination and disadvantage. Traditional approaches to combating discrimination often focus on single categories, neglecting the complex reality that individuals may face multiple forms of discrimination simultaneously.

To effectively tackle intersectional discrimination, the SAHRC must adopt nuanced and comprehensive approaches. This involves recognizing and understanding the various factors that contribute to an individual's vulnerability to discrimination. For example, a woman of color with a disability may face unique challenges that cannot be adequately addressed by solely focusing on gender, race, or disability separately. The SAHRC needs to develop policies and strategies that consider the multifaceted nature of discrimination. This may include creating targeted outreach programs, providing specific support services, and conducting thorough research to identify the specific needs of individuals facing intersecting forms of discrimination.

Additionally, the commission should collaborate with other relevant organizations and stakeholders to create a more inclusive and supportive environment.

³² See The South African Human Rights Commission Act 40 of 2013.

³³ See EEA.

Educational initiatives are also crucial in addressing intersectional discrimination. By raising awareness about the interconnected nature of various forms of discrimination, the HRC can promote a more informed and empathetic society. This includes conducting workshops, producing educational materials, and engaging in public awareness campaigns to foster a culture of respect and acceptance.

The SAHRC plays a pivotal role in safeguarding fundamental human rights, but the challenges presented by intersectional discrimination necessitate a more nuanced and comprehensive approach. By recognizing the interconnected nature of discriminatory factors and adopting targeted strategies, the SAHRC can contribute significantly to creating a society where every individual is treated with dignity and equality.

CHALLENGES AND PROGRESS

The challenges and progress in the realm of anti-discrimination measures highlight the intricate nature of addressing societal biases and fostering genuine egalitarianism. Despite visible strides in recognizing and combating discrimination, the journey is far from straightforward, with various hurdles that demand a nuanced and multifaceted approach.

One of the key challenges lies in tackling intersectional discrimination, which involves the overlapping of multiple social identities, such as race, gender, sexuality, and socioeconomic status.

People often experience discrimination not just based on a single characteristic but as a result of the intersection of several factors. This complexity makes it difficult to address discrimination through a one-size-fits-all approach, requiring a comprehensive understanding of the interconnected layers of identity and privilege.³⁴

Systemic biases embedded within institutions and structures present another formidable challenge. These biases are deeply ingrained and can perpetuate discrimination even when individuals within these systems may not harbor explicit discriminatory intentions.³⁵ Overcoming systemic biases requires a systematic overhaul of policies, procedures, and organizational cultures to ensure that equality is not only advocated for but also embedded into the fabric of institutions.

³⁴ Turan, J. M., Elafros, M. A., Logie, C. H., Banik, S., Turan, B., Crockett, K. B., Pescosolido, B., & Murray, S. M. (2019). Challenges and opportunities in examining and addressing intersectional stigma and health. – *BMC Medicine*, p. 17. <https://doi.org/10.1186/s12916-018-1246-9>.

³⁵ Banaji, M. R., Fiske, S. T., & Massey, D. S. (2021). Systemic racism: Individuals and interactions, institutions, and society. *Cognitive Research: Principles and Implications*, Vol. 6, No. 1, pp. 1–21. <https://doi.org/10.1186/s41235-021-00349-3>.

Cultural norms also contribute to the complexity of addressing discrimination. Societal attitudes and expectations, often deeply rooted in historical context, can perpetuate stereotypes and discriminatory behaviors. Changing these norms requires a combination of education, advocacy, and societal dialogue to challenge ingrained beliefs and promote a more inclusive and accepting culture.³⁶ Moreover, progress in anti-discrimination efforts is hindered by resistance from various quarters, including individuals who may feel threatened by societal changes or perceive efforts to address discrimination as a challenge to their status quo. This resistance can manifest in political, social, and economic spheres, hindering the implementation of effective anti-discrimination measures.

Despite these challenges, there has been notable progress in raising awareness about discrimination and fostering a more inclusive environment. Movements advocating for equality and justice have gained momentum, leading to increased visibility of marginalized voices and greater public scrutiny of discriminatory practices.³⁷ Legal frameworks and policies have evolved to address discrimination, providing a basis for holding individuals and institutions accountable for discriminatory actions.³⁸

Education and awareness initiatives have played a crucial role in challenging stereotypes and promoting understanding. Schools, workplaces, and communities are increasingly recognizing the importance of diversity and inclusion, fostering environments that celebrate differences rather than perpetuate discrimination. While challenges persist in the effective implementation of anti-discrimination measures, there is evident progress in raising awareness, changing cultural norms, and implementing policies to address systemic biases.³⁹ The journey towards genuine egalitarianism requires a continued and concerted effort, acknowledging the complexity of intersectional discrimination and actively working towards dismantling entrenched biases in all facets of society.

³⁶ Smith, S. G., & Sinkford, J. C. (2022). Gender equality in the 21st century: Overcoming barriers to women's leadership in global health. – *Journal of Dental Education*, Vol. 86. No. 9, pp. 1144–1173. <https://doi.org/10.1002/jdd.13059>.

³⁷ Mueller, A., Wood-doughty, Z., Amir, S., Dredze, M., & Nobles, A. I. (2021). Demographic Representation and Collective Storytelling in the Me-Too Twitter Hashtag Activism Movement. *Proceedings of the ACM on Human-Computer Interaction*, 5(CSCW1). <https://doi.org/10.1145/3449181>.

³⁸ Louw, A. M. (2022). Language Discrimination in the Context of South Africa Workplace Discrimination Law. – *Potchefstroom Electronic Law Journal*, Vol. 25, No. 1, pp. 1–38. <https://dx.doi.org/10.17159/1727-3781/2022/v25i0a12279>.

³⁹ Fix, R. L., Thurston, I. B., Johnson, R. M., & Andrisse, S. (2023). Promoting anti-racism in the legal system: An application of the STYLE framework. *Frontiers in Psychology*, p. 14. <https://doi.org/10.3389/fpsyg.2023.1061637>.

CONCLUSION

South Africa's dedication to eliminating discrimination and promoting inclusivity is a dynamic and continuous journey aimed at achieving authentic egalitarianism. The legal underpinning of this commitment is exemplified by the Promotion of Equality and Prevention of Unfair Discrimination Act, a cornerstone in the nation's efforts to rectify historical imbalances. This legal framework, coupled with affirmative action initiatives, demonstrates a proactive stance in addressing systemic inequalities that have persisted over time.

The pivotal role played by the Human Rights Commission underscores the institutional commitment to safeguarding and advancing human rights in the country. Despite these significant strides, challenges persist, serving as a reminder that the path to equality is multifaceted and requires ongoing efforts. This highlights the imperative need for a sustained commitment to reinforcing anti-discrimination measures, ensuring that legal and societal structures continually evolve to meet the demands of an inclusive and equitable society.

As South Africa grapples with the intricate nuances of intersectional discrimination, acknowledging and addressing the intersecting forms of bias and prejudice, the nation remains resolute in its pursuit of a society that transcends historical disparities. The unwavering commitment reflects a national ethos that recognizes the importance of fostering an environment where all individuals, regardless of their background, enjoy equal opportunities and rights. In navigating the complexities of social dynamics, South Africa remains steadfast in its aspiration for a more inclusive and equitable future.

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LEGISLATION

Administration Act 2 of 1995

Basic Conditions of Employment Act 75 of 1997

Employment Equity Act 55 of 1998

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2004

The Development Facilitation Act 67 of 1995

The Extension of Security of Tenure Act 62 of 1997

The Housing Act 107 of 1997

The Labor Relations Act 66 of 1995

The Land Reform (Labor Tenants) Act 3 of 1996

The National Water Act 36 of 1998

The Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998

The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000

The Restitution of Land Rights Act 22 of 1994

The South African Human Rights Commission Act 40 of 2013

CASE LAW

Minister of finance v Van Heerden 2004 (6) SA 121 (CC)

On Equal Access to Healthcare in the Republic of Serbia

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The Republic of Serbia has ratified most international instruments against discrimination. This matter is addressed satisfactorily in the Constitution and corresponding legislation. In practice, there are frequent examples of healthcare inequalities that violate the principle of universal access. For example, in rural areas, due to lack of adequate medical equipment, patients must travel to larger centers resulting in discrimination based on geographical location. Reported cases of healthcare inequities in the Republic of Serbia, qualified as intersectional discrimination, are not fundamentally different from those in the EU countries. Accordingly, a comprehensive analysis of the national decisions in the context of the European jurisprudence, can significantly contribute to improving access to the domestic healthcare.

Keywords: *right to health, access to healthcare, health equity, intersectional discrimination, Roma and migrant women*



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1. Equitable healthcare access as a core principle of international health law

There is no such thing as free healthcare. Moreover, accessing healthcare can prove quite expensive. Arguments exist claiming that it is inevitable that costs of certain medical procedure will be a decisive factor for not providing a service, especially when it comes to a rare disease or terminally ill patients. A recent study has shown that it is estimated that costs for providing beneficial healthcare for every person in France would amount to five and a half times the GDP of France.¹ However, the fact that a medical procedure is costly must not undermine the existence and exercise of human rights, nor can it be a justification for discrimination – something that is prohibited by the Declaration of Geneva, i.e. the Hippocratic Oath of the modern world.²

Unfortunately, discrimination is present in countries all over the globe. Discrimination in healthcare takes many different forms which are not easily determined. Few types of discrimination can be distinguished: discrimination in healthcare access on the basis of class, race or ethnicity, gender, immigrant status, sexual orientation or gender identity, disability, older age, and genetics.³ Before we provide an insight of the current status and issues concerning the right to healthcare and right to equal access to healthcare in the Republic of Serbia, we should firstly familiarize ourselves with what these rights actually represents and what are their foundations in international law.

The right to health is a fundamental human right and was, first recognized in 1946 in the Preamble of the Constitution of the World Health Organization.⁴ Its importance has been stressed out again in Article 25.1 of the Universal Declaration of Human Rights that affirmed that everyone has the right, amongst other, to a standard of living adequate for the health of himself and of his family, including medical care and necessary social services.⁵ Additionally, the importance of this

¹ Pattinson, Shaun D. (2017) *Medical Law and Ethics – Fifth Edition*, Sweet & Maxwell, p. 33–34.

² World Medical Association, Declaration of Geneva, Adopted by the 2nd General Assembly of the World Medical Association, Geneva, Switzerland, September 1948.

³ Sheperd, D., Lois, S. (2013), *Bioethics and the Law – Third edition*, Wolters Kluwer Law and Business, p. 615.

⁴ The preamble stated that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. Fact Sheet No. 31: The Right to Health, Office of the United Nations High Commissioner for Human Rights and World Health Organization, 2008, 1, available at: <https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf>, 11.02.2024.

⁵ Universal Declaration of Human Rights, General Assembly of the United Nations, 10th December 1948.

right was emphasized when it comes to children by Article 24 of the United Nation's Convention on the Rights of the Child⁶ and migrants by the Resolution of the United Nations Human Rights Council 26/21.⁷ All of the aforementioned, made the right to health indivisible from other human rights, putting it side-by-side to the rights to education, participation, food, housing, work and information.⁸ As time passed, the significance of this right was confirmed through multiple acts of international law. In 1966 by Article 12 of the International Covenant on Economic, Social and Cultural Rights, right to health was enshrined, determining the right to the highest attainable standard of health and further on establishing that the right to health contains interrelated and essential elements: availability, accessibility, acceptability and quality⁹. Therefore, access to healthcare was listed as one of the key aspects of the right to health.¹⁰

Access to healthcare, like the very right of which it is a part of, was then further divided into four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility and information accessibility.¹¹ Due to the subject of this paper, we will mainly focus on the firstly mentioned dimension, i.e. non-discrimination. Namely, all health facilities, and other related medical goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, forbidding discrimination on any of the prohibited ground.¹² Fulfillment of the general ideas set out in these international legal acts, depends on the actual steps each country will take to ensure that all of their citizens have the right to health in its full scope.

To ensure that countries in Europe will act accordingly, the European Union has taken further steps to establish the right to health as its' core principle. Starting from the Charter of Fundamental Rights of the European Union, Article 35 provides that everyone has the right of access to preventive health care and

⁶ United Nations, Conventions on the Rights of the Child; UN Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, art. 24.

⁷ United Nations, Resolution adopted by the Human Rights Council 26/21 Promotion of the right of migrants to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/RES/26/21.

⁸ Human rights, World Health Organization, 2023, available at: <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health>, 11.02.2024.

⁹ CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights on 11 August 2000 (Contained in Document E/C.12/2000/4), United Nations.

¹⁰ Equal access to health care, Resolution 1946 (2013), Council of Europe, 2023.

¹¹ CESCR General Comment No. 14, Op. cit., 4–5.

¹² *Ibidem*.

the right to benefit from medical treatment under the conditions established by national laws and practices.¹³ However, the proof of European Union's intent lies in the following "A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities".¹⁴ Unfortunately, the mere proclaiming of these values is not enough to achieve the set goal of high-level human health protection, especially in circumstances in which vulnerable and socially excluded groups might experience poor average levels of health.¹⁵ That was one of the reasons why the European Union took further steps such as the EU Health Strategy or the Open Method of Coordination for Social Protection and Social Inclusion in order to address inequalities in health outcomes.¹⁶ These acts might be beneficial even outside the borders of the European Union as they also provide aid for countries that are candidates for membership such as the Republic of Serbia by showcasing a path that should (or better, must) be followed.

Every legal act mentioned so far has referred to, or taken into consideration, the highest attainable standard of physical and mental health as a core principle. Countries have developed and implemented legislation and policies that guarantee universal access to quality health services, but it remains to see if the set standard will be achieved. After identifying what the key issues are, careful action must be taken. Since the aforementioned definitions of the right to health insinuated the need for legal accountability, equality, and nondiscrimination/participation¹⁷, the rest of this article will be dedicated to the latter.

2. Right to health in courts' decisions and opinions

Right to health with all its' aspects and forms is a fundamental human right that was established by most prominent international legal documents. However,

¹³ Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 326/391, 26.10.2012.

¹⁴ Article 35, Charter of Fundamental Rights of the European Union.

¹⁵ In light of that, it was documented that Roma people have an estimated life expectancy 10 years less than the general population due to multiple reasons such as living conditions, education, occupation and income, and most importantly for our subject – healthcare access. European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Solidarity in Health: Reducing Health Inequalities in the EU, 2009, 3, available at: <https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:52009DC0567&from=EN>, 12.02.2024.

¹⁶ *Ibidem.*, 4.

¹⁷ Binagwaho, A., Mathewos, K. (2023) The Right to Health: Looking beyond Health Facilities, Health Human Rights 25(1), 133–135, p. 133.

the question of the application of these legal acts and documents remains as a necessary step in determining its' actual scope. In order to provide a clear picture of the scope, case law of two courts should be consulted.

The first one is indirectly influencing the legal system in the Republic of Serbia, the Court of Justice of the European Union. It did not have many cases in its past in which it elaborated its stance concerning the right to health. The Court of Justice did make a reference to Article 35 in 33 cases.¹⁸ Unfortunately, those references were mainly made to emphasize that member countries have an obligation to ensure a high level of human health protection¹⁹ without any particular discussion about the right to health. One opinion in a case that was discussed in front of the Court of Justice of the European Union might be of importance to our cause. The opinion merely confirms that “health cannot be considered solely in terms of social expenditure and latent economic difficulties” since this right is perceived as a personal entitlement and is not connected to a person’s relationship with social security.²⁰

The second court, with a direct influence on the Republic of Serbia, is the European Court of Human Rights. It may come as a surprise that the Convention on Human Rights has not been mentioned in the previous chapter. That is because the right to health has not been specified *per se* in it. Luckily, a wide range of issues relating to health have been dealt by the European Court of Human Rights that resulted in decisions requiring countries to safeguard people’s mental and physical well-being, to make sure that people can access the healthcare they need, to have a say in the treatment they receive and allow seeking of justice when mistakes are made.²¹ Several cases deliberated in the European Court of Human Rights stood out as they are tied to the subject of this article.

Starting with the inequalities Roma women faced, the European Court of Human Rights determined breaches due to unavailability, or refusal, of the country to provide access to their medical records, and especially ill-treatment that led to unlawful sterilization. Access to personal medical records was linked to

¹⁸ Laugarre, C. (2023), A right to Health in the European Union, *OpinioJuris*, available at: <https://opiniojuris.org/2023/06/13/a-right-to-health-in-the-european-union/>, 12.02.2024.

¹⁹ European Commission v. Hungary, Judgment of the Court (Fourth Chamber), C-823/21, para. 55; Geoffrey Leger v Ministre des Affaires sociales, de la Sante et des Droits des femmes and Etablissement francais du sang, Judgment of the Court, C-528/13, para. 57.

²⁰ Aikaterini Stamatelaki v. NPDD Organismos Asfaliseos Eleftheron Epangelmaton (OAE), Opinion of the Advocate General Ruiz-Jarabo Colomer, C-444/05, para. 40.

²¹ Impact of the European Convention on Human Rights, Human rights and health, available at: <https://www.coe.int/en/web/impact-convention-human-rights/human-rights-and-health>, 12.02.2024.

Article 8 of the European Human Rights Convention (right to private and family life) as there is a positive obligation of the country inherent to respect for one's private life.²² The Court held that there had been a violation of mentioned Article since the applicants had not been allowed to photocopy their medical records. More precisely, the Court reasoned that the aforementioned positive obligation should extend "in particular in cases like the present one where personal data are concerned, to the making available to the data subject of copies of his or her data files".²³ Another example of discrimination of Roma women is the case *V.C. v. Slovakia*, in which a victim of forced sterilization was in question, a practice that persisted in Slovakia for decades, disproportionately affecting Roma women. In the decision concerning this case, the European Court of Human Rights noted that, based on the reports made by the Council of Europe Commissioner of Human Rights, the Roma women population was at a higher risk for reproductive health related discrimination due to the fact that "widespread negative attitudes towards the relatively high birth rate among the Roma compared to other parts of the population, often expressed as worries of an increased proportion of the population living on social benefits".²⁴ There was a breach of the patients' rights as "the absence at the relevant time of safeguards giving special consideration to the reproductive health of the applicant as a Roma woman resulted in a failure by the respondent State to comply with its positive obligation to secure to her a sufficient measure of protection enabling her to effectively enjoy her right to respect for her private and family life".²⁵ Although Slovakia brought in new rules on patients' consent to treatment, this issue serves as a reminder that countries must revisit their established practices to ensure equitable access to healthcare of all of their citizens.

Moving on, patients with HIV and rare genetic disorders are also usually denied their right to health and right to equal access to health services. Their rights are mainly violated by the failure of the country to provide adequate medical care which may occur either by placing patients in medical institutions which were not properly equipped or by simply inconsistent legislative approach.

²² In the particular case *K.H. and others v. Slovakia*, the applicants were eight women of Roma origin that could not conceive any longer after being treated at gynecological departments in two different hospitals and suspected that it was because they had been sterilized during their stay in those hospitals, additionally complaining that they could not obtain photocopies of their medical records.

²³ European Court of Human Rights, *K.H. and Others v. Slovakia* (application no. 32881/04) 28 April 2009, para. 47.

²⁴ European Court of Human Rights, *V.C. v. Slovakia*, (Application no. 18968/07) 12 June 2012, para. 146.

²⁵ *Ibidem.*, para. 154.

Namely, in the case *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, the Court held that there had been a violation of Article 2 (right to life) of the Convention, in both its substantive and its procedural aspects.²⁶ The Court established those Romanian authorities have “unreasonably put his life in danger, while the continuous failure of the medical staff to provide him with appropriate care and treatment was yet another decisive factor leading to his untimely death”.²⁷ Another example is the case of *Rosetta Costa and Walter Pavan* who learned that they were healthy carriers of an inherited disease and wanted to undergo medically assisted reproduction. However, under Italian law at the time, medically assisted reproduction was only available for sterile or infertile couples and, couples in which the man is a carrier of a sexually transmissible viral disease like HIV or hepatitis.²⁸ Thus, Rosetta and Walter were unable to access the treatment they needed, which resulted in Court’s decision that their rights were violated because Italian law in this area was inconsistent.

The previously mentioned case of *Valenin Câmpeanu* is also significant for the topic of this paper since it encompasses two or even more bases for discrimination since he was discriminated both on his ethnic origin and his disease. Unfortunately, this is not the only case in which intersectional discrimination²⁹ was documented since the European Court of Human Rights also ruled that the applicants’ rights were violated in the case *Wenner v. Germany* in which prisoners suffering from long term addiction were denied drug substitution therapy.³⁰ The European Court of Human Rights also found violations of Article 3 in cases,

²⁶ It found in particular: that Valentin Câmpeanu, a HIV-positive, intellectually disabled young man of Roma ethnicity, had been placed in medical institutions which were not equipped to provide adequate care for his condition, that he had been transferred from one unit to another without proper diagnosis, and, that the authorities had failed to ensure his appropriate treatment with antiretroviral medication.

²⁷ *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC] – 47848/08, Judgment 17 July 2014.

²⁸ Ban lifted on medically assisted reproduction for healthy carriers of serious genetic diseases. *Costa and Pavan v. Italy* Application no. 54270/10, 28 August 2012.

²⁹ Intersectional discrimination stands for discrimination that is based on multiple personal characteristics, i.e. we can usually identify more than one types of discrimination in each. The first person to define intersectional identity as a basis of violence and discrimination was Kimberle Crenshaw in the context of race and gender. See more: Crenshaw, K. (1991) *Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color* – *Stanford Law Review*, vol. 43, no. 6, p. 1241–1299 and also: Kuzminac, M. (2023) *The importance of Combating Intersectional Discrimination in the World of Work – European Union Context* – *Zbornik radova 36. susreta Kopaoničke škole prirodnog prava Slobodan Perović*, vol. 3, p. 23–46.

³⁰ *European Court of Human Rights, Wenner v. Germany*, Application no. 62303/13 1 September 2016.

such as *G.M. and others v. Moldova*, abortions and birth control measures were imposed on three intellectually disabled women that were residents in a neuropsychiatric asylum after they have been repeatedly raped by one of the head doctors at the asylum.³¹

The cases elaborated above are a confirmation of the need to ensure the highest possible application of the international legal acts that enact, amongst other, the right to health and right to equitable healthcare access. Besides that, they showcase a need to have these provisions implemented in, not only, the legal system of each particular country, but also to ensure that these provisions are applied consistently and without prejudice. The analysis continues by providing an insight on the antidiscrimination in healthcare in legislation of the Republic of Serbia.

3. Antidiscriminatory Healthcare Legislations in the Republic of Serbia

The following part of the paper will provide additional information about relevant legal acts in the Republic of Serbia that can have either direct or indirect effect on discrimination in healthcare. Also, by reviewing those legal acts, we hope to emphasize questions and issues that could be improved and point out strong aspects of Serbian legislation.

The most important legal act of each country is its Constitution. As such, it holds the key values and rules that are to be respected and that each Law and each person needs to be in accordance with. The Serbian Constitution³² has a general clause on prohibition of discrimination in Article 21. The mentioned Article states that every person has an equal right to legal protection, with no discrimination.³³ The next article relevant to this topic is titled *The right to healthcare* and it states that each person has a right to protect its mental and physical health. As we can see, Serbian Constitution follows the European legal trend of prohibiting any kind of discrimination which implies that everyone has a right to healthcare. The goal of the constitutional provision as such is to ensure the right to healthcare has the highest possible level of legal guarantee and to also put pressure on the

³¹ European Court of Human Rights, *G. M. and Others v. the Republic of Moldova* (no. 44394/15), 22 November 2022.

³² Constitution of the Republic of Serbia, Official Gazette of RS, no. 98/2006 and 115/2021.

³³ It continues to state that each discrimination, direct or indirect, on every basis, and especially based on race, gender, nationality, social background, birth, religion, political or other beliefs, property status, culture, language, age and physical or mental disabilities.

legislators to enact Laws and different legal acts that are needed in order to make the protection as effective as possible.³⁴

Moving on, we need to consider several Laws relevant to this topic. Firstly, Serbia has a general Law on the prohibition of discrimination.³⁵ This Law sets up general standards that need to be followed³⁶ and that are further analyzed in detail in other specific laws. When it comes to the topic of this paper, this Law states that there is a ban on discrimination when it comes to provision of public services and using premises and spaces.³⁷ The Law also gives special protection to older people and states in a separate article that they need to be given dignified living conditions with no discrimination especially when it comes to equal access and protection from neglect and harassment in the course of receiving healthcare services.³⁸ Moving on, there is a special article of the Law stating that no person can be denied access to health care or required to meet additional requests in order to receive health care³⁹ if those requirement are otherwise not necessary by any medical reasons solely based on their specific attributes that could lead to discrimination.⁴⁰

The most important Law when it comes to the discrimination in healthcare, is the Law on healthcare.⁴¹ It states that healthcare is equally available to both Serbian citizens and foreigners as well as people with no citizenship who have

³⁴ Kosanović, M., Gajin, S., Milenković, D. (2010) *Prohibition of Discrimination in Serbia and Vulnerable Social Groups*, Belgrade, p. 66.

³⁵ The Law on prohibition of discrimination, Gazzete of the Republic of Serbia, no. 22/2009 and 52/2021.

³⁶ In Art. 1 of the Law, it states that this Law regulates general prohibition of discrimination, different cases, and situations of discrimination, and also procedures of protection against discrimination.

³⁷ Art. 17, Law on the prohibition of discrimination, it states that discrimination will occur when a company or a person refuses to provide a service that it is otherwise in obligation to provide based on his or her job, solely based on discriminatory grounds. Moreover, discrimination will happen even if the person or company requires a fulfillment of an additional request that is otherwise not necessary in order to fulfill the request. The article continues to state that everyone will have a free access to spaces and premises and gives an example of the spaces and premises used for health purposes.

³⁸ Article 23. Law on the prohibition of discrimination.

³⁹ Healthcare discrimination is defined in this article as denying a person of a diagnosis, withholding information relevant to a person's health or condition, denying different measures of treatment or rehabilitation or in general receiving any kind of harassment or insults while staying at a health care institution.

⁴⁰ Article 27. Law on the prohibition of discrimination.

⁴¹ Law on healthcare, Official Gazzete of the Republic of Serbia no. 25/2019 and 92/2023 – authentic interpretation.

their permanent or temporary residence in Serbia.⁴² In the same article, it continues to state that emergency healthcare will be available to people who are in transit through Serbia.⁴³ It is important to point out that the legislator decided to define that healthcare is available equally to citizens and noncitizens which shows a good practice. By doing so, the legislator made an important step towards making healthcare equally available to most. We also found that a rule that people in transit have a right only to emergency healthcare is a rightful one.

Law on healthcare also defines principle of justice in healthcare.⁴⁴ A general article which defines such a wide principle should be defined as broadly as possible. Defining special examples of personal features that can lead to discrimination, but not “closing the list” of possible reasons for discrimination is the only proper way of doing so. Therefore, we can say that this article gives the best possible protection against discrimination when it comes to healthcare. The Serbian legislator goes a step further because, in the same article, it states that there will be no discrimination if there are anti-discriminatory measures enforced in order to achieve full equality, protection or progress of a person, or a group of people that are found to be in an uneven position.⁴⁵ This means that affirmative action measures have a very important place in Serbian legislation.⁴⁶

⁴² Art. 3 Law on healthcare.

⁴³ Art. 3 Law on healthcare.

⁴⁴ Art. 21 Law on healthcare. The principle, as defined in this legal act, says that discrimination based on race, gender, sex, sexual orientation, and gender identity, as well as age, nationality, social background, religion, political or other views, financial status, culture, language, health status, type of disease, physical or physiological disability as well as any other personal property that can cause discrimination is forbidden.

⁴⁵ Art. 21 Law on healthcare.

⁴⁶ It is important to emphasize and know that affirmative action measures are introduced in Serbian legislation at the highest level since article 21 of the Serbian Constitution states that those measures which are introduced in order to achieve actual equality are not to be considered discriminatory. The fact that this claim can be found in the Constitution makes it even expected for the mentioned rule to find its place in Law on healthcare. Serbia does not differ from the rest of the world when it comes to the need to introduce affirmative measures in order to actually achieve equality for all. See more, Matijević, M., Erić, V. (2010) The affirmative action measures: The terminological determination and introductory consideration of the content of the notion – *Foreign legal life*, no. 2/2010. On the other hand, we need to mention situations where there are no formal attributes or circumstances that usually lead to discrimination. For example, people who have the same condition but the treatment is only available for one of them. The way medical personnel will act in those situations is a question that has been asked and answered numerous times but there is no golden rule to be applied. However, the decisions made in those situations, if they are not based on discriminatory factors, but are based on, for example, the probability of a person to survive the treatment, are not considered to be discrimination. See more, Frakt, A. (2020) Who should be saved first? Experts offer Ethical Guidance, available at:

Moving on to the last Law directly relevant to this topic, the Law on patients' rights.⁴⁷ In the same manner as the Law on healthcare, this Law also guarantees an equal right to quality and continuous health care.⁴⁸ This Law also regulates access to healthcare of foreigners.⁴⁹ Regulation of this question is done in a slightly different manner than in the Law on healthcare. Namely, this legal act states that healthcare is available to foreigners who can access healthcare in Serbia, according to law and ratified international agreements.⁵⁰

Another article of the Law on patients' rights relevant to the topic of this paper is Article 6.⁵¹ It states that in the process of obtaining health care, a patient has a right to equal access to health care services, with no discrimination based on their financial possibilities, place of living, type of disease, time of his or her admission to the health care service, or according to any other difference that can cause discrimination.⁵² We would like to emphasize a very sound approach of our legislator in this exact case since it explicitly stated that place of living cannot lead to discrimination when it comes to access to healthcare. Considering the regional distribution of people living in Serbia on one hand and the distribution of clinical centers in the country, we consider this a very realistic situation that could lead to discrimination and that needed to be addressed.⁵³

<https://www.nytimes.com/2020/03/24/upshot/coronavirus-rationing-decisions-ethicists.html>, 12.2.2024.

⁴⁷ Law on patients' rights, Official Gazette of the Republic of Serbia, no. 45/2013, 25/2019 – other Laws.

⁴⁸ Art. 3 Law on patients' rights.

⁴⁹ Art. 3 Law on patients' rights.

⁵⁰ We can see that this way of regulating the question of access of healthcare to foreigners is different than stating that every foreigner who has a residency in Serbia has access to healthcare. One can have residency in Serbia without having healthcare. Although those situations are not often, which is probably why the legislator decided to make this slight difference in the wording of the Law, they can still happen. In order to achieve an existence of a healthcare system with no discrimination, or with discrimination being at its minimum, we believe that the wording of the Law on healthcare is a better one.

⁵¹ In the first part of the article, the Law states that a patient has a right to available and of quality healthcare, in accordance with his or her health situation, and in the limits of material capabilities of the healthcare system.

⁵² Article 6, Law on patients' rights.

⁵³ Most of the clinical centers in Serbia are in Belgrade, six out of nine. Also, almost one third of the citizens of Serbia live in Belgrade. Rest of the country more often than not, need to come to Belgrade to receive adequate healthcare since some of the therapies are only available in clinical centers in Belgrade. Having in mind that Belgrade is also the economical capital of the country, that means that the rest of the country is somewhat deprived of the possibilities to earn in the same way as people living in the capital do. Also, according to the latest available data, Serbia is considered to be an old country with an average age of 43. All those factors can lead to discrimination. Especially of older people living outside

According to this Law, there is no violation fine if discrimination happens. However, there is a possibility of taking the issue of possible discrimination with a healthcare worker that governs the process of work or with the director of the healthcare institution, founder of a private hospital or a consultant for the protection of patients' rights.⁵⁴ We consider that a fine in a situation of proven discrimination could be imposed since it would affect both the personnel of the institution that directly affected the patient and the institution itself.

4. Cases of Discrimination that have been discussed in front of the Serbian

Commissioner for the Protection of Equality

In following part of the paper, we will analyze different cases that have been discussed by the Commissioner for the Protection of Equality.⁵⁵ This section will be divided based on different aspects that led to discrimination in accessing healthcare.

4.1. Discrimination based on the type of disease

Most of the cases we encountered relevant to this topic are related to people being victims of discrimination due to their HIV positive status. We will discuss some of them.

Commissioner for protection of equality was reached out to by the Union of the organization in Serbia that deals with the protection of people who live with HIV virus. It did so since they pointed out to the "violation of human rights and patient rights at the department of Endocrinology at the Clinical Center in Vojvodina". Namely, they stated that the temperature-therapy-diet list that could be found on the hospital bed of a patient and it had on it, in big bold red letters written "HIV". This made this confidential information available to everybody.⁵⁶

of Belgrade needing healthcare. Their access to healthcare institutions appropriate treatments is made harder for them considering the fact that they need to travel to Belgrade sometimes for a couple of times and considering the fact that their material situation is not one that can allow for these trips to be considered something that is easily available.

⁵⁴ Article 30 Law on patients' rights.

⁵⁵ The Commissioner is an independent and specialized state authority established by the Law on prohibition of discrimination in 2009. It is elected by the National Assembly of Serbia. It has the main authority when it comes to preventing all kinds of discrimination, protection of equality and it controls the application of rules and laws against discrimination. See more at: https://equineteurope.org/author/serbia_cpe/.

⁵⁶ Recommendation of measures to the Clinical Center of Vojvodina, Commissioner for Protection of Equality Brankica Janković, 07-00-191/2019-02, 4 4.2019.

It is known that all patient information is to be kept confidential. Therefore, by doing this, it is more than obvious that the Center acted in a discriminatory manner towards the patient.

Moving on, the next situation is also related to the person who is HIV positive. In this case, a person made an appointment at a private dentist ordination and did not disclose the information that he is HIV positive. However, at the time of his appointment, he pointed out that he is HIV positive. At that time, the dentist denied him the right to the procedure. The Commissioner gave the opinion that this manner of acting was discriminatory, and that discrimination was done on the basis of patient's disease.⁵⁷ Similar case happened at the Faculty of Dentistry where a patient was denied the procedure, because of his HIV positive status. Also, his rights were violated because his HIV status was written on his chart visible to others. The Commissioner issued a recommendation for the Faculty to issue a letter of apology to the patient.⁵⁸

Finally, one more case that came to the Commissioner because of patients' HIV positive status. Namely, the patient went to the Institute for mental health due to his suicide attempt. After disclosing information that he is HIV positive, he was denied the care he needed. The Commissioner found no evidence that this was based on anything other than discriminatory reasons, i.e. the fact that he has HIV virus and that, the institution is therefore in violation of the discrimination prohibition.⁵⁹

4.2. Discrimination based on social-economic status

Even though there were no cases registered nor opinions issued by the Commissioner, there have been cases in practice reported of this kind of discrimination. For example, men are forbidden from being next to the mother of their child when she is giving birth, unless they pay a certain amount of money.⁶⁰

⁵⁷ Opinion of the Commissioner for Protection of Equality, Nevena Petrušić, 07-00-453/2013-02 (Complaint against the dentist C.M. from L. because of discrimination based on disease in the area of providing for services on 30.12.2013).

⁵⁸ Opinion of the Commissioner for Protection of Equality, Brankica Janković, 07-00-444/2020-02 on 12.10.2021.

⁵⁹ Opinion of the Commissioner for Protection of Equality, Nevena Petrušić, 07-00-156/2014-02 (Complaint of M. L. against the Institute for Mental Health because of discrimination based on disease in the area of healthcare on 1.8.2014).

⁶⁰ Future dads who want to attend to the birth of their child had to pay roughly around 150 euros, and also for the lab work needed that is charged extra. See more, To attend the childbirth or not, available at: <https://www.bebac.com/tekst/bit-i-ili-ne-bit-i-na-prod-jaju>, 15.2.2024.

Discrimination based on this has especially become evident during the time of the COVID-19 pandemic.⁶¹

4.3. Discrimination based on the place of residence

As we stated before, major healthcare institutions are found in several big cities of Serbia, most of them in the country capital, Belgrade. This means that people need to visit those Centers in order to receive the care they need which can lead to discrimination. In one case that the Commissioner gave an opinion, it was decided that there is no evident discrimination.⁶²

4.4. Discrimination based on ethnicity

In Serbia, most of the cases concerning discrimination based on ethnicity are related to Roma people. Unrelated to the number of cases represented to the Commissioner we can say that this basis for discrimination is more than often. Also, Roma are often victims of intersectional discrimination. An analysis of the factors that affect quality of access to health services reveal that personal documentation is a statistically significant problem in Serbia.⁶³

A case of discrimination that reached the Commissioner is a one where a girl was denied the opportunity to have her medical chart opened and therefore denied the opportunity to have all the required vaccines. The Commissioner gave her opinion that there was certainly discrimination in that case.⁶⁴ Unfortunately,

⁶¹ Namely, people with lower income had more opportunity of getting the virus based on the nature of their work, mostly those are frontline jobs that include face-to-face communication with a high number of people. Also, they were forced to mostly use public transportation to go to work which made it even more likely they would be infected with the virus. See more: Intersectionality in Healthcare, available at: <https://www.news-medical.net/health/Intersectionality-in-Healthcare.aspx>, 12.2.2024.

⁶² The petitioner stated that she was denied care in Belgrade Clinical institute and was referred to the Clinical Institute of Kragujevac, however, the evidence showed that this was not the case, and that there was no discrimination in this case. The Commissioner also stated that both of the Institutes were institutions of the same Clinical level and that even if she was referred to the other Institute, there would be no discrimination. Opinion of the Commissioner for Protection of Equality, Brankica Janković, 07-00-223/2021-02 on 4.8.2021. We do not completely agree with the reasoning since this would lead to more travel for the person who is stationed in Belgrade and could potentially lead to health deteriorating.

⁶³ Idzerda, L., Adams, O., Patrick, J., Schrecker, T., Tugwell, P. (2011) Access to primary healthcare services for the Roma population in Serbia: a secondary data analysis – BMC International Health and Human Rights, 11:10.

⁶⁴ Opinion of the Commissioner for Protection of Equality, Nevena Petrušić, 07-00-519/2013-02 (Complaint of M.B. against the hospital because of discrimination based on ethnicity in the area of healthcare on 16.3.2015).

most of the cases of discrimination based on ethnicity do not reach official government institutions.⁶⁵

4.5. Discrimination based on gender

In the first case, a men needed a medicine that was prescribed by the Republics fund for healthcare to be issued and covered by medical insurance only for women and not men.⁶⁶ The medicine is on the list of medical insurance covered medicines only for women and not men. The Commissioner gave an opinion that although the medicine was on the list of insurance covered drugs only after menopause, this was a case of indirect discrimination based on gender.⁶⁷

Other case concerns the situation where a father was denied an option to stay at the room of his child who was a patient at a hospital due to the fact that the hospital had a rule that only mothers are the ones who can stay at the room when a child is a patient, and other family members can do so only when the mother is not available. The Commissioner stated that this was a discriminatory manner of acting that was based on stereotypes and tradition of the society and that the said rule should be changes as to refer to both parents equally.⁶⁸

4.6. Discrimination based on disability

One case that the Commissioner gave an opinion on concerns a situation where a patient was denied a procedure just because of her disability. Her guardian tried to make an appointment for her numerous times but was always denied because of an alleged lack of documentation. After the case was presented to the Commissioner, it was concluded that the institution did violate the prohibition of discrimination rule and that the sole reason the patient was denied the health-

⁶⁵ One case was especially media covered. In that situation, the pregnant Roma girl was abused on her delivery by the doctor which led to the loss of her child. In this case, because of the sad outcome of the situation, the police were involved and the case is ongoing. At the time of writing this paper, no case in front of the Commissioner was started. See more: Ksenija Pavkov, „I begged the doctor to save my baby, he insulted me, grabbed my chin“, available at: <https://n1info.rs/vesti/molila-sam-doktora-da-mi-spasi-bebu-vredjao-me-stiskao-za-vilicu-porodilja-o-gubitku-devojice-nakon-prodjaja/>, 19.1.2024.

⁶⁶ The medicine in question is given mostly to women after menopause, however it can be given to men also.

⁶⁷ Opinion of the Commissioner for Protection of Equality, Brankica Janković, 07-00-166/2016-02 (Complaint of S.R. against the Republics fond for healthcare based on gender in the area of providing healthcare on 1.8.2014).

⁶⁸ Opinion of the Commissioner for Protection of Equality, Nevena Petrušić, 07-00-193/2014-02 (Complaint of P.C. against the doctor S. R. based on gender in the area of providing healthcare on 1.8.2014).

care procedure she needed was due to her disability. The Commissioner gave a recommendation to make an appointment for the patient as soon as possible.⁶⁹

Based on the analysis of the cases of discrimination, it is more than obvious that although Serbia does have an adequate legislation in this area, its implementation to real life is far from ideal. Cases of discrimination do happen, however, what we consider is not proper is the protection available in those situations. In most of the cases we discussed, the Commissioner stated that the situation was the one where there was discrimination, however most of the “sanctions” could be more adequate.

5. Equitable Healthcare Access in Legal Theory

It was mentioned at the very beginning that the right to health is a fundamental human right established by the provisions of international and domestic law. Additionally, it is important to emphasize that this right does not extend only to timely and appropriate healthcare but also to health determinants such as: adequate supply of food and housing; access to potable water; healthy occupational and environmental conditions; and access to health-related education and information.⁷⁰

As it can be noticed, the term *access* is some kind of *leit motif*. That is because the right to health cannot be enjoyed without the possibility to access to health-related services, facilities or information. It is particularly important for e.g., persons with disabilities who often encounter significant barriers to healthcare services. As already stated, we emphasize that access to healthcare has four inter-related dimensions.⁷¹ We distinguish non-discrimination as a topic that requires special attention due to multiple reports confirming that discrimination is very much existent in healthcare systems, hence jeopardizing equity, and equality as core principles of our societies⁷².

⁶⁹ Opinion of the Commissioner for Protection of Equality, Nevena Petrušić, 07-00-437/2014-02 (Complaint of D. T. against the Clinic for gynecology KCS because of discrimination based on disability in the area of healthcare on 29.12.2014).

⁷⁰ United Nations, Human Rights office of the High Commissioner, About the right to health and human rights, Special Rapporteur on the right to health, available at: <https://www.ohchr.org/en/special-procedures/sr-health/about-right-health-and-human-rights>, 17.02.2024.

⁷¹ Those four dimensions are, once again, non-discrimination, physical accessibility, economic accessibility and information accessibility. CESCR General Comment No. 14, Op. cit., 4–5.

⁷² If we make a difference in terms of healthcare, the equality is giving everyone the same access to healthcare. Equity is giving everyone a healthcare that fits.

Every person should have equal access to preventive, promotive, and curative health services⁷³, without prejudice to their race, ethnicity, age, disability, gender identity, sexual orientation, nationality, socioeconomic status, or geographical background.⁷⁴ Unexpectedly, the principle of equality in healthcare is a relatively unexplored topic. However three features of diversity can be identified: gender identity and sexual orientation, race and ethnicity, religion or belief.⁷⁵ These features are, unfortunately often a basis for discrimination which is why in European legal theory there is an ongoing discussion concerning discrimination of individuals with mental disabilities⁷⁶, women with disabilities⁷⁷, asylum seekers and refugees⁷⁸, unregistered migrants⁷⁹, refugee women who are not proficient in a foreign language or are illiterate⁸⁰, children and adults with rare diseases⁸¹, transgender individuals⁸², and sex workers.⁸³ Before providing

⁷³ Banerjee, A. (2020) Equity and Quality of Health-care Access: Where Do We Stand and the Way Forward? – *Indian J Community Med.* 45(1): 4–7.

⁷⁴ Health Equity, available at: <https://www.healthaffairs.org/topic/1244>, 17.02.2024.

⁷⁵ Orzechowski, M., Nowak, M., Bielińska, K., Chowaniec, A., Doričić, R., Ramšak, M., Łuków, P., Muzur, A., Zupanič-Slavec, Z., Steger, F. (2020) Social diversity and access to healthcare in Europe: how does European Union's legislation prevent from discrimination in healthcare? – *BMC Public Health* vol. 20.

⁷⁶ Sandberg, M., Ahlström, G., Kristensson, J. (2015), [Access to healthcare for people with intellectual disability](#) – *BMC Nursing*, 14 (Suppl 1): S1.

⁷⁷ Karami Matin, B., Williamson, H., Kazemi Karyani, A., Rezaei, S., Soofi, M., Soltani, S. (2021) Barriers in access to healthcare for women with disabilities: a systematic review in qualitative studies – *BMC Women's Health*, 21:44.

⁷⁸ Wenner, J., Biddle, L., Gottlieb, N., Bozorgmehr, K. (2022) Inequalities in access to healthcare by local policy model among newly arrived refugees: evidence from population-based studies in two German states – *International Journal for Equity in Health*, 21:11; Wenner, J., Bozorgmehr, K., Duwendag, S., Rolke, K., Razum, O. (2020) Differences in realized access to healthcare among newly arrived refugees in Germany: results from a natural quasi-experiment – *BMC Public Health* vol. 20.

⁷⁹ André, J., Azzedine, F. (2016) Access to healthcare for undocumented migrants in France: a critical examination of State Medical Assistance – *Public Health Reviews*, 37:5.

⁸⁰ Floyd, A., Sakellariou, D. (2017) Healthcare access for refugee women with limited literacy: layers of disadvantage – *International Journal for Equity in Health*, 16:195.

⁸¹ Bogart, K., Hemmesch, A., Barnes, E., Blissenbach, T., Beisang, A., Engel, P. (2022) Healthcare access, satisfaction, and health-related quality of life among children and adults with rare diseases – *Orphanet Journal of Rare Diseases*, vol. 17, Article number: 196.

⁸² Skuban-Eiseler, T., Orzechowski, M., Steger, F. (2023) Why do transgender individuals experience discrimination in healthcare and thereby limited access to healthcare? An interview study exploring the perspective of German transgender individuals – *International Journal for Equity in Health*, 22:211.

⁸³ On opportunities of commercial sex workers to lead healthy lives, [Taylor-Robinson, S.](#), De Souza Lopes, P., [Zdravkov, J.](#), Harrison, R. (2021) Should commercial sex workers have unrestricted healthcare access across the world? – *International Journal for Equity in Health*, vol. 20, Article number: 237.

details on most documented types of discrimination in healthcare, we would also like to point out that perceived discrimination, which refers to individuals' perception of negative attitude, judgment, or unfair treatment⁸⁴, should be taken into consideration as well.

Firstly, when speaking about discrimination based on gender, it has been noted that, if compared to males, women with the same condition may not receive the same level of care or different treatment which leads to poorer outcomes of their treatment.⁸⁵ That usually leads to dismissing women's medical concerns because of stereotypes that this person is more emotional and therefore may be "exaggerating" their symptoms.⁸⁶ Moving on to discrimination based on ethnicity, but still keeping in mind the gender discrimination mentioned above⁸⁷, Roma women across Europe face some of the most egregious reproductive rights violations and are subjected to systemic intersectional discrimination in reproductive health settings in several European countries.⁸⁸ Consequences of this are various, however one of them is denying counseling on the full-range of birth control options because of stereotypes about the sexuality of a particular racial or ethnic group.⁸⁹

When it comes to discrimination based on religion or discrimination of migrants and asylum seekers, it seems that even the most developed countries are not immune to it.⁹⁰ Moreover, undocumented migrant women living in Europe

⁸⁴ Hanssens, L., Detollenaere J., Van Pottelberge A., Baert, S., Willems, S. (2017) Perceived discrimination in primary healthcare in Europe: evidence from the cross-sectional QUALICOPC study – *Heal Soc Care*, 25(2), 641–651; Straiton, M., Kjell Aambø, A., Johansen, R. (2019) Perceived discrimination, health and mental health among immigrants in Norway: the role of moderating factors – *BMC Public Health* vol. 19, Article number: 325.

⁸⁵ Paulsen, E. (2020) Recognizing, Addressing Unintended Gender Bias in Patient Care, available at: <https://physicians.dukehealth.org/articles/recognizing-addressing-unintended-gender-bias-patient-care>.

⁸⁶ Help for patients facing sex discrimination and harassment in healthcare, available at: <https://nwlc.org/help-for-patients-facing-sex-discrimination-and-harassment-in-healthcare/>.

⁸⁷ As stated before, this leads to intersectional discrimination.

⁸⁸ Inequality and Discrimination in Maternal Health in Europe, available at: <https://reproductiverights.org/center-reproductive-rights-inequality-discrimination-maternal-health-europe/>.

⁸⁹ Help for patients facing sex discrimination and harassment in healthcare, available at: <https://nwlc.org/help-for-patients-facing-sex-discrimination-and-harassment-in-healthcare/>; Sjenčić, M., (2015) Prevenција diskriminacije u oblasti zdravstvene zaštite i olakšavanje pristupa romske populacije zdravstvenoj zaštiti i realizaciji njihovih prava kao pacijenata – Zdravstvena zaštita Roma: vodič za prepoznavanje slučajeva diskriminacije u zdravstvu, Associazione SUPRAM, 8–20.

⁹⁰ Antidiskriminierungsstelle des Bundes, Zaštita od diskriminacije u Nemačkoj – Savetnik za izbeglice i nove doseljenike, available at: https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Refugees/fluechtlingsbroschuere_serbisch.

often face considerable barriers in access to reproductive healthcare due to discriminatory legal and policy restrictions that do not allow them equal access to healthcare, especially throughout pregnancy and childbirth, leading to increased risks of poor maternal health outcomes, obstetric emergency and pregnancy-related complications.⁹¹

Sexual orientation is another well documented basis for discrimination in healthcare, in addition to discrimination in healthcare access of transgender individuals. Namely, individuals within the LGBT community encounter difficulties accessing healthcare mainly due to distrust between patients and medical professionals, along with problematic attitudes of employees within the healthcare systems. When it comes to Europe, thirteen member states lack adequate medical facilities for gender reassignment procedures, while health insurance in at least sixteen countries does not cover such treatments.⁹² It is evident LGBT and transgender individuals often face discrimination in healthcare, thus their right to access healthcare is violated.

Finally, individuals with obesity commonly face social stigma which leads to discrimination in healthcare.⁹³ It was documented that patients who have suffered discrimination due to their obesity had worse treatment outcomes which is why they are more likely to avoid future care.⁹⁴

As a conclusion, in one of the examples elaborated above we have mentioned intersectional discrimination. However, even if it was not explicitly mentioned, it is obvious from our showcase of different types of discrimination in

[pdf?__blob=publicationFile&v=4](#), 15–16, 18.02.2024; In August 2010, a general practitioner in a small town in Hesse, Germany, decided not to treat Muslim women wearing headscarves, patients without basic German skills and Islamic families with more than five children, displaying these new rules on a poster in his practice. *See more:* European Union Agency for fundamental rights, Inequalities and multiple discrimination in healthcare, available at: https://fra.europa.eu/sites/default/files/fra_uploads/1947-FRA-Factsheet_In-equMultDiscrimination_EN.pdf, 2, 18.02.2024.

⁹¹ Perilous Pregnancies: Barriers in Access to Affordable Maternal Health Care for Undocumented Migrant Women in the EU European Union, <https://reproductiverights.org/perilous-pregnancies-health-care-for-undocumented-migrant-women-in-the-eu-2020/>.

⁹² Savet Evrope, Diskriminacija na osnovi seksualne orijentacije i rodnog identiteta u Evropi, available at: <https://rm.coe.int/diskriminacija-na-osnovi-seksualne-orijentacije-i-rodnog-identiteta-u-/16807ba909> 2011, 18.02.2024.

⁹³ Rubino, F., Puhl, R. et al. (2020) Joint international consensus statement for ending stigma of obesity – *Nature Medicine*, Vol. 26, 485–497.

⁹⁴ Rubino, F. op.cit. *See more:* Gudzone, K. A., Bennett, W. L., Cooper, L. A., Bleich, S. N. (2014) Patients who feel judged about their weight have lower trust in their primary care providers – *Patient Educ. Couns.* 97, 128–131; Puhl, R., Peterson, J. L., Luedicke, J. (2013) Motivating or stigmatizing? Public perceptions of weight-related language used by health providers – *Int. J. Obes.* Vol. 37, 612–619.

healthcare that we can usually identify more than one types of discrimination in each case. In a study recent study conducted by European Union's Agency for Fundamental Rights, three particularly illustrative groups facing multiple discrimination in accessing healthcare: a) women who also belong to a migrant/ethnic minority, including women with disabilities, who are trying to access reproductive healthcare; b) older people who also belong to a migrant/ethnic minority, including those with disabilities; c) young people aged 18 to 25 with intellectual disabilities who also belong to a migrant/ethnic minority.⁹⁵ Albeit discrimination on one or multiple characteristics, discrimination is a well-documented health challenge, thus researchers and policymakers should consider barriers to healthcare that lie within the healthcare experience itself as potential intervention targets.⁹⁶

6. Concluding remarks

The importance of access to healthcare for all is an internationally recognized global goal.⁹⁷ However, ensuring access to healthcare is a complex, multi-dimensional challenge.⁹⁸ It requires acts of multiple stakeholders, and it is undoubtedly deeply founded in the principle of solidarity⁹⁹ and social justice. During our analysis we noticed that there is room for improvement, as the discrepancies in the level of implementation of anti-discriminatory measures among countries has been detected both by reports and case law. Thus, there is a need for comprehensive EU-wide regulations, which would implement the principle of equal treatment in the specific context of healthcare, and general anti-discrimination regulations must be strengthened by inclusion of anti-discrimination provisions directly into national healthcare laws.¹⁰⁰

⁹⁵ European Union Agency for Fundamental Rights, *Nejednakosti i višestruka diskriminacija u zdravstvenoj zaštiti*, available at: https://fra.europa.eu/sites/default/files/fra-factsheet_in-equalititesmultidiscrimination_hr.pdf, 1–2, 18.02.2024.

⁹⁶ Rivenbark, J., Ichou, M. (2020) Discrimination in healthcare as a barrier to care: experiences of socially disadvantaged populations in France from a nationally representative survey – *BMC Public Health*, vol. 20, Article number: 31.

⁹⁷ Dawkins, B., Renwick, R., Ensor, T., Shinkins, B., Jayne, D., Meads, D. (2020) What factors affect patients' access to healthcare? Protocol for an overview of systematic reviews – *Systematic Reviews*, vol. 9, Article number: 18.

⁹⁸ Nicholas C. Coombs, Duncan G. Campbell and James Caringi, A qualitative study of rural healthcare providers' views of social, cultural, and programmatic barriers to healthcare access *BMC Health Services Research* 2022 22:438.

⁹⁹ Atuire C., Hassoun, N. (2023) Rethinking solidarity towards equity in global health: African views – *International Journal for Equity in Health*, 22:52.

¹⁰⁰ Bielińska, K. et al., *Op. cit.*

Besides steps that need to be taken in legislation, health professionals should be trained from the earliest days of their course on how race, sex, socioeconomic class, and disabilities of various kinds interact with each other causing inequalities in health and exaggerating them in healthcare.¹⁰¹ For instance, in order to reduce Roma discrimination, a comprehensive sensitization program for all levels of health workers could be implemented, followed by internships in Roma settlements for medical and nursing students, which could considerably improve their mutual communication and understanding.¹⁰² Moreover, additional steps need to be taken outside of healthcare such as public campaigns educating Roma on their rights, including the right to healthcare.¹⁰³ Understanding that healthcare access is a right and not a privilege can be beneficial not only for patients but the whole society.

Finally, when speaking about discrimination in healthcare, we should always bear in mind that ultimately socially vulnerable groups, by experiencing healthcare related inequities, simultaneously also suffer in terms of increased mortality, morbidity, and limitations in functioning when compared to the rest of the population. For instance, many of the poor health outcomes experienced by persons with disabilities cannot be explained by the underlying health condition but are health inequities driven by unfair societal and health system factors.¹⁰⁴

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¹⁰¹ Intersectionality in Healthcare, available at: www.news-medical.net/health/Intersectionality-in-Healthcare.aspx.

¹⁰² Leanne, I, Op. cit.

¹⁰³ Leanne, I. Op. cit.

¹⁰⁴ Gréaux, M., Moro, M., Kamenov, K., Russell, A., Barrett, D., Cieza, A. (2023) Health equity for persons with disabilities: a global scoping review on barriers and interventions in health-care services – *International Journal for Equity in Health*, vol. 22, Article number: 236.

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ТРУДОВОПРАВНИ АСПЕКТИ
НА ДИСКРИМИНАЦИЯТА
В ЕВРОПА





Challenges on European Non-Discrimination Law from the Social Model of Disability Approach

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The European Union Framework Directive provides for protection against discrimination on various grounds, including disability. However, its material scope is only limited to the employment field. What seemed to be a breakthrough in anti-discrimination law (as it finally stepped forward to embrace protected grounds in addition to the traditional ones such as gender and race) has been evaluated and criticized from different points of view: it is argued that, nowadays, European regulation on protection against discrimination still is flawed. One of the prior issues that may be solved is the determination of the personal scope of application of the Framework Directive. Considering the European legislator avoided defining disability, this onus has been on the European Court of Justice, that has outlined a definition this term in order to implement the Directive provisions. In doing so, the influence of the disability model that has prevailed at each moment has been crucial, entailing a struggle among the former medical model and the emerging social model. Insofar as the criteria of this latter has been imposed, a Human Rights approach was developed, and the personal scope of the Framework Directive could be extended to a wide variety of health problems covered by the notion of disability. It is worth mentioning the case-law that has marked a turning point for the European definition of disability, as *Chacón Navas*, *HK Danmark*, *Z vs. A*, *FOA*, and *Daouidi*, all of them referred hereinafter. This article has two main objectives. First of all, to identify the elements given by the European Court of Justice for the purpose of defining disability, and for this purpose the leading cases will be analyzed. Secondly, according to the social developments in disabilities studies, some concerns about the evolution of the dynamic concept of disability will be outlined. The article concludes with brief final remarks on the future development of the disability concept within the European non-discrimination regulations.

Keywords: *Disability, impairment, limitation, non-discrimination, European Court of Justice, health condition, employment, equality*



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I. Disability as a protected ground in the EU Non-Discrimination Law

As it stands today, the European Non-Discrimination law draws its roots from the article 13 of the Treaty of Amsterdam, valid from 1999, which provided competences for the EU (European Union) to develop legal acts to fight against discrimination, in particular, against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. As a result, in 2000 the Framework Directive (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation) entered into force. Finally, alongside sex or racial origin, which traditionally had been protected by the international and European laws, other personal circumstances came to be covered by a high level of protection when they are cause of an unfair and unjustified different treatment.¹

In point of fact, one of the key features of the right against discrimination is their dynamic nature, inasmuch as discrimination, stereotype, and marginalization of different groups of individuals evolves. The right not to be discriminated, which is considered to be the highest expression of the principle of equal treatment, recognized in articles 2 and 3 of the Treaty of European Union, bans treating a person less favorably than others on account of a consideration which should be morally irrelevant.² In particular, it does not allow direct or indirect discriminatory treatment or harassment on prohibited discriminatory grounds; although it allows a different treatment due to the possibility of developing positive action measures. To protect victims, it establishes procedural safeguards, including a reversal of the burden of proof, and the possibility for victims to receive monetary compensation.

Any legal system that aims to promote equality, such as that of the EU, has the responsibility of defining an effective personal and material scope to achieve its objectives, which is not always an easy task.

The EU framework has been harshly criticized for providing a dissimilar level of legal protection depending on the circumstances at stake. Disability is one of these under-protected groups, mainly because the scope of application

¹ Schiek, D. (2002) A New Framework on Equal Treatment of Persons in EC Law? – European Law Journal, vol. 8, 2, p. 300; Waddington, L., Bell, M. (2001) More equal than others: Distinguishing European Union equality directives – Common Market Law Review, vol. 38, p. 588.

² Costello C., Barry E. (2003), Equality in Diversity: The New Equality Directives, 2003, p. 2 [online version].

of the Framework Directive refers only to the employment area. What is more, compared to the rest of the protected grounds addressed in the Directive, there is a considerably wide number of the exceptions that may justify the difference in treatment when disability is *ratio decidendi*.³

Nonetheless, what is generally accepted is the role of the EU as a trigger in non-discrimination protection, and the recognition of disability as a protected ground by non-discrimination law implies an important swift and advance on the perspective of how equality is seen. EU embraces a substantive idea of equality that has overcome the Aristotelian idea of equity, and not only claims for likes treated alike, but to reach a sophisticated equality based in economic resources and personal opportunities of development.⁴ Disability became in a circumstance that, instead of being ignored, needed to be considered in order to guarantee the equality of opportunities.⁵ As evidence, we could mention the duty of employers to make reasonable accommodations or adjustments in the workplace for people with disabilities, unless they would constitute a disproportionate burden.

In the remainder of the article, a study will be carried out on the development of the concept of disability. The jurisprudence of the CJEU (Court of Justice of the EU) will be studied in order to clarify the personal scope of the Framework Directive when issues related to the health conditions of workers have to fit into the definition of disability and thus achieve non-discriminatory protection.

II. The EUCJ definition of disability

2.1 Evolution of the concept of disability

Despite the abovementioned, the Framework Directive does not include a definition of disability, and, moreover, there is also no referral to the State member for this purpose. Therefore, the CJEU has undertaken the task of outlining it, following different cases it has confronted. The effectiveness of the legal provisions included in this Directive will depend directly on the terms of its implementation, which in turn will depend on how each of its protected grounds is delimited.

³ Howard, E. (2006), The Case for a Considered Hierarchy of Discrimination Grounds in EU Law – Maastricht Journal of European and Comparative Law, vol. 13, 4.

⁴ Barnard C., Hepple, B (2000) Substantive Equality – The Cambridge Law Journal, vol. 59, 3, 2000.

⁵ Waddington L. (2011) Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability? – NTM|NJCM-Bulletin, vol. 36, 2.

Furthermore, it has been taken into account that the listing of protected ground according to Article 1 is a *numerus clausus*.⁶

In any case, the absence of a definition of disability has become a somewhat problematic issue due to the lack of consensus among the different legal institutions and Member States, which translates into high legal uncertainty.⁷ Disability is a multifaceted phenomenon that could have implications for many areas of law, albeit we are referring in this case to the field of discrimination, and thus legal actors seem reluctant to introduce a formal definition. However, the CJEU has essentially limited itself to defining the characteristics of disability, in order to differentiate it from other situation related with health condition.

Along the way led by the CJEU to specify what should be understood as disability, it is important to point out the role of the International Convention on the Rights of Persons with Disabilities (CRPD). This is a binding legal international treaty, adopted in 2006, which made a shift in the perspective of the welfare treatment of people with disabilities, followed by the replacement of the traditional medical model with the social model of disability. Briefly, the medical model that has been the long-standing understating of disability considers it entirely from an individual point of view of those who suffer from it, and hence, disability for the medical model is the result of the physical, mental, sensory or psychological impairments that a person suffers from. On the contrary, the social model refuses to assume that disability is a medical problem, and draws attention to the context, the environment and the society. Disability is seen as a social consequence, a result of a social organization unable to develop effective structures to ensure the inclusion of all its members.

At the outset, the EUCJ provided a narrow definition of disability that has considerably limited the possibilities of people with health problems to be protected by the non-discrimination right. In case C-13/05, *Chacón Navas*, 11 July 2006, the CJEU was asked if a dismissal of an employee that had been absent from work due to sickness was covered by the Framework Directive. The EUCJ rejected it, and merely stated that disability could not be assimilated to illness or disease, due to the fact that this last only hindered the abilities and capacities for

⁶ C. 56 *Chacón Navas*: “However, it does not follow from this that the scope of Directive 2000/78 should be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof”.

⁷ Favalli S., Ferri, D. (2016) Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints – European Public Law, vol. 22, 3, 2016, p. 4 [online version].

a short period of time. Hence, disability is said to be “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”. Notwithstanding, this judgement seems to forget mention two relevant facts. On the one hand, that the disease is a very heterogeneous and diverse reality; on the other, that there is a causal relationship between the disease and its consequence, the disability.⁸ The result was an outdated,⁹ and deficient legal regime from the perspective of the application of the substantive equality.¹⁰

At a later stage, the CJEU approached a social model of disability, allowing a more sensitive perspective to the inclusion difficulties that people with health problems could face. Had not been the EU become a party of the CRPD, this evolution would not have been possible. The definition of the latter treaty on disability is broader due to the social model impact. Article 1 of the CRPD states that “persons with disabilities are those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full effective participation in society on an equal basis with others”.

In cases C-335/11 and C-337/11, *Hk Danmark*, 11 April 2013, the CJEU recognizes that under some circumstances, an illness can be considered a disability in terms of the Framework Directive. In doing so, the temporal aspect of the impairment became paramount,¹¹ and the ECJ concludes: “the concept of ‘disability’ in Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.” This decision-making has been shouldered in other succeeding cases;¹² however, as in section §III will be explained, its

⁸ Cabeza Pereiro, J. (2013) La discriminación por discapacidad: el caso Chacón Navas – Revista del Ministerio de Empleo y Seguridad Social: Revista del Ministerio de Trabajo, Migraciones y Seguridad Social, 102, p. 304.

⁹ Favalli, S., Ferri, D. (2016) Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle? – European Journal of Health Law, vol. 23, 1, p. 22.

¹⁰ Waddington, L. (2007) Court of Justice: Case C-13/05, Chacón Navas v. Eurest Colectividades SA – Common market law review, vol. 44, 2, p. 497.

¹¹ López Álvarez, M. J. (2018) A vueltas con la calificación del despido por enfermedad – Revista española de derecho del trabajo, 209, [online version].

¹² See C-36312, *Z vs A*, 18 March 2014; C-354/13, *Fago d Arbejde FOA*, 18 December 2014;

interpretation, which was expected to be more ambitious, dragged remains of the social model.¹³

The final relevant case is C-395/15, *Daouidi*, 26 May 2019. The factual account stated a work accident, which led to a situation of sick leave due to temporary incapacity. After a few weeks, the company dismissed the worker based on disciplinary reasons for not meeting expectations, although he had been enjoying a sick absence paid leave until that moment. For the CJEU, Framework Directive should be interpreted in the sense that the fact of being in a situation of temporary incapacity can, but does not necessarily imply, the limitation must be lasting. Documents and certificates referring to the status of the person were studied in order to make a decision and assess whether that limited capacity would be lasting or not. Based on these indications, the National Court classified this dismissal as discriminatory due to disability, and the company made its decision on the assumption that the worker's temporary disability was going to be lasting.

2.2. State of the art: requirements for assessing disability

The EU legal framework against discrimination, influenced by the international one, represented by the CRPD, does not provide for a definition on disability. Both handle an open-ended and evolving concept,¹⁴ based on the relation between individual impairment, social environment, and integration difficulties. The lack of a formal definition means that its content depends on the meaning given to each of its terms, resulting in a concept that fluctuates depending on the context. However, regardless of its strengths and weakness, its relational concept has expanded the possibilities of anti-discrimination protection for people with health problems, compared to the first definition that was only based on individual deficiencies.

To-date, considering the jurisprudence of the CJEU, a situation of disability can be acknowledged on the basis of the following requirements:

and a comment on Waddington L. (2015) *Saying All the Right Things and Still Getting It Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law* – *Maastricht Journal of European and Comparative Law*, 22, 4.

¹³ *Ibid.*, p. 588.

¹⁴ Favalli S., Ferri, D. (2016) *Tracing the Boundaries between Disability and Sickness in the European Union*, cit., p. 13; Grue, J. (2019) *Inclusive Marginalisation? A Critical Analysis of the Concept of Disability, Its Framings and Their Implications in the United Nations Convention on the Rights of Persons with Disabilities* – *Nordic Journal of Human Rights*, vol. 1, 37, p. 8.

(i) To be the result from physical, mental, sensorial or psychological impairments, as the CRPD mentions. At first, the CJEU did not include sensory disability, but with this definition we can say that all deficiencies are included.¹⁵ CJEU in *HK Denmark* defined disability as “a limitation which results from physical, mental or psychological injuries (...)”. In any event, the use of the mentioned adjectives – physical, mental, sensorial, or psychological – indicates that the origin of the impairment has to be biomedical.¹⁶ Disability does not reach any type of limitation of deficiency that a person may experience outside their health or their physiognomy. In point of fact, health condition is a core element in the understanding of disability provided by the International Classification of Functioning, Disability and Health (ICF),¹⁷ the World Health Organization classification whose aim is to provide a standardized and universal language for describing human body functioning and disability. Throughout the ICF, the idea that disability is conceived to explain the functioning of a person and the interaction between health states (diseases, disorders, injuries, traumas, etc.) and the contextual factors is repeated several times.

(ii) The existence of long-term impairments of uncertain duration. Although the inclusion of this temporal requirement excludes short temporal impairments from the scope of the Framework Directive, noteworthy is the reinterpretation made by the CJEU in *HK Denmark* and *Daouidi*. According to them, the Directive provides protection to those who suffer from an impairment of a long-term or uncertain duration, because their situation bears similarities with the hinder over a long period of time that characterizes disability.

Practical problems may arise from the concreteness of the parameters for identifying the long-term impairment. For example, in the United Kingdom, the Equality Act 2010 has opted for a fixed criterion and has set that long-term means twelve months at least. At the same time, it can be complex to determine what evidence must be provided to establish long duration, or whether the subjective character of the discriminating agent is sufficient.¹⁸

¹⁵ Iturri Gárate, J. C. (2021) Concepto jurídico de discapacidad – Anales de derecho y discapacidad, 6, p. 9.

¹⁶ Barnes C., Mercer G. (2003) Disability, Polity Press, UK, p. 67.

¹⁷ Available online: <https://iris.who.int/bitstream/handle/10665/42407/9241545429.pdf?sequence=1>

¹⁸ Beltrán de Heredia Ruiz, I. (2017) La enfermedad o dolencia de larga duración como supuesto de discapacidad: doctrina del TJUE –Trabajo y derecho: nueva revista de actualidad y relaciones laborales, Extra 6.

Notwithstanding, the main concern related to this issue is the onus to differentiate between a long-term limitation or a long-term impairment,¹⁹ which better reflects disability according to the social model. For some authors, this requirement seems to be strengthened by the fact that the impairments themselves must have a long or uncertain duration, over and above any limiting consequences it may have.²⁰ However, an excessive focus on the duration of impairments at the expense of their limitation effects could be criticized. From the social model point of view, perhaps it would be more accurate to focus not only on impairments per se but also to be aware on their limiting consequences for the purpose of assessing disability.

(iii) There is an interaction with social barriers. This third element is the core of the definition of disability according to the social model paradigm. Through its inclusion, disability goes beyond the individual sphere to become a social problem, and society is responsible for making necessary modifications to achieve effective inclusiveness. As can be inferred from the word interaction, there need to be two related elements: on one side, the impairment of the person, on the other, the society. Both internal and external elements will be essential elements for disability to exist.²¹ Society needs to promote universal design – design and composition of an environment so that it can be accessed, understood and used to the greatest extent possible by all people regardless of their age, size, ability or disability, and accessibility, because they enable people with disabilities to have access to goods, services, benefits (Article 9 CRPD).

Under no circumstances is the person suffering from impairments responsible for their limitation and for the barriers and hurdles that could be found in society. This is why this recent approach to disability that draws attention from the society where a disabled person is said to be the keystone on the recognition of their freedoms and rights,²² and to give them a citizenship status, thanks to the objectives and values the society should have.

¹⁹ Ferri, D. (2019) *Daouidi v Bootes Plus SL and the Concept of ‘Disability’ in EU Anti-Discrimination Law* – European Labour Law Journal, vol. 10, 1, pp. 77–79.

²⁰ Broderick, A., Waddington, L. (2018) *Combatting disability discrimination and realising equality: a comparison of the UN CRPD and EU equality and non-discrimination law*, Publications office of the EU, p. 58.

²¹ Kazou, K. (2019) *Analysing the definition of disability in the UN convention on the rights of persons with disabilities: is it really based on a ‘social model’ approach?* – International Journal of Mental Health and Capacity Law, 23, p. 38.

²² Crow, L. (1996) *Including All of Our Lives: Renewing the social model of disability* – Encounters with Strangers: Feminism and Disability, Women’s Press, London.

(iv) That a person's participation in professional life is hindered. As it has been already mentioned, the Framework Directive on Equality has a limited scope of application, in comparison with the other directives that make up European anti-discrimination law. As can be deduced from its title, and as it is developed in Article 3, its scope is restricted to the field of employment and occupation: access to employment, selection criteria, recruitment, promotion criteria, working conditions, pays and dismissals. The CJEU in case *Z vs. A* has made a restrictive interpretation, and pointed out that in the notion of disability enshrined in the Directive, the impairment must limit professional development in a direct way.²³ Consequently, according to the CJEU's decision in that case, the situation of women without uterus could be covered by the CRPD but, as long as it does not directly affect their ability to work, would not be covered by the Framework Directive.

In other news, CJEU explained that the loss of working capacity does not have to be absolute, and a mere capacity reduction of working capacity will be sufficient in terms of assessing disability. However, it is also difficult to establish how a reduction in capacity would be measured. Faced with this difficulty, one can resort to making a comparison between the development that is considered normal for a subject at an earlier point in time and that which results after the limitation.

(v) That there have to be equal conditions with other workers. One of the main criticism that scholars have made of the EU's concept of non-discriminatory law is the ever-present need to find a comparator when assessing a discrimination.²⁴ That is, what matters is not so much the negative consequences that may arise from a situation, but the very fact that they are different from the others. There are many reasons that can be considered to explain the practical disadvantages of its use, and we refer to an article for an in-depth study.²⁵

In the case of disability, the importance of the comparator is even more evident since it is part of its core elements. However, it has been argued, the comparator does not necessarily have to be adequate and has been found to be biased because it is used to refer to a socially dominant group, usually male,

²³ Waddington, L. (2015) *Saying All the Right Things and Still Getting It Wrong*, cit., pp. 588–589.

²⁴ Bolger M., Bruton, C., Cliona, K. (2012) *Employment Equality Law*, Round Hall Thomson Reuters, Dublin, Ireland, 2012; Fredman, S. (2016) *Substantive equality revisited* – *International Journal of Constitutional Law*, vol. 14; Schiek, D. (2016) *Revisiting intersectionality for EU Anti-Discrimination Law in an economic crisis – a critical legal studies perspective* – *Sociologia del Diritto*, vol. 27, 2.

²⁵ Fredman, F. (2016), cit.

white, heterosexual, and with a non-abled body.²⁶ Despite this, we wondered whether it is possible to define what full participation is, or when the participation in professional life is done on equal basis with others. Given the lack of any consensus parameters, a solution adopted by the stakeholders is to measure their development compared with what is considered “normal”.²⁷

(vi) That it entails a limitation. Defining a limitation is not an easy task. As a proof of its ambiguity, the CDPR does not even refer to it and its only in the case law of the CJEU where the wording “limitation” is mentioned. Nonetheless, following academics that have studied disability from a social model point of view, and in a very summarized way, it could be said that a limitation is a consequence of an impairment when faced with social barriers, and those altogether give rise to disability.²⁸ A limitation may arise because a person cannot develop capabilities due to weaknesses in the environment, which generates disability. At this moment, the limitation has to be directly tied to the impairment, as the CJEU has dictated on their cases as *FOA* or *Z vs. A*. Nevertheless, one of the demands to be studied on the pages below is to attach importance to the limitations rather than to the impairments.

III. Time to broaden the scope of the European non-discrimination perspective on disability

3.1. Working with an illness

Suffering from an illness throughout life is a contingency that many people have to deal with. A person in good health can easily function in society and perform tasks of everyday life. But an illness is a circumstance that affects people’s state of health and can paralyze or slow their vital development. Despite the fact there is no legal definition of what an illness is or when a worker can be defined as a sick worker, it is generally accepted that any condition on the state of health of a person can have negative consequences for their work performance. Hence, many social security systems consider illness as a contingency to be protected; and also, the labor legislation on prevention of occupational hazards is concerned to prevent its occurrence.

However, as a matter of fact, sick workers are exposed to face complex issues in their workplace. Scholars have studied for ages the causes for their social

²⁶ *Ibid.*, pp. 717–719.

²⁷ Grue J. (2019) cit., pp. 11–12.

²⁸ Crow, L. (1996) cit.

stigma, prejudices, and stereotypes. Since the last few years, theories have placed the cause of the marginalization of sick people in their inability to be socially and economically productive.²⁹ With some frequency, illnesses keep sick workers away from work,³⁰ even if there are situations in which the job performance may continue just with slight adaptations. Furthermore, irrespective of the cause, medical leaves pose a risk on the continuation of the employment relationship.³¹

According to EUROFUND,³² workers suffering from a chronic disease are around 25%. Their working conditions face more struggles than fit workers and they are more likely to leave the market early, before the age of 60, although in most cases, this situation could be amended with a correct adaptation of the workplace. The results of the EUROFUND research allow us to affirm that sick workers, whether chronically ill or not, need greater protection. Protection against unfair attitudes, which in some cases could even be discriminatory, is practically non-existent within the EU framework.

3.2. The importance of the social model and its criticism

After the World War II, the medical model spread widely in Europe and its corresponding political organizations. The objective pursued by this model is to cure, repair, or eliminate the bodily defects that a person can have by promoting the health care system and social services. The social model is also known as the rehabilitative model or the care model. As a result, people with disabilities were marginalized and excluded from society, being considered as problematic, deficient, and useless, and separated them from citizenship involvement.

Gradually, since the 1970s, and particularly in the United Kingdom, academics changed their point of view and developed a new theory to explain disability: the social model. A starting point for disability studies had started, not only in the field of medicine, but also in any other area tied to human health concerns. The social model is a powerful instrument to expand human rights for all people, both with and without disabilities. Therefore, its ultimate consequence will be the effective eradication of social stereotypes that cause discrimination

²⁹ Nussbaum, M. C. (2011) *Creating Capabilities: The Human Development Approach*, Harvard University Press.

³⁰ Chimienti, M. (2023) *Unemployment Status Subsequent to Cancer Diagnosis and Therapies: A Systematic Review and Meta-Analysis – Cancers*, vol. 15, 5.

³¹ Fernández Martínez, S. (2015) *Enfermedad crónica y despido del trabajador: una perspectiva comparada – Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, vol. 3, 1.

³² Eurofound, *How to respond to chronic health problems in the workplace? – Publications Office of the European Union*, Luxembourg, 2019.

and social exclusion of people with disabilities. In the implementation of this latter social model, however the medical model is influencing the law and the legal operator's decisions. This is because its practical application offers tangible results in terms of healing and recovery of the health of a disabled person.³³

From an international perspective, legal standards have indeed embraced the social model, as the weight of the latter lies in its own influence. Although for some authors the CRPD has moved closer to the social model, which is a cause for celebration in terms of advancing the recognition of Human Rights, there are still some limitations that prevent it from being fully considered a system in compliance with the social model. In this case, it will be more accurate to use the term social-contextual model in contrast of the pure social model.³⁴ For both the CRPD and the CJEU, disability is not exclusively the result of social barriers because there must also be a concurrence of an impairment in the disabled person. The result of all this is that when assessing disability, a certain degree of severity is required for the deficiency, as is the case with its appearance (see FOA case) and its duration (see *Chacón Navas* case). Therefore, we can ask ourselves if the importance assigned to the characteristics of disability is an influence on the medical model that should be eliminated?

Since the social model approach began to become widespread, disabled people have improved their quality of life, among other reasons, because it has proven to be a useful tool in the fight against discrimination. However, reviewers of the social model have returned to the traditional theses of the medical model to correct the flaws that the social model had demonstrated on explaining disability totally.

As an example, let us read what the scholar T. Shakespeare has written: "The difference between my interactional approach and the social model is that while I acknowledge the importance of environments and contexts, including discrimination and prejudice, I do not simply define disability as the external disabling barriers or oppression. (...) The difference between my approach and what social modellists would describe as the medical model is that I do not explain disability solely in terms of impairment. My approach is non-reductionist, because

³³ de Asís Roig, R. (2013) Sobre el modelo social de la discapacidad : críticas y éxito – IDHBC – Papeles el tiempo de los derechos, p. 11.

³⁴ Ferri, D. (2022) The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination – European Constitutional Law Review, vol. 16, 2; Kazou, K. (2019), cit.; Waddington L. (2015) Saying All the Right Things and Still Getting It Wrong, cit., p. 588.

I accept that limitations are always experienced as an interplay of impairment with particular contexts.”³⁵

The social model has been revisited with new contributions that highlight the importance of impairments as a keystone on the understanding of disability. These impairments are defined from a biological perspective as a loss or weakness in the functioning on the human body. Thus, disability must require that there is always a functional impairment related to the body of a disabled person. Otherwise, one could reach the undesirable point that any difficulty in social development were covered under the umbrella of so-called disability.³⁶ From the point of view of the social model, what is claimed is that anyone would be treated in a less favorable manner on the basis of its impairment, but impairment has to deal with considerations of the medical model.

Aware of the risks that can arise from an exaggerated interpretation of disability under the social model standards, it is necessary to provide an adequate response that, from a legal point of view, is capable of effectively contending discrimination based on the ground of disability. That is to say, whoever alleges discrimination in a legal proceeding should not dedicate an exaggerated effort in providing evidence of their physical, mental, sensorial, or psychological impairment.³⁷ In doing so, they could leave aside the importance of assessing discrimination, which is the different and unfair treatment based on the interaction between their impairments and the society, which leads to disability. Nevertheless, the answer of this question will bring the reader to the starting point of this article: what is disability and why people with disabilities are discriminated?

At this point, it can be stated that the definition of disability should fit the social model, and at the same time it must amend the possible shortcomings it has, that have been already explained. Its ultimate goal must be effective in combating discrimination and stigmatization that people with disabilities face.

3.3. A brief review on future concerns: disability from the social model approach

European disability doctrine is stuck and no new rulings on this topic have been recently issued. The current definition of disability, that has been studied above, has brought up some advantages and disadvantages. It has been repeatedly said that its dynamic nature is very positive, but it can also be said that there are

³⁵ Shakespeare, T. (2016) *Disability Rights and Wrongs*, Routledge, New York, p. 56.

³⁶ Crow, L. (1996), cit.; Grue, J. (2019) cit.

³⁷ Cabeza Pereira, J. (2013), cit., p. 492.

some contradictions in the disability requirements given by the CJEU. If the aim of the EU legislation is to provide an updated response to the phenomenon of discrimination on the ground of disability and to adopt the guidelines outlined by the revisited social model, it is worth expressing some ideas on future concerns.

More than twenty years ago, the Equality Framework Directive came into force. Already then, its limited scope of application was subject to criticism.³⁸ Since 2008, a proposal of a Horizontal Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation is paralyzed on their legal procedure of approval. Therefore, the notion of disability for the purposes of EU anti-discrimination law is still limited today to the field of work and occupation. Furthermore, it can be argued that the CJEU makes a restrictive interpretation of the relation between the impairment and their limitation effects in the workplace. Considering the case *Z vs. A*, it is a fact that fertility problems of a worker are not directly related to their ability to perform their duties. Nevertheless, a general overview of the limitations of people with disabilities in the development of their day-to-day lives will find that indirectly, there is a relation between work and health conditions such as fertility.

The CJEU does not consider impairments themselves nor social barriers as sufficient evidence to prove disability, but rather it is their interaction that constitutes a limitation which hinders the full participation of a person concerned in professional life. However, the CJEU requests tend to be very restrictive as well when evaluating the degree of limitation. In case *FOA*, for example, the CJEU does not consider sufficient the obesity of a worker at stake and his dismissal as a limitation effect. From our point of view, and according the social model approach, the limitations a person with a disability could face can be of different nature, tangible or intangible.

Last but not least, it is worth making some references considering the requirements related to impairments. Any impairment is the necessary substrate for assessing disability. Disability “is the form of discrimination that acts specifically against people with, or who have had, impairment. This does not mean that impairment causes disability, but that is a precondition for that particular oppression”.³⁹ Once the impairment is occurs, its interaction with social barrier causes disability. However, when analyzing the severity and duration of impairments, the CJEU resolutions mention in several occasions the limitation of the capacity, and not the

³⁸ Waddington L., Bell, M. (2001), cit.

³⁹ Crow, L. (1996).

impairment itself. For instance, “for a limitation of the capacity to participate in professional life to fall within the concept of ‘disability’, it must be probable that it will last for a long time”⁴⁰, or “it must therefore be concluded that if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of ‘disability’”⁴¹. From our point of view, the intention of the CJEU has to be interpreted to strengthen the consequences of the limitation in the ability and working capacity of the person who suffers from it. Although the CJEU has stated that sickness and disability are two separated concepts,⁴² this way of understanding limitations, which undoubtedly derives from a particular interpretation of the social model, blurs the frontiers between sickness, chronic illness, and disability. Any health condition, regardless of its pathological characteristics such as its treatment and duration, could be considered disability when it has limitative effects on the capacity of the person for a long-period of uncertain time.⁴³ Nevertheless, this leads to difficult interpretative questions such as how limitation could be proven or measured.

IV. Conclusions

The social model of disability sheds new light in the definition of disability, causing changes in the legal application of the provisions assessing disability. The social model has been able to define disability as a consequence of involving individual pathologies and social structures. However, disability cannot be reduced to societal related aspects, and a proposed review of the social model reinforces the importance of the individual impairments.

The CJEU has made a definition on disability in order to determine the personal scope of application of the Equality Framework Directive, whose aim is to combat the discrimination on the grounds of disability, sexual orientation, religion or belief, and age in the workplace. Its decisions are strongly influenced by the CRPD, which embraces the social-contextual model approach. The structural elements that define disability are the following: (i) to be a result from physical, mental, sensorial, or psychological impairments; (ii) for a long time or uncertain

⁴⁰ *HK Denmark*, recital 41.

⁴¹ *Chacón Navas*, recital 46.

⁴² *Chacón Navas*, recital 44.

⁴³ Ferri, D. (2018) *Daoudi v Bootes*, pp. 77–79.

duration; (iii) that interact with social barriers; (iv) that hinders the participation of a person in professional life; (v) on equal basis with other workers; and consequently (v) entailing a limitation.

If the social model is imposed on the CJEU's doctrine, it is necessary to analyze the future concerns and shifts that can suffer its rulings. Basically, if disability is seen as the consequences of the interaction between impairment and social barriers, the limitative effect should be the core element when assessing disability. It would open the door to other health conditions to be covered under the concept of disability.

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Workplace Harassment in a Macedonian Legal Context: from a Concept of Protection Against Discrimination to a Concept of Protection of the Dignity of All Workers?

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Workplace harassment is a negative phenomenon that poses a threat to the integrity and dignity, as well as the occupational safety and health of workers. It particularly affects working women and their equal opportunities in the labor market, and as such it takes shape as sex-based and sexual harassment. In principle, the protection against workplace harassment depends on the concept and the legal approach in its regulation. While in certain legal systems (such as that of the USA) it is defined as discrimination (discrimination-based concept), in other legal systems (such as those of continental European countries) it is apprehended in a broader sense, not necessarily as discrimination (concept based on the protection of dignity). In North Macedonia's legislation, there is a blurred conceptual and legal approach to the regulation of workplace harassment. On the one hand, it is determined as discrimination, and on the other hand, as psychological and sexual harassment at the workplace, which precludes the existence of a discriminatory ground. Recent legislative tendencies are aimed at regulating workplace harassment as a concept independent of the existence or non-existence of discriminatory grounds, that is, motives. Hence, this article is aimed at contributing to a more comprehensive definition and understanding of the concept of workplace harassment in North Macedonia.

Keywords: *workplace harassment, discrimination, sex-based harassment, sexual harassment, mobbing*



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Introduction

Workplace harassment is a negative and harmful phenomenon which can affect all workers, irrespective of their employment status, type of work they perform, sectors in which they work (private or public, urban or rural) and the fact whether they are employed in the formal or informal economy.¹ It is mainly composed of conduct of non-physical nature, including different kinds of *psychological forms* (e.g. manipulating a person's reputation, isolating a person, slandering and ridiculing, devaluating rights and opinions, setting impossible working goals and deadlines, underutilizing talent, etc.) but also of *sexual forms* (e.g. all sorts of sexual assaults, blackmails, advances, comments, innuendos, etc.). However, it is sometimes connected to much more severe forms of *workplace violence* regardless of whether they occur in a form of a '*physical*' violence (for example: physical attacks, beating, kicking, slapping, stabbing, shooting, pushing, etc.) or non-physical or '*psychological*' violence (coercion, threat, verbal abuse – pointing fists, damaging or throwing objects at the victim, etc.) which could inflict gross and serious damage to the psychological integrity of the victim.²

Given the wide spectrum of negative and often overlapping behaviors and practices of workplace harassment and violence, any attempt to distinguish or treat these terms independently is a complex manipulation. However, despite such a setting, the first international instruments regulating violence and harassment in the world of work in an integrated manner were adopted only in 2019.³ ILO Convention No. 190 defines the term 'violence and harassment in the world of work' (which essentially encompasses two separate but functionally related terms) in the broadest sense, as a 'range of unacceptable behaviors and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.'⁴ Convention No. 190 also defines the term 'gender-based violence and harassment'. In this regard, the Convention is aimed at eliminating 'violence and harassment directed at persons

¹ International Labour Organization (2020a) Safe and Healthy Working Environments Free from Violence and Harassment. Geneva: ILO, p. 28.

² Chappell D., Di Martino V. (2006) Violence at work, Third edition. Geneva: International Labour Office, p. 10; International Labour Organization (2020b) Safe and Healthy Working Environments Free from Violence and Harassment: The Report at a Glance. Geneva: ILO, p. 3.

³ See: International Labour Organization (ILO) Convention No. 190 and Recommendation No. 206 on Eliminating Violence and Harassment in the World of Work.

⁴ ILO Violence and Harassment Convention, 2019 (No. 190), Art. 1, para. 1, subpara. (a).

because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment'.⁵

While the all-embracing notion 'violence and harassment', i.e. 'gender-based violence and harassment' in the world of work is of a more recent date, and is an expression of the inclusive, integrated and gender-responsive approach of the Convention No. 190, for many years at a comparative level, a number of different terms (e.g. psychological harassment, moral harassment, mobbing, bullying, etc.⁶), have been used, that are usually unified around the terms 'workplace harassment' and 'sexual harassment'. In some legislations, workplace harassment is viewed as a form of discrimination, while in others, discrimination may be subsumed under the notion of workplace harassment (Colombia), or sexual harassment may be considered as a manifestation of violence (Mexico). Some countries make a clear distinction between psychological harassment (mobbing) and other forms of workplace harassment and violence (Türkiye), or between work-related violence and violence and harassment more generally conceived (Denmark). Convention No. 190 combines the two regulatory approaches: the one that sees workplace harassment as a working environment challenge is intertwined with the other, which identifies workplace harassment as a discrimination.⁷

In principle, there are two doctrinal approaches on which the concept of workplace harassment is built. The first one (primarily represented in the US legal system) is based on the concept of perceiving workplace harassment, solely as *a form of discrimination*, while the second (primarily represented in EU law and continental European countries), although, qualifying workplace harassment (and particularly sexual harassment) as a form of discrimination is based on the concept of understanding workplace harassment as *a broader issue of protection of dignity irrespective of the existence or non-existence of discriminatory*

⁵ ILO Violence and Harassment Convention, 2019 (No. 190), Art. 1, para. 1, subpara. (b).

⁶ International Labour Organization (2020c) Policy Brief: ILO Violence and Harassment Convention No. 190 and Recommendation No. 206, p. 5.

⁷ International Labour Organization (2024) Preventing and Addressing Violence and Harassment in the World of Work through Occupational Safety and Health Measures. Geneva: International Labour Office, p. 50. Direct discrimination occurs when less favourable treatment is explicitly or implicitly based on one or more prohibited grounds. It includes sexual harassment and other forms of harassment. The Committee considers that without a clear definition and prohibition of both *quid pro quo* and hostile work environment sexual harassment, it remains doubtful whether the legislation effectively addresses all forms of sexual harassment (as a serious manifestation of sex discrimination and a violation of human rights). See: International Labour Organization (2012) Giving globalization a human face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, International Labour Conference, 101st Session. Geneva: International Labour Office, pp. 312, 330–331.

basis.⁸ *Human dignity* means that an individual or group feels self-respect and self-worth and is concerned with physical and psychological integrity and empowerment. It can be harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits.⁹ The term '*workplace dignity*', more concretely, may be defined as 'the intrinsic, unalienable, worth of everything in the workplace, which should be respected, protected and promoted'. On the one hand, it is about the intrinsic value of the workplace itself, as a physical or mental space where people come together to conduct work, or to exert physical and mental efforts constructing something, which may be physical as well as intangible, such as ideas or creativity.¹⁰ On the other hand, it is inextricably linked to the protection of the worker's moral integrity from workplace harassment. Protecting the dignity of the worker is an indispensable element of work culture¹¹ and it is aimed at achieving a safe working environment that is free from sexual harassment, harassment and any other act of gender-based violence.¹²

Macedonian legal system uses the concept of workplace harassment as an integrated concept (including sex-based harassment), first within the general regulations on labor relations and equality and non-discrimination, and then with the special regulation on protection against workplace harassment. Anyhow, the legal framework is still characterized by a series of conceptual ambiguities, obscurities and contradictions that refer to almost all the more significant issues related to workplace harassment, starting from the definition and prevention and protection to legal remedies and sanctions for perpetrators of workplace harassment.

1. The concept of workplace harassment in the United States versus European Union and European continental legal systems

While the *US concept* (i.e. workplace discrimination doctrine) is designed to protect against *discriminatory harassment* (primarily in the fields of racial

⁸ Friedman, G. S., Whitman, J. Q. (2003) The European Transformation of Harassment Law: Discrimination versus Dignity. – Columbia Journal of European Law, Vol. 9, No. 2, 241–274, p. 4.

⁹ Réaume, Denise G. (2003) Discrimination and Dignity. – Louisiana Law Review, Vol. 63, No. 3, 645–695, pp. 663, 667.

¹⁰ Bal, M. (2017) Dignity in the Workplace: New Theoretical Perspectives. Palgrave Macmillan, p. 74.

¹¹ Lubarda, B. (2004) Evropsko radno pravo. Podgorica: CID, p. 265.

¹² European Institute for Gender Equality, Glossary and thesaurus, https://eige.europa.eu/publications-resources/thesaurus/terms/1213?language_content_entity=en accessed May 8, 2024.

and sex-based harassment), *the concept of the EU and European continental law*, although containing an anti-discrimination component, generally develops on a broader scale and leans towards protection against *any form of workplace harassment (discriminatory and nondiscriminatory)* that applies to all workers, not just certain groups of workers (for example, members of minority groups or women).¹³

The difference between these two doctrinal approaches is that in the *US*, unless it is proved that the workplace harassment was motivated by a certain *discriminatory ground* (for example, race or gender), the victim will not be able to obtain adequate protection. Such an approach in the *US* has its roots in *American history* (since it stems from the fight against slavery and racial discrimination against African-American people, and particularly women) and the *structure of the labor market* (since the American labor market is mobile and flexible; it is based on the concept of ‘employment at will’, which assumes dynamic recruitment, promotion, and dismissal of workers who, in such circumstances, need protection against harassment, and especially against sexual harassment in the so-called ‘*quid pro quo*’ form in order to prevent practices in which the employer, i.e. the manager blackmails a female worker to provide him with sexual pleasures in exchange for being employed, promoted or to preserve her job).

Workplace harassment in the USA is not only unethical but also a clear violation of federal employment discrimination law under Title VII of the Civil Rights Act of 1964. This Title covers all workplaces with fifteen or more workers and prohibits employers from taking an adverse action against a worker on the basis of race, color, sex, national origin, or religion. Sex discrimination has been specifically covered by the statute since its inception, and the protections afforded by the statute have been interpreted in subsequent years to include both ‘hostile work environment’ and ‘*quid pro quo*’ forms of sexual harassment.¹⁴

¹³ Lerouge L., Hébert, L. C. (2013) The law of workplace harassment of the United States, France, and the European Union: comparative analysis after the adoption of France’s new sexual harassment law. – *Comparative Labor Law & Policy Journal*, Vol. 35, No. 1, 93–122, pp. 94, 97. In *US*, judgments finding no discrimination make no reference to dignity. See: Réaume, Denise G., op. cit., p. 658.

¹⁴ In 1980, the United States Equal Employment Opportunity Commission (EEOC) issued its non-binding Guidelines on Discrimination because of sex, which defines sexual harassment as: ‘unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature’, which commonly occur in two general forms: ‘*quid pro quo*’ (when submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, or submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual) and ‘hostile work environment’ (when such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive

Indeed, the Supreme Court has expressly adopted both concepts of discrimination.¹⁵ Sex discrimination and sexual harassment, then, are among the broadest and most comprehensive concepts of discrimination, including not only prohibitions against discriminatory tangible actions but environments that are hostile in nature as well. Title VII prohibits employers from engaging in sexual harassment or perpetrating a hostile work environment on the basis of sex. The problem is widespread, sometimes even crossing the line into sexual or physical assault.¹⁶

Compared to the US model, the *EU model, as well as the European continental model* for protection against workplace harassment (including sexual harassment), despite the fact it is nominally regulated in the context of anti-discrimination legislation (the four most important EU Equal Opportunities Directives define workplace harassment (including sexual harassment) as form of discrimination) are essentially developed through the doctrine of the protection of ‘*dignity*’. The European legislator has never intended to deviate from the perception of these negative behaviors as a violation of the principle of women’s, i.e. peoples’ dignity. In their regulatory approach, the social partners at EU level are also supporting the perception of workplace harassment (including sexual harassment) as an integral part of the concept of protection of dignity and integrity (in terms of health and safety at work) of workers.¹⁷ It means that the concept of protection against workplace harassment in Continental Europe refers to protec-

working environment). Hébert, L. C. (1995) Sexual harassment is gender harassment. – University of Kansas Law Review. Vol. 43. 565–607.

¹⁵ In its landmark decision in *Meritor Savings Bank v. Vinson* 477 US 57 (1986), the Supreme Court first recognized sexual harassment as a form of sex discrimination under Title VII of the Civil Rights Act of 1964. In its groundbreaking opinion, the US Supreme Court recognized sexual harassment as a form of sex discrimination under Title VII, noting, “without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminates’ on the basis of sex”. See: Jones, T., (2020) *Harassment Because of Sex* – McGinley, A. C., Buonocore Porter, N. (eds.) *Feminist Judgments: Rewritten Employment Discrimination Opinions*. Cambridge, New York: Cambridge University Press, 215–265, pp. 219–220.

¹⁶ Seiner, J. A., (2021) *Harassment and the Virtual Workplace*. – *The Virtual Workplace: Public Health, Efficiency, and Opportunity*. Cambridge University Press, 163–184, pp. 166–167, 172, 178.

¹⁷ This is evidenced by the Framework Agreements adopted by the European Social Partners, among which, of particular importance in the context of protection against harassment and sexual harassment in the workplace is the Framework Agreement on Harassment and Violence at Work of 2007. This Framework agreement was signed by the social partners: BUSINESSEUROPE, CEEP, UEAPME and the ETUC on 26 April 2007. The Framework Agreement, *inter alia*, provides a range of different forms of harassment and violence at work such as: physical, psychological and/or sexual; one-off or more systematic patterns; among colleagues, between superiors and subordinates or even by third parties such as clients, customers, patients or students; from minor cases of disrespect to more serious

tion against all forms of harassment (regardless of whether it is discriminatory or nondiscriminatory-based or motivated), and means that the worker should be protected from all unwelcome/unwanted conduct due to the very nature of such conduct, and not due to the motive of the harasser.

Although the term ‘unwelcome’ behavior is a reflection of the terminology used in US law, and the term ‘unwanted’ conduct derives from EU law, there is essentially *no significant difference* in the qualification of these terms. In the US, there is a wealth of jurisprudence in determining potential lines of distinction between the criterion of ‘unwelcomeness’ (which is sometimes deemed to exist even if the victim ‘voluntarily’ complies with certain behavior of a sexual nature)¹⁸ and what is coined as a ‘provocation’ by the victim.¹⁹ Compared to the term ‘unwelcome’ conduct applicable in US law, in defining workplace harassment (including sexual harassment), the EU law uses the similar term ‘unwanted’ conduct. Considering the *dilemma of the ‘subjective versus objective’ perception* of the sexual conduct, the term used in EU law is more in congruence with the victim’s ‘subjective’ view of the conduct, rather than with the more ‘general impression’ whether the conduct constitutes unwanted sexual harassment through the prism of the harasser.²⁰ What really matters in the EU law is the *effect of the conduct upon the victim* rather than examining the effect of equivalent conduct on a reasonable person or the motive of the perpetrator.²¹

2. Macedonian Legal Framework for Addressing Workplace Harassment

The issue of workplace harassment has been the subject of *gradual legal regulation* in North Macedonia for approximately 15 years. The chronology of the regulation of workplace harassment (including sex-based harassment) may be structured in *three phases*, in particular: first phase (2005–2009), second phase (2009–2013) and third phase (2013–present day). The *first phase* (2005–2009) started with the first attempt for more concrete recognition and regulation of

acts of harassment or violence, including criminal offences. See: Blanpain, R. (2014) European labour law. Kluwer Law International.

¹⁸ See: Meritor Savings Bank v. Vinson 477 US 57 (1986).

¹⁹ E.g. in McLean v. Satellite Technology Services, Inc. (1987) where a female employee regularly offered to engage in sexual acts with other employees and often lifted her skirt to show her supervisor that she was not wearing undergarments, a single attempt by her supervisor to hug and kiss her was held not to be sexual harassment. See: Cihon, P. J., Castagnera, J. O. (2011) Employment and labor law. South-Western Cengage Learning, p. 103.

²⁰ Lerouge L., Hébert, L. C., op. cit., p. 109.

²¹ Barnard, C. (2012) EU Employment Law. Oxford: Oxford University Press, p. 358.

workplace harassment in North Macedonia within the frames of the 2005 Labor Relations Law²² (hereinafter: LRL). Within this phase, *harassment and sexual harassment* were defined exclusively as *forms of discrimination, i.e. discriminatory harassment*. The *second phase* (2009–2013) covers the period of expansion of the meaning and context of harassment and results in amendments to the LRL from 2009 which established the term *psychological harassment – mobbing*, again defined as *discriminatory harassment*. The *third phase* (since 2013) marked the beginning of the *cross-cutting legislative approach to harassment*, under which harassment, on one hand, started to be regulated *independent of the existence of any prohibited discriminatory ground* (primarily through the enactment of the Law on Protection Against Workplace Harassment, hereinafter: LPAWH²³), while, on the other, it persisted as *a form of discrimination* (within the framework of the LRL), but also as a subject matter of the equality of treatment and non-discrimination regulations, such are the Law on Equal Opportunities of Women and Men of 2012 (hereinafter: LEOWM)²⁴ and the Law on Prevention and Protection Against Discrimination of 2020 (hereinafter: LPPAD).²⁵

In Macedonian legislation, the term ‘harassment’, generally appears in two forms: first, as *discrimination*, i.e. discrimination-based harassment and second, as *nondiscrimination-based harassment*, i.e. harassment at the workplace.²⁶ While the *former* is regulated by *one set of legislative acts (LRL, LEOWM and LPPAD)*, the *letter* is governed by the *LPAWH*, which contains an indicative list of behaviors and activities that are not considered harassment at the workplace and among which is discrimination.²⁷ This division is further reflected in the ‘*legal channels of protection against workplace harassment*’. Compared to the legal channel of protection envisaged in the *LRL* (which only provides rules regarding the shifting of the burden of proof to the employer²⁸ and protecting persons who have initiated proceedings or testified during a procedure for legal protection against psychological harassment²⁹), the *LPAWH*, establishes a more comprehensive system for reporting and resolving disputes for protection against harassment, which, despite numerous weaknesses, has emerged as the main and

²² Official Gazette of the Republic of Macedonia No. 62/05.

²³ Official Gazette of the Republic of Macedonia No. 79/2013.

²⁴ Official Gazette of the Republic of Macedonia No. 6/2012.

²⁵ Official Gazette of the Republic of Macedonia No. 258/2020.

²⁶ See: Каламатиев, Т. (2013) Антидискриминацијата и психолошкото вознемирување (мобинг) во позитивното право на Република Македонија. *Droit du Travail. Première Journée d'étude de droit compare franco macédonien*, 139–150, pp. 13, 15.

²⁷ See: LPAWH, art. 8, para. 1, point 1.

²⁸ LRL, art. 11, para. 2.

²⁹ LRL, art. 11, para. 3.

most important legal channel. Anyway, despite the substantial and procedural differences between the two legal regimes for regulating harassment, *in practice, the line between them is very thin, or virtually inexistent*. This is so because in the procedures for court redress against workplace harassment, the courts are tolerating claims based both on LPAWH and LRL, and in the judgments passed they rarely *belabor the existence or inexistence of discrimination in the context of the existence or inexistence of workplace harassment*.³⁰

Gender-based harassment in the Republic of North Macedonia is not a separate and distinct concept of harassment, but it is regulated and developed within the broader term ‘harassment’ at work, which includes sexual harassment. In the last few years, the first more significant researches aimed at identifying sexual violence and harassment, including sexual harassment, have been conducted.³¹ However, despite the slow but gradual development of the regulation of workplace violence and harassment (including gender-based violence and harassment) and the raising of awareness of these phenomena, the impression is that they are still not sufficiently recognized by people in the country.

3. Types of Workplace Harassment in the Context of Macedonian Labor Legislation

There are several different types of workplace harassment laid down in Macedonian labor legislation. Principally, ‘harassment’ in North Macedonia, on the one hand, can be divided into ‘harassment related to any discriminatory ground’ laid down in LRL, such as ‘racial or ethnic origin, color of skin, gender, age, health or disability, religious, political or other conviction, membership in trade unions, national or social background, family status, financial standing,

³⁰ See: Judgments of the Appellate Court in Bitola (dated 09.10.2019, ROZH no.-834/13; dated 23.04.2020, ROZH no.-604-19); Judgments of the Appellate Court in Skopje (dated 15.10.2014, ROZH no.-219/14; dated 15.09.2016, ROZH no.-316/15; dated 10.10.2013, ROZH no.-834/13; dated 24.10.2013, ROZH no.-775/13).

³¹ According to a research conducted as part of a Study on the scope of various forms of sexual violence in the Republic of Macedonia from 2017, the following forms of sexual harassment in the workplace were recognized: abuse of position (demonstration of power); sexual blackmail (job loss); comments and jokes with sexual connotations; unwanted touches; issues of intimate life; sexually connoted proposals; exposure to pornographic material; employment based on physiognomy; comparison of physiognomy between colleagues with a detailed description; ambiguous comments, etc. See: Димушевска, Е., Трајковска, Ј. (2017) Студија на опсег на различните форми на Сексуално насилство во Р. Македонија. Скопје: Национална мрежа против насилство врз жените и семејно насилство – Глас против насилство, pp. 41–43.

sexual orientation or other personal circumstances'³², 'sex-based harassment as harassment related to sex', 'sexual harassment' and 'psychological harassment – mobbing' (as *forms of discriminatory harassment*), but on the other hand, it can also be encompassed by the concept of 'harassment at the workplace' (which can appear *in the forms of psychological and sexual harassment, regardless of the existence, or inexistence of a discriminatory basis, i.e. motive*).

While in the *first case*, 'sex-based harassment as harassment related to sex' is primarily regulated by the *LRL* and *LPPAD* in the *second case*, it is subject to regulation by the *LPAWH*. Its definition *implicitly* emanates from the *general definition of the term 'harassment' within the LRL*, which refers to 'any unwanted behavior caused by any of the grounds of discrimination (including sex) that aims at or constitutes violation of the dignity of the job candidate or the employee, and which causes fear or creates hostile, humiliating or offensive behavior'.³³

The term 'sexual harassment' is defined in an *identical manner, both in the LRL and the LPAWH*. This term is defined by the abovementioned laws as 'any verbal, non-verbal or physical behavior of a sexual nature that aims at or constitutes violation of the dignity of the job candidate or worker, and which causes fear or creates hostile, humiliating or offensive behavior'.³⁴ On the one hand, while the *LRL* and *LPPAD* are restricted to harassment which is motivated by a discriminatory ground, in the *LPAWH*, it is perceived as excluding discriminatory-based harassment, although, sexual harassment *per se* is a form of discriminatory-based harassment. On the other hand, it is also important to mention that both the first and second set of regulations, regulate sexual harassment, only in its 'hostile work environment' form, *but not in its 'quid pro quo' form*. So, Macedonian labour legislation defines the term sexual harassment in a partial way, envisaging only the so-called 'hostile work environment', but not the equally important 'quid pro quo' form.³⁵ The *need for regulating* this form of harassment, i.e. sexual harassment in the context of employment and work in North Macedonia, is *continuously indicated by the ILO supervisory bodies*.³⁶

³² *LRL*, art. 6, para. 1.

³³ *LRL*, art. 9, para. 3.

³⁴ *LRL*, art. 9, para. 4 and *LPAWH*, art. 5, para. 2.

³⁵ The 'quid pro quo' form of sexual harassment in North Macedonia, is implicitly regulated under criminal law as a crime against sexual freedom and sexual morality, that is, as sexual assault by position abuse. See: Association for emancipation, solidarity and equality of women of RM (2011) *Violence over women at the workplace (psychological harassment and sexual harassment)*, Skopje, pp. 49–50.

³⁶ In the last 10 years, the ILO CEACR has sent several Observations and Direct Requests to the Government of North Macedonia on the alignment of the national regulations with international standards on equality and non-discrimination. In the most recent Observation

Compared to Directive 2006/54/EC, i.e. the Gender Recast Directive (Article 2, paragraph 1, d) and Convention No. 190 (Article 1), the *omission of the qualification of sexual harassment as 'unwanted/unacceptable'* behavior, is also evident. The definition provided in Article 1.1(a) of the Convention (No. 190) *does not include intent as one of the constitutive elements*, thus focusing on the unacceptability of the conduct, practices or threats, and on their effect on victims.³⁷ In this regard, it is worth mentioning that within the framework of the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the CEACR has already pointed out that the lack of intent or the existence of intent should not be relevant in harassment issues.³⁸ But, these are not the only ambiguities.

The major ambiguity comes with the introduction of the term '*psychological harassment – mobbing*', whose intention was to protect workers against any kind of psychological harassment at the workplace, regardless of whether such harassment is caused by a specific discriminatory ground or by arbitrary personal intolerance and dislike, but it was defined as a *form of discrimination*. As a consequence, *there are currently two different definitions of the same concept psychological harassment – mobbing*. According to *LLR* mobbing is 'any negative behavior of an individual or a group that is often recurring (at least within a period of six months) and amounts to a violation of the dignity, integrity, reputation and honor of the workers and cause fear or creates a hostile, degrading or offensive behavior, the ultimate goal of which may be termination of employment or resignation from work'.³⁹ On the other hand, according to *LPAWH*, psychological harassment at the workplace means 'any negative behavior of an individual or a group that is recurrent, continued and systematic and amounts to a violation of

dated 2019, in the context of the implementation of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the CEACR reiterated its request to the Government of North Macedonia to clarify the dilemma whether the Law on Equal Opportunities of Women and Men includes the two forms of sexual harassment in the workplace, i.e. '*quid pro quo*' and 'hostile work environment'. Furthermore, the CEACR, in the Direct Request dated 2020, once again requested from the Government of North Macedonia to submit information concerning: (i) the measures adopted by the labour inspectorate to prevent and address sexual harassment; (ii) the number of complaints filed and of cases detected; and (iii) the remedies available, and the sanctions imposed. According to art. 4, point 21 of the Draft Law on Gender Equality of 2021 the term 'discrimination' includes 'harassment and sexual harassment'.

³⁷ International Labour Organization (2024) Preventing and Addressing Violence and Harassment in the World of Work..., p. 5.

³⁸ International Labour Organization (2021) Violence and harassment in the world of work: A guide on Convention No. 190 and Recommendation No. 206. Geneva: International Labour Office, p. 10.

³⁹ LRL, art. 9–a, para. 3.

the dignity, integrity, reputation and honor of the worker and causes fear or creates discomfort or degradation, the ultimate goal of which may be violation of physical or mental health, compromising the professional future of the worker, termination of employment or resignation from work'.⁴⁰

One could note several substantial differences in the definitions of psychological harassment. Firstly, it is evident that, *as opposed to LRL, LPAWH does not use the term 'mobbing'* to complement the term 'psychological harassment at the workplace', despite the fact that both laws regulate an identical phenomenon. Furthermore, the definition of psychological harassment in LPAWH is also characterized by *three substantial differences compared to the one in LRL*. The *first* refers to the *period of time* within which the negative behavior is recurring, that is necessary to qualify such behavior as psychological harassment (where *LRL* provides for a period of *at least six months*,⁴¹ *LPAWH* notes that should be *recurring continually and systematically*,⁴² without specifying a period of time). Macedonian case law usually inclines to the qualification laid down in *LRL*, under which the prerequisite for the existence of psychological harassment is that the plaintiff suffered psychological harassment for a period of at least six months.⁴³ *Argumentum a contrario*, the chances of a one-off negative behavior violating the dignity, integrity, reputation and honor of the worker being qualified as psychological harassment, notwithstanding the extent of the adverse effects it has caused, are very slim, since neither the legal framework, nor the Macedonian jurisprudence recognize such behaviour as psychological harassment. The *second difference* relates to *potential consequences*, *i.e. the ultimate goal* of psychological harassment. While under *LRL* the ultimate goal *may* be termination of employment or resignation of the worker, under *LPAWH*, *in addition to* termination of employment or resignation, the ultimate goal of psychological harassment *may also* be causing harm to the physical or mental health and compromising the professional future of the worker. The jurisprudence, restrictively sticks with the consequences of psychological harassment laid down in *LRL*. In a number

⁴⁰ LPAWH, art. 5, para. 1.

⁴¹ LRL, art. 9-a, para. 1.

⁴² LPAWH, art. 5, para. 1.

⁴³ For instance, such position has been taken by the Appellate Court in Skopje, which, in its Judgment dated 08.11.2018 (ROZH-1422/18) states that 'the plaintiff has worked at the job from the time of appointment of the defendant as the new director of the institution until the time of filing the lawsuit at hand less than six months, which is the minimum requirement for establishing the existence of psychological harassment at the workplace'. In another case, the Appellate Court in Bitola, in its Judgment dated 03.10.2017 (ROZH-529/17), stated that 'the harassment activities should be very intensive at least once per week or should occur in the course of a longer period of time of at least six months'.

of litigations for protection against psychological harassment, the courts are implicitly making the qualification of certain behavior as psychological harassment contingent upon the prior decision on termination of employment of the plaintiff (worker).⁴⁴ The *third difference* concerns the *legal treatment of psychological harassment*, where *LPAWH does not equate* the term of psychological harassment to discrimination in any of its provisions. The indicative list of behaviors and activities that are not deemed to be harassment at the workplace in LPAWH is a subject of criticism by the expert community, *inter alia*, because it includes *individual enactments* adopted by the employer and regulating rights, obligations and responsibilities arising from employment, as well as *denying and preventing the exercise of rights* laid down in law, collective agreement and employment contract.⁴⁵ In view of the fact that in practice the violation of the workers' rights arising from employment is often causally related to the violation of their personal rights (health, dignity, integrity, reputation, and honor) as a result of a suffered workplace harassment, such cases included in the indicative list lead to unnecessary restrictions of the definition of harassment at the workplace and in the protection of the victims against harassment. The courts usually fall in such trap and in a large number of cases where the findings of psychological harassment subtly arise from specific individual enactment of the employer regulating rights, obligations, and responsibilities or denying and preventing the workers from exercising their rights arising from employment, the courts find that there are no elements of psychological harassment at the workplace present.⁴⁶

⁴⁴ See the following Judgments of the Appellate Court in Skopje: Judgment dated 10.10.2013 (ROZH no.-834/13); Judgment dated 15.10.2014 (ROZH no. 219/14); Judgment dated 15.09.2016 (ROZH no. 316/15).

⁴⁵ See: LPAWH, art. 8, para. 1, indents 1 and 2.

⁴⁶ Such examples may be found in the following cases: Judgment of the Appellate Court in Skopje (ROZH 219/14) where the plaintiff had a successful lawsuit to annul a decision on termination of employment for economic reasons, followed by *reduced salary, reassignment to a lower position, work tasks not in line with qualifications, ban on attending a joint New Year's celebration, withdrawal of an official telephone*; Judgment of the Appellate Court in Skopje (ROZH 316/15) where the employer imposed two consecutive fines against the worker; has not assign him any work tasks during the period January – February; Judgment of the Appellate Court in Skopje (ROZH 1588/17), where following the participation of the plaintiff (head of the Human Resources Department in the Basic Court Skopje 1 Skopje) in the protests of the so-called Colourful Revolution, the defendant (President of the Basic Court Skopje 1 Skopje) *unlawfully reassigned the plaintiff to perform other work tasks with a virtually unattainable performance rate of 400 cases per month, which was ascertained by the State Labour Inspectorate, following a monthly report on temporary incapacity for work due to illness the report was made public at a personal Facebook profile and attracted offensive comments, a motion for disciplinary procedure was filed against the plaintiff.*

Conclusion

Workplace harassment and discrimination often coexist. Overt forms of discrimination are principally prohibited in most countries around the world. Subtle, covert and unconscious manifestations of discrimination appear instead, particularly through workplace harassment, considering that they are not (or not always) strictly regulated as discrimination. Such a reality points to the ever greater importance of a collective and broad-based approach to addressing workplace harassment.⁴⁷

There is a risk that the line between discrimination and workplace harassment gets blurred, so it is important to comprehend the relationship between the two, even if some authors suggest that it is often challenging to answer the question “whether workplace harassment comes first and discrimination second, or *vice versa*”. Workplace harassment, just like discrimination, may be based on individual, institutional and structural grounds⁴⁸, and the two phenomena not only coexist but one can lead to the other. Another point raised on the interrelationship between the two relates to the fact that there is evidence that risk groups for workplace harassment among workers are those classified as having protected status. In other words, workplace harassment may disproportionately affect protected groups, and membership of more than one protected group increases the probability of being subjected to workplace harassment. Women, people with disabilities and minority men are disproportionately targeted by harassers at work without any clear link to a prohibited discriminatory ground. Recognition of a right to a work environment free from workplace harassment for all workers is important and responds to a need broader than the one that is currently filled by anti-discrimination laws.⁴⁹

Today, almost 150 countries have adopted national regulations addressing workplace harassment.⁵⁰ Depending on different approaches in different countries, normative responses directed against workplace harassment can be found in the regulations on equality and nondiscrimination, labor relations (including occupational safety and health), tort and criminal law. The legal approaches can also be classified in terms of whether they are inclined to the concept of treating

⁴⁷ International Labour Organization (2024) Preventing and Addressing Violence and Harassment in the World of Work..., p. 4.

⁴⁸ International Labour Organization (2024) Preventing and Addressing Violence and Harassment in the World of Work..., p. 16.

⁴⁹ Ibid., pp. 6, 16, 18.

⁵⁰ World Bank Group (2019) Compendium of International and National Legal Frameworks on Sexual Harassment in the Workplace: Volume III of V – Countries H-P, first edition. Washington: World Bank, p. x.

harassment, solely as a form of discrimination (which is predominant in the US) or to a combined concept which in addition to discrimination, emphasizes the aspect of protection of dignity and integrity (which is predominantly represented in the EU and the European countries in general). Protection based on discriminatory basis alone is contrary to the principle of every worker's right to dignity at work. This all-encompassing concept of dignity at work has been used as an umbrella concept to prevent and address discriminatory and nondiscriminatory workplace harassment.⁵¹

By adopting the first international labor standards (ILO Convention No. 190 and Recommendation No. 206 concerning the Elimination of Violence and Harassment in the World of Work) which envisage an integrated, inclusive and gender-responsive approach to regulating violence and harassment in the world of work, it seems that the conceptual differences in addressing workplace harassment are becoming less important. The most important thing is that everyone has the right to a world of work free from violence and harassment. By ratifying relevant international and regional instruments and aligning national legislation with EU law, North Macedonia has been shaping its legal framework for protection against violence and harassment at work, including gender-based violence and harassment, for more than 15 years now. The existing legal framework for workplace harassment in North Macedonia is characterized by several systemic weaknesses and shortcomings. Several of them are particularly significant. Firstly, the notion of 'harassment' in the Macedonian legal framework is diffused in several legal regulations, whereby the boundary between the treatment of harassment as discrimination or as a special form of negative conduct that does not have to be based on discriminatory ground is thin and unclear. Secondly, the term 'workplace harassment', does not encompass one-off conducts and practices, but only those that appear in a continuous and systematic pattern. At the same time, there is a collision between the two laws which define the psychological harassment – mobbing (LRL and LPAWH), where the former envisages the existence of continuity of at least six months, and the latter does not envisage any time frame. Thirdly, none of the current laws define sexual harassment in the '*quid pro quo*' form (thus, there is no protection of female candidates for employment or female workers, whose employment, promotion, reward or retention of employment is conditioned by providing sexual services to the employer, manager or supervisor). Fourthly, protection against workplace harassment does not cover a wide category of persons such as: persons in training – including interns and

⁵¹ International Labour Organization (2024) Preventing and Addressing Violence and Harassment in the World of Work..., pp. 16, 40.

apprentices, jobseekers, but also workers in the informal economy.⁵² In order to tackle and put an end to all forms of workplace harassment, clear and comprehensive legal provisions are needed.

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⁵² Каламатиев, Т., Ристовски, А., (2021) Нацрт-анализа за усогласеноста на македонското законодавство со Конвенцијата на Меѓународната организација на трудот за елиминирање на насилството и вознемирувањето во светот на работата, бр. 190, Скопје, 57–59.

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The Republic of Serbia's Approach to Legal Remedies for the Protection of the Right to Equality at Work

Ljubinka Kovačević*

Although the Labor Law regulating protection against discrimination in Serbia has been in effect for two decades, and the Law on Prohibition of Discrimination for 15 years, many challenges and problems related to protection against workplace discrimination remain. The procedures that provide urgent protection against discrimination primarily refer to filing complaints with the Commissioner for Protection of Equality, while in practice, it takes more than three years on average to obtain protection through court proceedings. The problem becomes even greater when we consider the difficulties in proving discrimination, as well as the ambiguous anti-discrimination law framework in place, since different laws introduce different discrimination proceedings, resulting in some overlap. Furthermore, although labor disputes can provide protection against workplace discrimination, their relationship with discrimination proceedings has not been directly regulated. This is also connected to the issues of the functions and the amount of compensatory damages available when workplace discrimination is proven. Along with these issues, the author will examine the issue of amicable resolution of workplace discrimination disputes, as well as the labor inspectorate's contribution to protection against workplace discrimination in the Republic of Serbia.

Keywords: *workplace discrimination; labor dispute; discrimination proceedings; compensation for damages; administrative protection*



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1. Introduction

Anti-discrimination legislation and labor legislation cannot prevent or remedy workplace discrimination on their own. Nonetheless, applicable legislation has an important role to play since adequate remedies can have a dissuasive effect on those who would violate the principles of equality and non-discrimination, in addition to serving to redress the wrong done to victims.¹ Such remedies are, therefore, crucial for upholding the rule of law. There are two essential requirements for effective implementation of the legislation on prevention of and protection against workplace discrimination: the right of victims to an effective legal remedy against the person who has violated the principles of equality and non-discrimination; and the existence of adequate mechanisms to ensure adequate levels of enforcement. When it comes to legal remedies for protection against workplace discrimination, the guarantee of the right to legal action requires the following: the establishment of mechanisms by means of which the relevant entity can protect the worker whose right has been violated; the right of that worker to initiate proceedings for violation of his or her rights, and the right of entities with a legitimate interest in ensuring respect for rights (e.g. trade unions and non-governmental organizations) to initiate, on behalf of the worker, a procedure for the protection of rights or to provide support to the worker in such a procedure.² In the Republic of Serbia, there are many ways to ensure the protection of workers, which implies many diverse approaches combining judicial protection (civil law, labor law, administrative law, misdemeanor law, or criminal law protection) and administrative protection with systems for the alternative resolution of disputes. The author examines the capacity of these legal remedies to provide everyone within the territory of the Republic of Serbia with the necessary protection against discrimination so that the right to equality can truly be exercised.

¹ Tobler, C. (2005) Remedies and Sanctions in EC Non-discrimination Law: Effective, Proportionate and Dissuasive National Sanctions and Remedies, with Particular Reference to Upper Limits on Compensation to Victims of Discrimination. Office for Official Publications of the European Communities, p. 5.

² Amparo Ballester Pastor, M. (2016) Reparation and Penalties in Discrimination Cases. Academy of European Law, p. 6.

2. Judicial protection against discrimination³

2.1. General remarks

In practice, it takes more than three years on average to obtain judicial civil protection against discrimination in the Republic of Serbia, which further diminishes the possible remedies of the imposed sanctions.⁴ This problem is exacerbated by the rather low number of initiated court proceedings for protection against discrimination: although Serbia does not have a centralized system for data collection on discrimination-related proceedings, it is estimated that there were around 150 such proceedings initiated in Serbian courts during the first eight years of the implementation of the Law on Prohibition of Discrimination (2009).⁵ This low figure can be explained by the difficulty of proving discrimination, as well as the ambiguous anti-discrimination legal framework provided, since different anti-discrimination laws introduce different discrimination proceedings, resulting in a degree of overlap. Furthermore, labor dispute proceedings (conducted according to the provisions of the Labor Law) can help to provide protection, although their relationship with discrimination proceedings has not been directly regulated.⁶ This presents a challenge for workers who feel discriminated against (in terms of having to decide what type of proceedings to initiate), as well as a challenge for the judges handling these cases, who have not been sensitized or trained to deal with this type of dispute. However, the main problem was that the notions of indirect discrimination, harassment, and sexual harassment, as well as the standard of reasonable accommodation, had to be clarified through case law. The same was true for proving indirect discrimination, particularly considering that up until only

³ A starting point for this section were the results of our earlier research presented in: Kovačević, Lj. (2023) Prevention and Protection against Workplace Discrimination in the Republic of Serbia. – *Revue de droit comparé du travail et de la sécurité sociale*, No. 4/2023, 250–255.

⁴ Krstić, I. (2021) Serbia – Country Report “Non-discrimination”: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78. Publications Office of the European Union, p. 70.

⁵ Reljanović, M. (2017) Studija o primeni Zakona o zabrani diskriminacije u Srbiji. Komitet pravnika za ljudska prava – YUCOM, p. 5. Court judgements on workplace discrimination are not registered as such. Instead, many are registered as labour dispute judgements or even as moral harassment dispute judgements (due to the lack of understanding of the differences between workplace discrimination and harassment). Court judgements in Serbia are made available to the public only if published by the courts on their websites or in case law databases (which can only be accessed by commercial users), or if required in accordance with the Law on Free Access to Information of Public Importance. Krstić, I. (2021) Serbia – Country report “Non-discrimination” ..., p. 65.

⁶ Strategy for Prevention and Protection against Discrimination from 2022 to 2030 (Official Gazette RS, No. 12/2022).

a few years ago, some judges thought that “personal characteristics were not an indispensable element of discrimination, which is why judgments to establish the existence of discrimination are sometimes passed, even when unequal treatment is not based on a personal characteristic”.⁷ Moreover, in some cases, no distinction is made between workplace discrimination and moral harassment at work, with cases of moral harassment being qualified as discrimination, even though the committed actions were unrelated to a worker’s personal characteristic(s).⁸ This approach was confirmed in the judgements of the Supreme Court of Cassation, which stated that “both mobbing and discrimination include the prohibited and unjust unequal treatment of a group or an individual whose rights are violated.”⁹ This means that, according to the Supreme Court of Cassation, the only relevant element of discrimination was the unequal treatment in relation to other persons in the same or similar situation. Fortunately, the Supreme Court has revised this view in recent years and now recognizes personal characteristics as an essential element of discrimination (at work).¹⁰

⁷ Krstić, I. (2018) *Zabrana diskriminacije u međunarodnom i domaćem pravu*. Pravni fakultet Univerziteta u Beogradu, p. 259.

⁸ Such was the case of a female employee who was allowed to return to work after the decision of the court to repeal her dismissal, only to find herself transferred to the master carpenter position in the department for manual and machine woodworking, upon signing an annex to the employment contract. The annex stipulated that, by order of the director, the employee would perform some of her duties outside the employer’s premises, if necessary. Upon her return to work, the employer demanded that she remove the nails from the pallets that were outside the woodworking area. When she refused, the employer dismissed her „anew,” explaining that by not executing the tasks, she disrupted the work process. So, the question became whether the amended employment contract meant that the employee was now obligated to perform any tasks, including tasks of unskilled workers that are unrelated to (manual or machine) woodworking, especially since this requirement was not made under extraordinary circumstances, where a temporary transfer to another job would be allowed, based on the unilateral decision (i.e. *ius variandi*) of the employer. The court concluded that the employer violated the dignity of the employee by requiring her to perform the work with a lower level of complexity (i.e. by failing to include her in the work process), asserting the following: “reintegration of a worker without an actual active involvement in the work process is the so-called “empty table mobbing,” i.e. a specific form of psychological abuse and harassment at work“ [Judgment of the Supreme Court of Cassation, Rev2, 321/12, of 27 June 2012, acc. to Popović, M. (2014) *Diskriminacija i mobing u sudskoj praksi*. Glosarijum, p. 70–72. Although the reasoning of the Court is acceptable, it cannot be accepted that the Court qualified this conduct as discriminatory harassment. Cf. Reljanović, M., Petrović, A. (2011) *Šikanozno vršenje prava, diskriminacija i zlostavljanje na radu – zakonska regulativa i praksa*. – Pravni zapisi, Vol. 2, No. 1, 186–196.

⁹ Ruling of the Supreme Court of Cassation, Rev2, 687/12, of 27 December 2012, acc. to Popović, M. Op. cit., p. 66.

¹⁰ Krstić, I. (2018), *Zabrana diskriminacije ...*, p. 259–260.

In disputes involving protection against workplace discrimination, judges have had to resolve various legal uncertainties brought about by ambiguous legal provisions.¹¹ For this reason, every court decision represents a significant contribution to the development of protection against discrimination. This is because these judgments serve as guidelines or templates for other judges in their decision-making, contribute to the shaping of institutes and principles that have not been clearly or sufficiently regulated, and, depending on the protection provided to victims of discrimination, encourage or discourage workers from seeking protection.¹²

2.2. Civil law protection against discrimination

2.2.1. Dilemma regarding the legal nature of workplace discrimination disputes

The Law on Prohibition of Discrimination¹³ introduces two mechanisms to protect victims. The first mechanism is based on proceedings before the Commissioner for the Protection of Equality, whereas the second mechanism relies on civil law protection against discrimination in courts, either through a lawsuit or on the basis of an interim measure. However, protection against discrimination on the grounds of disability, sex, and/or gender can be achieved both on the basis of the Law on Prohibition of Discrimination and special anti-discrimination laws. In practice, protection against disability-based discrimination is most often requested on the basis of the Law on the Prevention of Discrimination against Persons with Disabilities,¹⁴ whereas the Law on Prohibition of Discrimination is regularly used as a legal basis for protection against sex/gender-based discrimination, though this issue is regulated by the Law on Gender Equality.¹⁵ The Law on the Prevention of Discrimination against Persons with Disabilities, however, does

¹¹ Krstić, I. (2018), *Zabrana diskriminacije ...*, p. 258. The United Nations Committee on the Rights of Persons with Disabilities noted another problem, recommending that the Republic of Serbia take measures to ensure unhindered and non-discriminatory access to justice for persons with disabilities, including procedural adjustments for all, and access to civil proceedings for the deaf. Committee on the Rights of Persons with Disabilities (2016) Concluding Observations on the Initial Report of Serbia, 23 May 2016, CRPD/C/SRB/CO/1, para 24.

¹² Tasić, A. (2014) *Naknada nematerijalne štete u antidiskriminacionim parnicama: komentar sudske odluke*. – Zbornik radova Pravnog fakulteta u Nišu, No. 66, 295–306, p. 296.

¹³ Law on Prohibition of Discrimination (Official Gazette of the RS, No. 22/09 and 52/21).

¹⁴ Law on Prevention of Discrimination of Persons with Disabilities (Official Gazette of the RS, No. 33/06 and 13/16).

¹⁵ Krstić, I. (2021) Serbia – Country report “Non-discrimination”..., p. 63. Considering that the Law on Gender Equality (Official Gazette of the RS, No. 52/21) was only recently enacted, it has yet to be used as the basis for initiating court proceedings for protection

not allow for the burden of proof to be shifted to the prosecutor, nor does it allow trade unions or non-governmental organizations (NGOs) to initiate proceedings to protect against discrimination.

On the other hand, a jobseeker or an employee may initiate proceedings for compensatory damages before the court under the Labor Law.¹⁶ The dilemma here is whether a dispute between a worker who feels they have been discriminated against and their employer should be considered a labor dispute or a discrimination dispute. The applicable laws allow both legal qualifications,¹⁷ which makes it more complicated to properly classify disputes that may develop between the parties to the employment relationship in terms of the legal and factual issues arising in connection to acts of workplace discrimination and its consequences. This is because there is room for both qualifications, as the relationship between the Law on Prohibition of Discrimination (and other anti-discrimination laws) and other laws explicitly prohibiting discrimination (including the Labor Law) remains unresolved in the legal system. Such uncertainty is connected to the risk of violating the principle of legal certainty, as well as the unfair solutions implemented in practice. The jurisprudence of the courts classifies the dispute over the violation of employees' right to protection against discrimination as a labor dispute, or a kind of "technical subgroup of labor disputes," which may be problematic, given the differences between labor and discrimination disputes and the objectives and principles that drive or underpin them. This is evidenced in case law where the courts apply Labor Law provisions that allow the dispute against the decision of an employer who violated the rights of an employee to be filed within 60 days from the date of delivery of the decision. In accordance with this, courts will dismiss lawsuits filed by employees who feel they were discriminated against after the deadline prescribed by the Labor Law, even though the Law on Prohibition of Discrimination does not contain such a deadline.¹⁸

against discrimination; however, even for the preceding law (Law on Equality of Sexes), relevant case law regarding its implementation was lacking.

¹⁶ Labour Law (Official Gazette of the RS, No. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 113/17 and 95/18), Art. 23, para 1.

¹⁷ A labour dispute (individual) is a dispute between an employee and an employer over rights, obligations, and responsibilities arising from the employment relationship, one of which is the right to protection against discrimination, according to the Labour Law. On the other hand, a discrimination dispute stems from denying, threatening, or violating the right to protection against discrimination. This is always the subject of a discrimination dispute, regardless of the specific disagreement between the parties to the dispute, which is why a dispute over workplace discrimination can also be qualified as a discrimination dispute. Cf. Tasić, A. (2016) *Postupak u parnicama za zaštitu od diskriminacije*: PhD dissertation. University of Niš Faculty of Law, p. 167.

¹⁸ Reljanović, M. Op. cit., p. 7, 34. and 43.

Some authors, however, have a different view of the presented legal solutions and believe that *a person who feels they were discriminated against at work can freely choose whether to initiate a labor dispute or a discrimination proceeding*, and can initiate a discrimination proceeding even if the labor dispute has not yet been settled.¹⁹ This solution is acceptable if we consider the need to create conditions for everyone to exercise their right to be protected by the appropriate courts and other public authorities against all forms of discrimination.²⁰ The jurisprudence of the European Court of Human Rights concurs, affirming that when there are several legal remedies available to a victim of human rights violations, it is up to the individual who believes his or her right has been violated to decide which legal remedy to pursue.²¹

If an employee decides to seek protection in a labor dispute (for example, a dispute over discriminatory dismissal), it is important to consider the view of the court towards discrimination. Some authors believe that the preliminary question is whether discrimination exists in the case. One interpretation is that the court can resolve this preliminary issue within the labor dispute. However, this interpretation is problematic because, in Serbia, labor disputes are under the jurisdiction of the basic courts, while discrimination proceedings are decided by higher courts. This means that the basic court must declare that the legal matters in the jurisdiction of the higher court fall outside of its own jurisdiction and that this is an obstacle to deciding on the violation of the right to equality in labor disputes.²² Consequently, the basic court should, in a labor dispute, decide to terminate the proceedings until the final decision is reached in the discrimination dispute, where the main issue is whether discrimination exists in the case. However, this interpretation of this legal lacuna can be problematic, particularly because of reasons related to the principle of urgency in resolving labor disputes. This is because the termination of a labor dispute causes a delay in the proceedings, especially when the principle of urgency in resolving discrimination proceedings has not been actualized yet and proving discrimination is complicated.²³ Finally, in accordance with principle of legal certainty, it would be desirable if the legislator laid down the conditions under which the procedure for protection against

¹⁹ Acc. to: Krstić, I. (2021) Serbia – Country report 'Non-discrimination' ..., p. 59.

²⁰ Law on Prohibition of Discrimination, Art. 3, para 1.

²¹ Decision of the European Commission of Human Rights in Case Airey v. Ireland, of 9 October 1979 (Application No. 6289/73), para 23.

²² Tasić, A., Obradović, G. (2020) Posledice nezakonitog otkaza u slučaju diskriminatornog postupanja poslodavca. – Zbornik Pravnog fakulteta u Nišu, No. 89, 119–138, p. 129–130.

²³ Tasić, A., Obradović, G. Op. cit., p. 129–130.

workplace discrimination is carried out.²⁴ This is particularly important in cases when the deadline to initiate a labor dispute has expired and an employee can only obtain protection against workplace discrimination in a discrimination lawsuit. However, unlike in a labor dispute, an employee who feels that he or she was wrongfully dismissed cannot file a request for return to work (reinstatement) in a discrimination proceeding. This violates the unity of legal order and puts victims of discriminatory dismissal in an unfavorable position, which further underlines the necessity for direct regulation of the relationship between the Labor Law and the Law on Prohibition of Discrimination.²⁵

2.2.2. *Judicial protection based on anti-discrimination legislation*

Everyone who feels they have been discriminated against has the right to judicial protection against discrimination. Court proceedings may be initiated in the name and with the consent of such person by the Commissioner for the Protection of Equality, an organization that protects human rights or the rights of a group of people (including trade unions), or a voluntary examiner of discrimination (a so-called “tester”).²⁶ In this way, judicial protection is provided for discriminated persons who cannot bear the burden of costly and lengthy court proceedings, while active legitimation of the Commissioner for the Protection of Equality makes it possible to conduct so-called “strategic litigations,” aimed at protecting the public interest in the field of equality protection.²⁷ In practice, however, courts have mostly rejected lawsuits filed by human rights organiza-

²⁴ Tasić, A., Obradović, G. Op. cit., p. 130.

²⁵ Tasić, A., Obradović, G. Op. cit., p. 133–134.

²⁶ A *trade union* can represent employees – members of said union – in discrimination proceedings, but only if they are represented by an attorney who has passed the bar exam. On the other hand, *non-governmental organizations* may initiate judicial protection proceedings if their statutes state that they are engaged in the promotion and protection of human rights or the protection of certain vulnerable categories of the population. Such organizations can file lawsuits only with the prior written consent of employees who feel they have been discriminated against. However, if a case pertains to the discriminatory treatment of unspecified persons, consent is not required to initiate proceedings. In practice, non-governmental organizations most often file complaints with the Commissioner for the Protection of Equality, but some of them also initiate court proceedings. So far, the organizations who have been active the most have been those specializing in protection against discrimination on the grounds of sexual orientation, as well as those specializing in protection of the Roma people. Petrušić, N. (2018) *Praksa sudova u oblasti antidiskriminacije: Tri studije slučaja*. – Dvornik, S. (ed.) *Suzbijanje diskriminacije: Uloga pravosuđa*. Fondacija Heinrich Böll, 67–88, p. 68.

²⁷ Petrušić, N., Cvetković, M. (2019) *Granice građanskopravne odgovornosti poslodavca za diskriminatorne akte zaposlenih prema trećim licima*. – *Pravo i privreda*, No. 7–9, 602–616, p. 608.

tions. A major reason for this was the Law on Civil Procedure rule that only an attorney at law can act as a natural person's representative, which the courts misinterpreted as being obliged to dismiss all lawsuits filed by organizations that were not represented by an attorney.²⁸ After the Constitutional Court declared this provision unconstitutional, the circle of proxies expanded, with the provision that human rights organizations and trade unions may appear in court proceedings as interveners.

The legislator did not specify a timeframe for filing charges or initiating proceedings in discrimination cases, except for disputes where damages are claimed and the Law of Contracts and Torts prescribes the statute of limitations (three years from learning of the damages and the damaged, or five years from the time the damage occurred). All discrimination disputes are subject to review,²⁹ and interim measures may be instituted. Furthermore, the *principle of urgency* in court proceedings adds to the effectiveness of protection for victims of discrimination. Unfortunately, this principle has not been defined with regard to procedural deadlines and other quantitative coordinates (e.g. the first hearing deadline, the deadline for completing first instance proceedings, the maximum number of hearings that can take place during the main hearing in the first instance, etc.).³⁰ It should be noted that, given the nature and importance of the legal matter, discrimination proceedings often take an unreasonably long period of time.³¹ Finally, it should be noted that judges often encounter difficulties with the burden of proof rule, which shall be discussed later on in greater detail. In some cases, judges have trouble identifying the comparator group, as well as implementing the proportionality test, while some court buildings and courtrooms in Serbia are still inaccessible to persons with disabilities.³²

Civil law protection is achieved by filing the following lawsuits: an omissions lawsuit; a lawsuit to establish discrimination; a lawsuit to eliminate discrimination, and a lawsuit for compensatory damages caused by discrimination. Employees can also submit a request to publish the judgment, but only in conjunction with a previously specified request and only if the discriminatory act was

²⁸ Krstić, I. (2018) *Zabrana diskriminacije...*, p. 259.

²⁹ More precisely, this means that decisions in discrimination disputes can be made at three levels. When the third instance review before the Supreme Court of Cassation has been exhausted, there is still the possibility of filing a constitutional complaint with the Constitutional Court.

³⁰ Tasić, A., Obradović, G. *Op. cit.*, p. 125.

³¹ The Law on the Protection of the Right to Trial within a Reasonable Time (Official Gazette of RS, No. 40/15 and 92/23) prescribes instruments to expedite proceedings, and seeks to alleviate this problem, but its implementation has yet to yield the desired results.

³² Krstić, I. (2021) Serbia – Country report 'Non-discrimination' ..., p. 63–64.

performed in public.³³ Finally, the Law of Contracts and Torts allows for the filing of an *actio popularis*.³⁴ In the public interest, trade unions and non-governmental organizations can also file this request, and there is no requirement for a victim whom they should represent or support.³⁵ Contrary to this, the Commissioner for the Protection of Equality does not have the prerogative to file such a lawsuit, but can contribute to the protection of the public interest by initiating *strategic litigation*. This typically includes cases of widespread discrimination with good prospects for the adoption of the Commissioner's requests. Strategic litigation is initiated and conducted in the public interest, to ensure consistent and effective implementation of the principles of equality and non-discrimination, as well as to encourage victims of discrimination to initiate court proceedings.³⁶

Since its inception, the Commissioner's office has filed 20 strategic lawsuits, including one against a commercial bank, where an employee, on her first day back from maternity leave, was offered a lower-paying job, despite there being no objective reasons related to the process or organization of work (the new mother's duties were entrusted to her colleague – a mother of adult children). In this case, the Commissioner found indirect discrimination based on the gender, marital, and family status of the employee, taking into account the fact that in the prior three years, 24% of the total number of bank employees were transferred to lower-paying jobs upon their return from maternity leave, while 18 employees

³³ Vodinelić, V. V. (2012) Građanskopravna zaštita od diskriminacije. – Petrušić, N. (ed.), *Sudska građanskopravna zaštita od diskriminacije. Poverenik za zaštitu ravnopravnosti / Pravosudna akademija*, 220–240, p. 239. This is the case when, for example, a discriminatory job advertisement is posted in the media, and a verdict is then published in the same media outlet to allow for a legal reaction to discrimination in front of roughly the same circle of people who witnessed the discriminatory act. In addition, publicizing the verdict can sensitize the public on issues of discrimination, helping them to develop a proper understanding of certain illegal actions and properly distinguish between discrimination and other similar phenomena. Violation of the right to protection against discrimination alone is sufficient for the court to order the verdict's publication, regardless of whether a specific discriminatory act caused pain and fear among the workers.

³⁴ Law of Contract and Torts (Official Journal of the SFRY, No. 29/78, 39/85, 45/89 and 57/89, Official Journal of SRY, No. 31/93, Official Journal of SM, No. 1/03, and Official Gazette of the RS, No. 18/20), Art. 156, para. 1.

³⁵ Krstić, I. (2021) Serbia – Country report 'Non-discrimination' ..., p. 66.

³⁶ In order to initiate court proceedings in a case involving only one victim, it is necessary to obtain their consent. However, where a case cited alleged discrimination against two or more people, there was uncertainty as to whether consent was required to engage in strategic litigation. This was resolved in the decision of the Supreme Court of Cassation, which states that in circumstances of discrimination of a group of people, children, or Roma, the Commissioner does not need to acquire written consent. Krstić, I. (2021) Serbia – Country report 'Non-discrimination' ..., p. 67.

held positions at the bottom of the job hierarchy before using maternity leave, making it impossible to demote them to lower-paying jobs.³⁷ In light of all this, and considering the fact that discrimination against employees who decide to become mothers has broader social significance, the Commissioner decided to engage in strategic litigation.³⁸ The First Basic Court in Belgrade rejected the Commissioner's request,³⁹ and two years later, the Belgrade Court of Appeals rejected the Commissioner's appeal⁴⁰, finding that the transfer of the employee occurred for objective reasons (work process requirements). Upon review, the Supreme Court of Cassation rejected the Commissioner's request and upheld the decision of the Court of Appeals.⁴¹

2.2.3. Judicial protection based on labor legislation

There are several regimes of employment relationships in Serbian law, and they differ depending on the employer. The general regime covers private sector, where employees can achieve judicial protection against workplace discrimination via labor disputes. The lawsuit can be filed by an employee or a trade union representative if authorized by the employee (who has to be a union member). The deadline to initiate the proceedings is 60 days from the date of service of the employer's decision, or within 60 days upon learning of the violation of rights. In accordance with the provisions of the Law on Civil Procedure, specific rules apply to these lawsuits, reflected in the urgency of the court proceedings, as well as the court's ability to determine interim measures *ex officio*, to prevent violence, or to eliminate irreparable damage.⁴² On the other hand, the public sector is very diversified. Judicial protection of the rights of civil servants, as well as employees in autonomous provinces and local self-government units, can be achieved through administrative disputes, whereas for employees in public services and public enterprises, judicial protection can be achieved through labor disputes. The Labor Law facilitates the demonstration of discrimination by validating the rule that the defendant must prove that he or she had objective and justifiable reasons to treat the employee differently, providing that in the course of the procedure, the claimant made it plausible that discrimination took place. The Law on Prohibition of Discrimination and the Law on Gender Equality both contain rules

³⁷ Acc. to: Petrušić, N., Krstić, I., Marinković, T. (2016) Komentar Zakona o zabrani diskriminacije. Službeni glasnik, p. 60–61.

³⁸ Complaint of the Commissioner for the Protection of Equality No. 1272, of 12 September 2012.

³⁹ Ruling of the First Basic Court in Belgrade 73 P. No. 18254/12, of 17 September 2013.

⁴⁰ Ruling of the Court of Appeal in Belgrade Gz-2764/14, of 10 September 2014.

⁴¹ Ruling of the Supreme Court of Cassation, Rev 262/2015, of 26 March 2015.

⁴² Civil Procedure Law (Official Journal of the RS, No. 72/11, 49/13, 74/13, 55/14, 87/18, 18/20 and 10/2023), Art. 438–439.

on *shifting the burden of proof*, while the Law on Prevention of Discrimination against Persons with Disabilities does not recognize this procedural rule. These rules enable the implementation of the EU burden of proof standards, as they are primarily designed to protect workers who are discriminated against as the weaker party in court proceedings. Workers are considered the weaker party not only because they are the weaker (economically dependent and legally subordinated) party to the employment relationship, but also because they often lack access to information relevant to the evidentiary hearing.⁴³ In practice, there are numerous problems with shifting the burden of proof. The first is related to the fact that a large number of judges mistakenly believe that the rule on shifting the burden of proof “violates their impartiality, because they take sides during the proceedings,” which is why the rule is not applied properly in practice.⁴⁴ This means that the rules on the burden of proof in court decisions are only mentioned “decoratively,” that the arguments to convince the court that the discrimination was made probable are left out, and that the lawsuits are rejected because the plaintiff failed to prove discrimination (*sic!*).⁴⁵

Furthermore, it should be noted that Serbian courts have not yet established, let alone refined, the standards required to address the question of which indications an employee should cite or submit to demonstrate that an employer has violated the prohibition of discrimination. In other words, a precise answer to the following questions: ‘Who is proving what?’, and ‘To which degree of certainty?’ is still to be provided.⁴⁶ The solution to this dilemma appears to be based on indications that the reason for the problematic action of the employer is most likely related to some real or assumed, innate or acquired, personal characteristic(s) of the worker, because, at first glance, one cannot see a rational reason that certain actions are taken or certain acts adopted by the employer.⁴⁷ We believe that resolving these concerns would make it much easier to file lawsuits against employers and thus encourage workers to seek judicial protection against discrimination.

⁴³ Tasić, A. (2018) Teret dokazivanja u antidiskriminacionim parnicama na primeru odluke Vrhovnog kasacionog suda. – Zbornik radova Pravnog fakulteta u Nišu, No. 78, 325–336, p. 329.

⁴⁴ Krstić, I. (2018) Zabrana diskriminacije ..., p. 259.

⁴⁵ Equal Rights Trust (2019) Ravnopravnost u praksi: Primena antidiskriminacionih zakona u Srbiji, pp. 100–101.

⁴⁶ Tasić, A. (2018) Teret dokazivanja..., p. 325.

⁴⁷ Mežnar, Š. (2010) Odškodina v primeru kršitve prepovedi diskriminacije in mobinga. – Delavci in delodajalci, No. 2–3, 437–458, p. 451–452.

2.2.4. Compensatory damages for workplace discrimination

2.2.4.1. Functions and amount of compensatory damages

The Serbian Labor Law does not regulate the employer's liability for damages caused by violating the prohibition of discrimination. Anti-discrimination legislation also lacks special rules on compensation for damages caused by workplace discrimination, so the general rules of the Law of Contracts and Torts apply. There is no maximum amount of compensation that can be awarded to a victim of discrimination in Serbia, as this decision is left to the discretion of the judges. However, judges often award very modest compensation, especially when compared to compensation for damages in other areas. This is particularly true for non-patrimonial damages, which is why some authors argue that the damages in the Republic of Serbia were and remain unreasonably low, and that the judges awarding low damages "are showing a lack of understanding for the harmful consequences of discriminatory treatment."⁴⁸

The Law of Contracts and Torts is particularly rigid when it comes to regulating the function of compensation for non-patrimonial damages. Its primary function is to provide satisfaction, while its other functions, such as prevention from and deterrence of discriminatory behavior, are not even mentioned in the legal text or validated in case law. This solution should be viewed in light of the process of harmonizing Serbian law with EU law, particularly with regard to the European standard of proportionate, effective, and dissuasive legal sanctions. We should bear in mind that the process of harmonizing Serbian legislation and practice with EU directives has not yet included a review of the functions of non-patrimonial damages, especially with regards to (un)justifiably awarding higher damages compared to cases where an employer has intentionally violated a worker's right to dignity, equality, and protection against discrimination.⁴⁹

In the Republic of Serbia, the preventive function of compensatory damages is not explicitly regulated by the Law of Contracts and Torts, or by labor or anti-discrimination legislation. Nevertheless, Serbian law, in principle at least, can be considered aligned with EU law, as the requirement to provide effective, proportionate, and dissuasive legal sanctions includes *full compensation for patrimonial and non-patrimonial damages*. We should bear in mind that the effective implementation of applicable regulations in practice, together with the payment of full damages, discourages employers from discriminatory treatment and encourages them to create conditions for the consistent implementation of

⁴⁸ Tasić, A. (2014) *Naknada nematerijalne štete...*, p. 298; Krstić, I. (2021) *Serbia – Country report 'Non-discrimination'...*, p. 63, 70.

⁴⁹ Mežnar, Š. *Op. cit.*, p. 457–458.

the principle of equality. In other words, the abstract threat of compensatory damages will not have a significant preventive effect if unsupported by sufficient compensation in specific cases.⁵⁰ This refers to the view that fair and adequate compensation should be high enough to be considered effective, proportionate, and dissuasive in the spirit of EU directives. It is believed that compensatory damages are dissuasive if an employer believes that paying them would be an expense that could jeopardize the continuity of their business. This results in general prevention in terms of influencing all employers to refrain from violating the prohibition of discrimination and to establish conditions in their workplaces that allow the principle of equality to be effectively implemented. In this regard, the amount of compensatory damage should be determined based on the degree of guilt of the employer, as well as their size (i.e., the number of their employees).

Finally, the provisions of the Law of Contracts and Torts governing *court fines* are important for protection against workplace discrimination. These provisions refer to a general means of protecting personal rights, according to which an employee who believes they have been discriminated against can request that the court threaten the employer with paying an appropriate sum, regardless of damages, if they fail to fulfil the obligations set out in the final judgment (obligation to refrain from discriminatory conduct or to eliminate discrimination).⁵¹ The enforcement of court fines is entrusted to public enforcement officers, since it is the obligation of the employer to pay the employee a certain sum of money for each day (or another unit of time) of delay in the implementation of non-monetary obligations. The possibility of imposing court fines in workplace discrimination disputes is particularly important, because Serbian law does not allow for an increase in compensation for non-patrimonial damages or punitive damages.⁵² Although the increase in damages does not seem acceptable, despite far higher damages being awarded in EU member states compared to Serbia, we think it is important for the protection of victims of workplace discrimination that court fines compel employers to consistently fulfil their obligations.

⁵⁰ Možina, D. (2017) Naknada štete zbog diskriminacije i zlostavljanja na radnom mestu. – Harmonius, No. 1, 127–147, p. 145.

⁵¹ Vodinelić, V. V. Op. cit., p. 237–238. This is a private fine that aims to “break the will of the employer” unwilling to fulfil their main obligation, and pressure them to refrain from discrimination or to eliminate it altogether. In the latter case, the court will establish a deadline for the employer to fulfil the obligation, as well as the sum of money to be paid to the employee if they fail to do so by the deadline. A court fine may be accompanied by a temporary measure. Keča, R., Knežević, M. (2021) Građansko procesno pravo. Službeni glasnik, p. 664.

⁵² Možina, D. Op. cit., p. 143.

2.2.4.2. *Subjective concept of non-patrimonial damages*

The Law of Contracts and Torts implements a subjective concept of non-patrimonial damages, which relates damages to mental and physical pain, or fear of sufficient duration and intensity.⁵³ Namely, the injured party may be awarded compensation in the name of non-patrimonial damage “only when the injury is manifested as one of the aforementioned types of damages, and provided that the severity and duration of pain and fear and other circumstances justify it, in order to restore the disturbed mental balance of the injured party.”⁵⁴ This means that violation of the right to protection against discrimination does not constitute non-patrimonial damage, or rather that non-patrimonial damages are not caused by violations of personal goods, but instead by pain or fear (i.e., violation of the personal domain that disturbs the mental and emotional balance of workers).⁵⁵ Non-patrimonial damage is considered to exist only if, as a result of a violation of the right to equality, an employee or a job candidate experiences pain or fear, as workplace discrimination cause suffering, stress, discomfort, humiliation, shame, sadness, mental tension, and other unpleasant feelings. This, ultimately, means that pain and fear are forms of non-patrimonial damage, and not just facts that, together with other circumstances, affect the court's assessment of whether the employee's right has been violated to a sufficient extent to qualify for damages.⁵⁶ Compensation for damages should facilitate the restoration of disturbed mental balance, or rather enable an employee to bear the consequences of discriminatory behavior more easily. This is achieved by awarding compensation in an amount that provides satisfaction for the pain or fear suffered. Many authors are critical of the subjective concept of non-patrimonial damages, notably because mentioning pain and fear in court, which is unavoidable in the subjective concept, might further undermine the already damaged dignity of workers.⁵⁷ This is especially true because the few workers who are willing to seek judicial protection against discrimination are likely to reconsider their decision to initiate the proceedings, not only because of the difficulty of demonstrating that their personal character-

⁵³ Karanikić Mirić, M. (2015) Objektivizovanje moralne štete. – Zbornik Matice srpske za društvene nauke, Vol. 152, No. 3, 487–503, p. 487.

⁵⁴ Conclusion of the Conference of Representatives of the Federal Court, Supreme Courts of the Republics and Autonomous Provinces and the Supreme Military Court on Problems of Non-Patrimonial Damages, dated 15 and 16 October 1986 „the Basis of Non-Patrimonial Damages,“ acc. to: Andrejević, S., Milutinović, Lj., Petrović, Z. (2007) Promene stavova sudske prakse o naknadi nematerijalne štete i nove tendencije. – Nematerijalna šteta. Intermex, 7–71, p. 22.

⁵⁵ Karanikić Mirić, M. Op. cit., p. 487.

⁵⁶ Karanikić Mirić, M. Op. cit., p. 490–491.

⁵⁷ Možina, D. Op. cit., p. 141.

istics were the real reason for unfavorable treatment, but also because they want to avoid a detailed public description of the mental pain caused to them by their employer's discriminatory treatment.⁵⁸ As a solution for improving the standing of victims, it was proposed that a legal amendment or case law be adopted or developed, meaning that it is implied in cases of discrimination, as one of the major violations of human dignity, that the victim has suffered mental pain, requiring no further proof.⁵⁹

2.2. Protection against workplace discrimination in penal law

2.2.1. Misdemeanor law protection

A request to initiate misdemeanor proceedings can be filed by an employee who feels they have been discriminated against, as well as by labor inspectors and the Commissioner for Protection of Equality.⁶⁰ However, judges oftentimes impose low fines, ranging from 80 to 800 euros.⁶¹ These sums are lower than the fines imposed for offenses governed by other laws, which also shows that judges in Serbia lack a thorough understanding of the harmful effects of discriminatory treatment.⁶² Another problem is that the fine's total amount is influenced by mitigating and aggravating circumstances, such as the degree of responsibility and economic strength (i.e., the employer's financial situation). However, judges or other competent authorities sometimes avoid engaging in the evaluation of specific circumstances, instead approaching the fine superficially, with a blanket statement that they have assessed all the circumstances of the case that impact the amount of the fine.⁶³ Finally, we should note the disparities in judicial practice from one court to the next, since sentencing is influenced by the specific social

⁵⁸ Mežnar, Š. Op. cit., p. 443–444.

⁵⁹ Mežnar, Š. Op. cit., p. 453.

⁶⁰ A notable example is the Commissioner for Protection of Equality's request to initiate misdemeanor proceedings against an employer who, under the youth employment opportunity program, refused to establish an employment relationship with a pregnant worker after the vocational training period ended, despite being obliged by a contract with the National Employment Service to keep them employed for at least 12 months (Request No. 373/12, of 4 September 2012). The Misdemeanor Court found the employer guilty and fined him 10,000 Serbian dinars (around 90 euros). This is considered a minor fine, especially as the employer admitted that the worker's pregnancy was the reason for the violation of the obligation in question (claiming that it was necessary for the proper functioning of the company for the worker to continue working without interruption), and that he had not hired two other young female workers from this program, who were also pregnant. Krstić, I. (2018) *Zabrana diskriminacije ...*, p. 295.

⁶¹ Krstić, I. (2021) Serbia – Country report 'Non-discrimination' ..., p. 69.

⁶² Krstić, I. (2021) Serbia – Country report 'Non-discrimination' ..., p. 63.

⁶³ Stojić, Lj. Op. cit., p. 213.

circumstances in a given area, such as a lower employment rate or lower average wages in a specific administrative area compared to the territories of other courts. Eventually, this can lead to lighter fines for certain illegal actions as a greater level of importance is attached to the material circumstances of the perpetrator, as a mitigating circumstance.⁶⁴ These and other challenges in the implementation of fines seriously affect their preventive function, because prevention depends on whether the costs of the sanction outweigh the benefits for the employer when committing the misdemeanor.⁶⁵

2.2.2. Criminal law protection

The Criminal Code is also incorporated into the Republic of Serbia's legal framework for protection against discrimination. It governs protection against discrimination, which can be extended to cases of workplace discrimination.⁶⁶ Moreover, certain crimes can be committed through discrimination against workers (e.g. abuse and torture), while others may involve a discriminatory attitude of the perpetrator towards the victim (e.g. human trafficking /for the purpose of labor exploitation/).⁶⁷ In this regard, we should bear in mind that if both civil and criminal proceedings have been initiated in connection with the same action, the court will, as a rule, suspend civil proceedings until criminal proceedings are over. Moreover, the failure of a claimant in criminal proceedings often means failure in civil proceedings, even if the degree of social danger of the action, the man-

⁶⁴ Vuković Stanković, M. (2013) Kaznena politika prekršajnih sudova u Republici Srbiji. – Bilten Vrhovnog kasacionog suda, No. 2, 307–320, p. 309; cf. Đorđević, Đ. (2017) Odmeravanje novčane kazne u prekršajnom pravu – Ignjatović, Đ. (ed.) Kaznena reakcija u Srbiji. Deo VII. Pravni fakultet Univerziteta u Beogradu, 95–109.

⁶⁵ See: Kovačević, Lj. (2023) Pravne sankcije u svetu rada: radnopravni aspekti. – Ignjatović, Đ. (ed.) Kaznena reakcija u Srbiji. XIII deo. Pravni fakultet Univerziteta u Beogradu, 169–230.

⁶⁶ Criminal Code (Official Gazette of the RS, No. 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19), Art. 128–129. Criminal charges may be brought by the Commissioner for the Protection of Equality. An example of this is a case concerning a police officer who slapped and cursed a Roma boy for playing football in a schoolyard after the school security guard demanded that he left the premises. When the boy disobeyed, the school principal called the police, who intimidated and insulted the boy. The insults, threats, and curses resumed at the police station, where the boy's parents provided a statement. However, the Public Prosecutor rejected the criminal charges, arguing that there was no reasonable suspicion that a crime prosecuted *ex officio* had been committed. Basic Public Prosecutor's Office in Novi Sad, KT-1569/2017, of 9 November 2017, acc. to Krstić, I. (2018) *Zabrana diskriminacije ...*, p. 287.

⁶⁷ Petrušić, N., Ilić, G., Reljanović, M., Ćirić, J., Matić, M., Beker, K., Nenadić, S., Trninić, V. (2012) *Primena antidiskriminacionog zakonodavstva i krivičnopravna zaštita*. Studija slučaja, praksa i preporuke. Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, p. 28.

ner of proving discrimination, and the purpose of punishment for discrimination in these proceedings differ. Finally, this practice may result in the discriminated person not receiving any compensation whatsoever.⁶⁸ On the other hand, there is a risk that the burden of the fine imposed against the employer is transferred to others: shareholders (through lower dividends), consumers (through increases in the prices of goods or services provided by the employer), employees (through lower wages or dismissal), and the state (through lower tax revenues and social benefits for fired workers).⁶⁹

3. Amicable resolution of workplace discrimination disputes

Conciliation, mediation, and arbitration allow parties in a dispute to save time, energy, and money. Due to their informal (or less formal) nature, these methods of resolution can be an attractive solution even for persons who are able to pay for court proceedings and legal representation, but prefer the amicable resolution of labor disputes because the procedure is more intimate and interactive and takes place away from the public eye. The latter is especially significant for employers who do not want the identity of the parties involved in a dispute to be disclosed or the ruling published in order to protect their business reputation. It also allows employees to present their needs and interests in a confidential setting. Despite these advantages, in the Republic of Serbia, court settlement of labor disputes has precedence over alternative dispute resolution.⁷⁰ This can be explained by a distinctive legal culture in which settling disputes in court represents the typical method, despite the problems impeding its application. In addition, the parties to the employment relationship are insufficiently informed on the possibilities and advantages of these methods.⁷¹ Other issues include the lack of a two-tier decision-making system in arbitration, as well as problems related to the execution of an arbitration award.

Labor disputes regarding workplace discrimination can be resolved in accordance with the Law on Mediation in Dispute Resolution. The Law on Prohibition of Discrimination also mentions mediation as a method of resolving discrimination disputes, since the Commissioner for the Protection of Equality

⁶⁸ Petrušić, N., Ilić, G., Reljanović, M., Ćirić, J., Matić, M., Beker, K., Nenadić, S., Trninić, V. Op. cit., p. 28.

⁶⁹ Jefferson, M. (2001) Corporate Criminal Liability: The Problem of Sanctions. – *Journal of Criminal Law*, Vol. 65, No. 3, 235–261, p. 238–239.

⁷⁰ Lazović, I. (2018) Priručnik o dobrim praksama u mirnom rešavanju radnih sporova. Inicijativa za razvoj i saradnju, p. 26.

⁷¹ Kovačević, Lj. (2019) Amicable resolution of individual labour disputes. – *Revue de droit comparé du travail et de la sécurité sociale*, No. 4, 226–230, p. 227.

may propose mediation depending on the previous assessment of the mediability of the dispute.⁷² If both parties agree, the complaint procedure is suspended until the mediation procedure is completed, with the provision that the complaint procedure will resume if the mediation procedure is not successfully completed within the stipulated timeframe.⁷³ However, we should not lose sight of the fact that the standard mediation procedure *is not* designed for discrimination cases. Besides, there is a possibility that mediation will be used to cover up responsibility for anti-discrimination violations, just as there is a need to prevent secondary victimization and to “fit” the mediation procedure into the complaints procedure to the Commissioner for Protection of Equality.⁷⁴ In light of this, the Commissioner developed a *special mediation model tailored to discrimination cases*. Based on the experience of foreign independent authorities for the protection of equality, the Commissioner's office set up a system of providing mediation services. This included establishing criteria and indicators for recognizing mediable discrimination cases, as well as regulating the selection of mediators, actions in specific stages of mediation, and monitoring the implementation of the agreement.⁷⁵ Furthermore, in accordance with the previous Law on Mediation,⁷⁶ a List of Authorized Mediators was established, who, in addition to the general mediator training program, had to complete specialized training for mediation in discrimination cases, according to the program established by the Commissioner.

The presented specialized system of mediation was, however, called into question by the entry into force of the Law on Mediation in Resolving Disputes, which states that only the Ministry of Justice can issue licenses for mediation and enter registration data in the unified Registry of Mediators, without the possibility of keeping mediator records within the Commissioner's office.⁷⁷ Therefore, according to the positive law of the Republic of Serbia, only persons with a mediation license who are registered in the Registry of Mediators can act as mediators in cases of workplace discrimination. In this regard, we should note that only a person with a university degree can assume the role of mediator. This narrows the options for parties to choose a mediator who meets their needs, particularly

⁷² Law on Prohibition of Discrimination, Art. 38, para. 1.

⁷³ In 2015, the Commissioner proposed mediation in two cases; the following year no such proposals were made; in 2017 the proposal was made in one case, while in 2018 mediation was proposed in 88 cases. Furthermore, in 2019, the Commissioner made only one proposal to resolve the dispute through mediation, while in 2020 there were no such proposals. Acc. to: Krstić, I. (2021) Serbia – Country report ‘Non-discrimination’ ..., p. 60.

⁷⁴ Petrušić, N., Krstić, I., Marinković, T. Op. cit., p. 277.

⁷⁵ Petrušić, N., Krstić, I., Marinković, T. Op. cit., p. 277.

⁷⁶ Law on Mediation (Official Gazette of the RS, No. 18/05).

⁷⁷ Petrušić, N., Krstić, I., Marinković, T. Op. cit., p. 278.

for minorities or marginalized social groups, who are typically not able to choose a mediator who is a member of their group (e.g. a person with a disability).⁷⁸ In the Republic of Serbia, a little over 10 percent of the population is university educated. For a successful mediation, however, experience and understanding of the context of certain events is far more important than formal education.⁷⁹

4. Administrative protection against discrimination

4.1. Proceedings before the Commissioner for the Protection of Equality

Independent institutions seek to provide additional forms of administrative control and protection of human rights. As a result, they enjoy both organizational and functional independence in relation to the executive power. In that sense, the procedures providing urgent protection against workplace discrimination primarily refer to filing complaints with the Commissioner for Protection of Equality, which, in accordance with its ombudsman-like nature, does not have commanding or repressive prerogatives,⁸⁰ nor the prerogative to initiate proceedings *ex officio* (i.e., without a prior complaint).⁸¹

The most important prerogatives of the Commissioner are related to the handling of complaints. The largest number of complaints submitted to this independent body since its establishment refer to workplace discrimination.⁸² Although the number of these complaints is high (a third of the total number of complaints from 2009 to the present day), it does not appear to reflect, at least not fully, the true scale of the challenges faced by jobseekers and employees in exercising their rights.⁸³

⁷⁸ Petrušić, N., Krstić, I., Marinković, T. Op. cit., p. 278–279. This is a severe problem for persons with disabilities as they often fail to receive adequate help from trade unions. This is because, due to the problems they face in their efforts to find and maintain employment, and advance their careers, persons with disabilities are either not members of a trade union or, due to their low representation in the working population (the employment rate of persons with disabilities in Serbia is around 13 percent), they cannot establish their representative trade union in the open market.

⁷⁹ Opinion of the Commissioner for Protection of Equality on certain provisions of Draft of Law on Mediation in Dispute Resolution, No. 011-00-49/2013-02, of 15 September 2013, <http://ravnopravnost.gov.rs/misljenje-o-pojedinim-odredbama-radne-verzije-zakona-o-posredovanju-u-resavanju-sporova/>, 10.3.2024.

⁸⁰ Petrušić, N., Krstić, I., Marinković, T. Op. cit., p. 245.

⁸¹ Krstić, I. (2018) *Zabrana diskriminacije ...*, p. 259.

⁸² Commissioner for the Protection of Equality (2019) *Special Report on Discrimination in the Field of Work and Employment*, p. 284.

⁸³ Further research indicates the imbalance between citizens' perception of workplace discrimination and the number of reported cases, but also between the number of reported cases and

The Commissioner is obliged to provide an opinion within 90 days of receiving the complaint as to whether there is discrimination in the case at hand. If the Commissioner determines that a violation has occurred, they are obliged to provide a recommendation in which they outline to the employer the preferred means of overcoming the consequences of the violation. The employer is, in turn, obliged to take appropriate measures within 30 days of receiving the recommendation. If the employer fails to act on the recommendation, the Commissioner may inform the public of the violation, as well as decide on initiating strategic litigation, misdemeanor, or criminal proceedings, while the discriminated person may initiate court proceedings for protection against workplace discrimination. In practice, informing the public has proven to be quite effective, since employers often start behaving in accordance with the Commissioner's recommendations, simply to avoid details of the case being made public.⁸⁴ It should also be noted that the court is not bound by the Commissioner's opinion on the existence of discrimination, as well as that no appeal can be filed against their opinion (although court proceedings over a specific event can be initiated).

In addition, the Commissioner is the only independent body with active procedural identification, since, as we have seen, this body can file a lawsuit in court, both in the name and with the written consent of a specific victim of discrimination, as well as in the name of unidentified victims of discrimination. Furthermore, the Commissioner can warn the public about the most common, typical, and severe cases of discrimination, monitor the implementation of regulations, initiate the adoption of new regulations, and provide opinions on the draft laws with the aim of promoting equality. Finally, the Commissioner can recommend important measures for achieving equality to public authorities and other persons.

4.2. Labor Inspectorate's contribution to protection against workplace discrimination

In the Republic of Serbia, the Labor Inspectorate is organized according to the Latin model of labor inspection, which means that it oversees the implementation of the Labor Law and a number of special laws. This includes the Law on Prohibition of Discrimination and the Law on Gender Equality, specifically

cases in which discrimination was found, either in proceedings before the Commissioner or in court. The results of the 2019 survey „Discrimination in the labour market“ show that 92 percent of employers, 84 percent of employees, and 86 percent of the unemployed believe that workplace discrimination is widespread in Serbia, while as many as a third of the respondents, both employed and unemployed, cite experiencing discrimination at work. Commissioner for the Protection of Equality. Op. cit., p. 284.

⁸⁴ Krstić, I. (2021) Serbia – Country report “Non-discrimination” ..., p. 71.

their sections dealing with the prevention of and protection against workplace discrimination. All employers (domestic and foreign) are monitored for compliance with these regulations,⁸⁵ with the exception of the state as an employer, where the administrative inspection oversees the implementation of regulations pertaining to the rights, duties, and responsibilities of civil servants, as well as those of employees in autonomous province authorities and local self-government units. In this regard, one recognizes the need to regulate the relationship between the Labor Inspectorate and other entities involved in the supervision of the implementation of relevant regulations. This is particularly true for other inspection activities, because double and multiple inspections waste already limited inspection capacities⁸⁶ and funds, highlighting the importance of clearly distinguishing between the responsibilities of distinct administrative bodies and inspection services with prerogatives in the same sectors.⁸⁷ Moreover, the supervisory function of the labor inspection often overlaps with the functions of independent control bodies, including the Commissioner for the Protection of Equality.

Labor inspectors can undertake preventive, corrective, and repressive measures. However, the Labor Law does not name specific *preventive measures*, while the Law on Inspection Supervision prescribes measures such as warning the supervised entity about their obligations, indicating the possible adverse consequences of an employer's actions, and ordering the entity to take or refrain from certain actions.⁸⁸ Furthermore, preventive action includes advisory visits, as well as the publication of checklists, which enable supervised subjects to self-assess risks, informing the public about changes in applicable regulations, promoting among social partners a culture of proper application of and compli-

⁸⁵ Law on Inspection Supervision (Official Gazette of the RS, No. 36/15, 44/18 and 95/18). The prerogatives of the labour inspectorate were extended to the supervision of unregistered entities.

⁸⁶ In 2022, the Labour Inspectorate covered 214 labour inspectors (Ministry of Labour, Employment, Veterans and Social Affairs – Labour Inspectorate [2023] Report on the Work of the Labour Inspectorate for 2022, p. 3). That number came very close to the International Labour Organization's recommended minimum of labour inspectors per 10,000 employees. However, we should not lose sight of the total number of employers in Serbia, since economic activity is most often carried out through organizational forms with a small number of employees (on average, six employees per employer), which is why inspections cannot cover all employers on an annual basis. According to the relevant parameters, each employer can only be inspected once every eight years! The unfavourable age structure of labour inspectors, as well as the absence of continuous professional development, is another concern. Lj. Stojić, 451–452.

⁸⁷ Đurić, Ž. (2005) Integracija inspekcije rada u Srbiji: novi pristup u vršenju nadzora. Dva sistemska pitanja. – Radno i socijalno pravo, No. 1–6, 115–124, p. 118.

⁸⁸ Law on Inspection Supervision, Art. 26.

ance with relevant legislation, such as organizing seminars and training for employers and employees, designing preventive and promotional campaigns, and the like. These measures can help prevent workplace discrimination, since labor inspectors are the only public authorities in the Republic of Serbia with access to all workplaces. This is crucial for the realization of the “enlightenment” role of labor inspection, in terms of the efficient transfer of the necessary information to employers and workers.⁸⁹

Corrective measures, on the other hand, aim to eliminate illegality in the work of employers, and include highlighting deficiencies and irregularities in the application of regulations, while setting an appropriate deadline for their elimination. The employer is obliged to notify the Labor Inspectorate about the order's execution within a period determined by the inspector,⁹⁰ but they can also submit an appeal to the minister responsible for labor issues against the decision ordering the elimination of the detected violation, while an administrative dispute can be filed against the minister's decision. Considering that an appeal, as a rule, has a suspensive effect, the procedure for the implementation of a corrective measure can be prolonged. Its main drawback appears to be the frequent absence of the necessary expedience.⁹¹

The Labor Inspectorate has one *repressive measure* at its disposal – it can submit a request to the court to initiate misdemeanor proceedings. The Labor Law qualifies violation of the prohibition of discrimination as a misdemeanor, with the provision concerning the submission of a request for the initiation of a misdemeanor proceeding (“The labor inspector shall submit a request for the initiation of a misdemeanor proceeding [...]”)⁹² interpreted differently in the literature. According to one acceptable interpretation, the labor inspector is required to submit this request,⁹³ while according to another interpretation, initiating a misdemeanor procedure is merely a possibility.⁹⁴ The position that the relevant legislation should be interpreted so that the labor inspector is obliged to initiate misdemeanor proceedings is based on the linguistic interpretation of the norm, but also on the fact that the Labor Inspectorate is the only public legal entity with

⁸⁹ Albracht, G. (2005) Globalization, Workplace and Health. – Labour Education, No. 3–4, 1–8, p. 7.

⁹⁰ Stojšić, Lj. Op. cit., p. 207.

⁹¹ Stojšić, Lj. Op. cit., p. 403.

⁹² Labour Law, Art. 270.

⁹³ Stojšić, Lj. Op. cit., p. 214; Ivošević, Z. (2015) Radno pravo. Pravni fakultet Univerziteta „Union“ / Službeni glasnik, p. 342.

⁹⁴ Jovanović, P. Op. cit., p. 364; Čolić, B. (2002), Zaštita prava zaposlenih pred sudovima i pred inspekcijским organima. – Radno i socijalno pravo, No. 1–3, 135–154, p. 154.

access to every workplace. However, it is necessary to consider the provision in question in light of the ILO standards ratified by the Republic of Serbia, as Convention No. 81 leaves labor inspectors free to decide whether to issue a warning or advice, rather than initiate or propose prosecution.⁹⁵ In this regard, we believe that the next amendment to the Labor Law should harmonize the Law with this ILO Convention and include the possibility (but not the duty) of labor inspectors to submit a request for the initiation of misdemeanor proceedings. The initiation of misdemeanor proceedings can be qualified as a repressive measure, since it may result in the imposition of a fine. Although a labor inspector cannot decide if a repressive measure will be taken, they can influence the competent authority to take such a measure, if necessary, against an employer.⁹⁶ If the conditions are met, the labor inspector can initiate other types of proceedings before competent state authorities, including filing charges for a crime.

Compared to ILO standards, the aforementioned repressive measure seems insufficient to ensure the effectiveness of Serbian labor legislation.⁹⁷ In the spirit of these standards, labor inspectors can impose mandatory penalties, as well as initiate the revocation (temporary or permanent) of permits and suspension of enforcement before the competent authorities. Labor inspectors can also take other measures that enable the achievement of the desired goals related to the consistent application of the relevant regulations. Oftentimes, the work of labor inspectors, which is aimed at detecting and punishing employers for violations of relevant regulations, is rendered meaningless in practice due to the slow nature of misdemeanor court proceedings.⁹⁸ This means that the application of the only repressive measure prescribed by the Labor Law – the submission of a request for initiation of misdemeanor proceedings – does not necessarily lead to the punishment of the employer. This is because misdemeanor proceedings are initiated by the misdemeanor court, based on the labor inspector's request, and there is no deadline for the court to initiate this procedure.⁹⁹ Therefore, it may happen that, despite the timely reaction of the labor inspector, the statute of limitations may

⁹⁵ ILO Labour Inspection Convention, 1947 (No. 81), Art. 17, para. 2.

⁹⁶ Drašković, D. (1998) *Inspekcija rada i njeni akti i radnje u vršenju inspeksijskog nadzora*. – Radno i socijalno pravo, No. 3–6, 167–184, p. 180.

⁹⁷ Jovanović, P. Op. cit., p. 364; Lubarda, B. (2002) *Inspeksijski nadzor prema Zakonu o radu*. – Radno i socijalno pravo, No. 1–3, 48–55; Brković, R. (2017) *Usluge inspekcije rada, upravne inspekcije i žalbenih komisija u cilju zaštite prava zaposlenih*. – Mićović, M. (ed.) *Usluge i odgovornost*. Pravni fakultet Univerziteta u Kragujevcu, 727–741, p. 735.

⁹⁸ Lipovčić, S. (2019) *Inspeksijski nadzor kao instrument borbe protiv faktičkog rada u domaćem i međunarodnom pravu*. – Strani pravni život, No. 3, 107–117, p. 112.

⁹⁹ Stojić, Lj. Op. cit., p. 216.

expire.¹⁰⁰ Thus, the sluggishness of the court system can undermine the authority of the labor inspection and lead to the absence of general prevention.¹⁰¹ In this regard, it seems necessary to expand the catalogue of repressive measures of the labor inspectors, especially considering the effectiveness of on-the-spot fines.¹⁰²

5. Conclusion

Access to justice for victims of discrimination, as well as the existence of effective, proportionate, and dissuasive sanctions, are necessary to ensure the effective enforcement of non-discrimination rules. Similar to the majority of European countries, the Republic of Serbia combines judicial proceedings (civil, criminal, labor, and/or administrative) with non-judicial proceedings; however, the implementation of workplace discrimination rules has increased the likelihood of civil proceedings being used over criminal proceedings since these regulations present challenges in terms of proof and the prerogative of the state prosecutor. All the more so since in the world of work, criminal sanctions are a last resort (*ultima/extrema ratio*), meaning that their application is acceptable only if there are no labor law, civil law, administrative, or misdemeanor sanctions that might successfully prevent the violation of legal rules.¹⁰³ On the other hand, the length and complexity of civil law procedures may act as a deterrent to those seeking redress, while the infrequency of litigations may itself be a deterrent to victims as the prevailing impression may be that success in proceedings is improbable.

¹⁰⁰ In 2019, labour inspectors submitted 1,869 requests to initiate misdemeanor proceedings, and statute of limitations expired for 270 requests. In 2020, 2,172 requests were submitted to initiate misdemeanor proceedings in the field of employment relationships, and statute of limitations expired for 452 of these requests. In the following year, inspectors submitted 2,390 requests, and statute of limitations ran out for 493 proceedings, while in 2022 2,441 requests were submitted, and statute of limitations ran out for 325 proceedings. Acc. to: Ministry of Labour, Employment, Veterans and Social Affairs – Labour Inspectorate (2019) Report on the Work of the Labour Inspectorate for 2018, p. 13–14; Ministry of Labour, Employment, Veterans and Social Affairs – Labour Inspectorate (2020) Report on the Work of the Labour Inspectorate for 2019, p. 13–14; Ministry of Labour, Employment, Veterans and Social Affairs – Labour Inspectorate (2021) Report on the Work of the Labour Inspectorate for 2020, p. 13–14; Ministry of Labour, Employment, Veterans and Social Affairs – Labour Inspectorate (2022) Report on the Work of the Labour Inspectorate for 2021, p. 20; Ministry of Labour, Employment, Veterans and Social Affairs – Labour Inspectorate (2023) Report on the Work of the Labour Inspectorate for 2022, p. 19.

¹⁰¹ The labour inspector has the option to submit a new request for initiation of misdemeanor proceedings.

¹⁰² Stojšić, Lj. Op. cit., p. 218.

¹⁰³ Cesaro, J.-F. (2012) La sanction pénale. – Teyssié, B. (dir.) La sanction en droit du travail. Édition Panthéon-Assas, 81–94, p. 87.

Moreover, the complexity and ambiguity of Serbian anti-discrimination law may deter victims of discrimination from initiating civil proceedings, while short time limits for bringing a case via labor dispute proceedings can be problematic for victims, particularly for persons with disabilities or with inadequate command of the official language(s). If the deadline to initiate a labor dispute has expired, an employee may only seek protection in a discrimination lawsuit; however, unlike in a labor dispute, an employee cannot file a request for reinstatement in a discrimination proceeding. This violates the unity of legal order and puts victims of discriminatory dismissal in an unfavorable position. Moreover, there is a shortage of skilled, experienced assistance for victims (in contrast to the professional advice and representation usually available to employers), which, combined with insufficient financial means to pursue a case, as well as limited access to free legal aid, represent barriers to litigation.

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Peaceful Dispute Resolution in Employee Discrimination Cases in The Republic of Serbia*

Marija Dragičević**

The lengthy court proceedings, the accumulation of pending court cases, high costs, strict formalism, slow and inefficient provision of judicial protection often results not only in the violation of one of the fundamental human rights – the right to a trial within a reasonable time but also in dissatisfaction of the disputing parties and the general public with courts efficiency. One of the possibilities, aimed at improving such a situation, is certainly a wider application of some peaceful dispute resolution methods in labor cases, including employee discrimination disputes. Employee discrimination disputes are characterized by mediatability and arbitrability. Given that Serbian law does not provide for the exclusive jurisdiction of courts or other state bodies, they can be resolved in arbitration and mediation procedures, in accordance with the Labor Act, the Act on Peaceful Settlement of Labor Disputes, and the Act on Mediation in Dispute Resolution. Compared to judicial settlement of discrimination disputes at work, both arbitration and mediation have certain advantages and disadvantages, which will be carefully considered in this paper. The author primarily aims to review the legal regime for the peaceful resolution of labor disputes involving the discrimination of employees in the Republic of Serbia, but also to identify the legal and social circumstances preventing the full application of advantages and potential opportunities of this dispute resolution method in work-related discrimination cases.

Keywords: *discrimination at work, arbitration, mediation*



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I. Introductory considerations

The guarantee of the right to protection against discrimination implies, among other things, the establishment and preservation of the system of civil law, labor law, criminal law, misdemeanor law and constitutional court protection against discrimination.¹ In addition, protection against discrimination in the Republic of Serbia is ensured by the Commissioner for the Protection of Equality, who, among other things, affirmed mediation for the resolution of discrimination disputes, as a special model of out-of-court dispute resolution, which can also be used for protection against discrimination at work or in relation to with work. However, since in this type of dispute involving discrimination, the subject of the dispute is the employee who believes that the employer has been discriminated against, the dilemma arises as to whether the dispute in question should be considered a labor dispute or, on the other hand, a discrimination dispute.²

Unlike civil and commercial disputes, as disputes from dominantly dispositive legal relations, labor disputes are a specific area, which affects the ways and methods of their resolution.³ In labor law theory, legislation and practice, numerous efforts have been made in order to comprehensively understand labor disputes as a specific type of legal dispute. However, it is very difficult to include all that should be understood under individual and collective labor disputes in a comprehensive and sufficiently clear way with one general formulation.⁴ Thus, according to one author, labor disputes can be defined as a state of disagreement over a specific issue or group of issues over which workers or employers clash, seek protection of their rights, or over which workers or employers support other workers or employers in their demands or objections.⁵ Based on possible differences, labor disputes can be divided

¹ Kovačević, Lj., Novaković, U. (2018) Mirno rešavanje sporova povodom diskriminacije zaposlenih na osnovu porodičnih dužnosti. – Pravo i privreda, No. 7–9, p. 444.

² Ibid.

³ Uzelac, A., Aras, S., Maršić, M., Mitrović, M., Kauzlarić, Ž., Stojčević, P. (2010) Aktuelni trendovi mirnog rešavanja sporova u Hrvatskoj: dosezi i ograničenja. – Zbornik Pravnog fakulteta u Zagrebu, Vol. 6, No. 60, p. 1285. <https://hrcak.srce.hr/file/94405>

⁴ Brković, R (2003) Radni sud, Institut za pravne i društvene nauke Pravnog fakulteta Univerziteta u Kragujevcu, Kragujevac, p. 19.

⁵ Gotovac, V. (2004) Alternativne metode rešavanja radnih sporova: mirenje i arbitraža. – Dika, M., Potočnjak, Ž. (ed.) Zasnivanje i prestanak radnih odnosa – Rešavanje radnih sporova (ed. Mihajlo Dika, Željko Potočnjak), Zagreb, p. 91. There are experts, such as the Belgian professor Lenaerts, who are of the opinion that any issue for which the worker is fighting should be considered as the subject of a labour dispute (De Roo, A., Jagtenberg, R. (1994) Settling Labour Disputes in Europe, Kluwer Law International, Deventer/Boston, p. 21).

into a larger number of types and subtypes.⁶ When the parties in the dispute, more precisely the number of participants in the dispute, and the subject of the dispute are taken as the criteria for classification, individual and collective labor disputes are distinguished. An individual labor dispute is a dispute that arises between an employee (under certain conditions and a person who is not in an employment relationship), on the one hand, and the employer, on the other hand, regarding the establishment or realization and protection of any individual right from the employment relationship, immediate personal interest based on the right or due to the violation of the work obligation from the employment relationship established by legal regulations.⁷ In accordance with the provisions of the Labor Act⁸, as the parent law for the field of labor relations, the right to protection against discrimination is one of the rights from the employment relationship, which is why a dispute due to the violation of this right can be considered a labor dispute. This Act does not use the term “labor dispute”, while in the literature a distinction is made between a labor dispute and a dispute (litigation) from labor relations, so that the term „labor dispute“ means only a dispute that arises due to the violation of the employee’s rights, i.e. a dispute in which the employee is the plaintiff and the employer is the defendant.⁹ On the other hand, a dispute (litigation) from labor relations is a broader concept, because in addition to a labor dispute, it also includes a dispute initiated by the employer against the employee.¹⁰ This theoretical distinction is inspired by the provisions of the Act on Civil Procedure, which uses the

The British Industrial Tribunals Act of 1919 defines the term „industrial dispute“ as any dispute or conflict between an employer and an employee or between an employee and an employee arising in connection with the existence or non-existence of employment or working conditions of any person (De Givry, J. (2014) *Prevention and Settlement of Labour Disputes, other than Conflicts of Rights*. – Kahn-Freund, O., Hepple, B. (ed.) *International Encyclopedia of Comparative Law* volume XV, Labour Law, Chapter 14, Martinus Nijhoff Publishers, Leiden, Boston, p. 3–4). Such broad definitions of labour disputes are deliberately given, in order to accommodate different conceptual definitions in different countries. Moreover, empirical observations show that precise and limited definitions are of little practical value, since real life disputes often do not correspond to a specific definition of labour disputes. See more: De Roo, A., Jagtenberg, R. *Op. cit.*, 21.

⁶ Kulić, Ž. (1998) *Pojam i osnovna obeležja radnog spora*. – *Radno i socijalno pravo – časopis za teoriju i praksu Radnog i socijalnog prava*, No. 3–6, p. 33.

⁷ Šunderić, B. (1991). *O radnom sporu*. – *Anali Pravnog fakulteta u Beogradu*, No. 1–3, p. 355–357; Brković, R. *Op. cit.*, 25; Kulić, Ž. *Op. cit.*, 33; Kovačević, Lj. *Op. cit.*, 444.

⁸ *Zakon o radu (Labour Act)*, Sl. glasnik RS, br. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – odluka US, 113/2017 i 95/2018 – autentično tumačenje).

⁹ Jovanović, P. (2015) *Radno pravo*, Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, p. 357.

¹⁰ *Ibid.*

term labor dispute,¹¹ and a similar solution is contained in the Act on Peaceful Settlement of Labor Disputes, which under the term individual labor dispute implies a dispute that can be initiated by both the employee and the employer.¹²

On the other hand, a discrimination dispute arises when the right to protection against discrimination is challenged, endangered or violated. This is always the subject of a discrimination dispute, regardless of what the specific subject of disagreement between the parties to the dispute is,¹³ which is why a dispute due to the violation of an employee's right to protection against discrimination can also be qualified as a discrimination dispute. This further complicates the reliable qualification of the dispute that exists between the subjects of the employment relationship on certain legal or factual issues that may be opened in connection with the act and consequences of discrimination at work. This is because the relevant legislation does not regulate the relationship between the Act on Prohibition of Discrimination¹⁴ (and other anti-discrimination laws), on the one hand, and other laws (including the Labor Act), which expressly prohibit discrimination, on the other hand, which is associated with the risk of injury principles of legal certainty, including the risk of unfair solutions in practice.¹⁵ In this sense, the legal consequences for the employee and the employer are different if the position is taken that the Labor Act is the *lex specialis* for all disputes regarding rights from the employment relationship,

¹¹ Zakon o parničnom postupku (Act on Civil Procedure), Sl. glasnik RS, br. 72/2011, 49/2013 – odluka US, 74/2013 – odluka US, 55/2014, 87/2018, 18/2020 i 10/2023 – dr. zakon. For a long time, the prevailing understanding in judicial practice was that for a certain individual dispute to have the quality of a labour dispute, i.e. a benefited litigation, it is necessary that the plaintiff be an employee and the defendant an employer, while in a dispute where the plaintiff is the employer and the defendant is the employee, the rules of the general provisions of the civil procedure would apply. According to the interpretations of a certain number of labour law writers, this practice of domestic courts is not justified, since the provision of Article 438 of the Act on Civil Procedure states that „in proceedings in labour relations litigation, and especially when determining deadlines and hearings, the court takes special account of the need for urgent resolution labour disputes“, from which it follows that these special rules of civil procedure apply equally to the situation when the plaintiff is an employee, but also to the situation when the plaintiff is an employer. Brković, R., Urdarević, B. (2023) Radno pravo sa elementima socijalnog prava, Službeni glasnik, Beograd, p. 238.

¹² Zakon o mirnom rešavanju radnih sporova (Act on Peaceful Settlement of Labour Disputes), Sl. glasnik RS, br. 125/04, 104/09, 50/18, art. 3, paragraph 1, item 7.

¹³ Tasić, A. (2016) Postupak u parnicama za zaštitu od diskriminacije, doctoral dissertation (unpublished), Pravni fakultet Univerziteta u Nišu, Niš, p. 167.

¹⁴ Zakon o zabrani diskriminacije (Act on Prohibition of Discrimination), Sl. glasnik RS, br. 22/2009 i 52/2021).

¹⁵ Kovačević, Lj. Op. cit., 445.

including protection against discrimination at work, and completely different if the position is taken that Act on Prohibition of Discrimination *lex specialis* for all cases of discrimination, including those related to employment relations.¹⁶

Some help in solving the dilemma related to this qualification is provided by the provisions of the Act on Peaceful Resolution of Labor Disputes, according to which, in the sense of this Law, a dispute involving discrimination is also considered an individual labor dispute. Domestic judicial practice is of a similar opinion, in which a dispute involving discrimination at work in relation to the termination of an employment contract qualifies as a labor dispute, while a dispute regarding other forms of discrimination at work (in relation to the conditions for employment and the selection of candidates for the performance of a certain job, working conditions and all rights from the employment relationship, advancement at work, etc.) qualifies as a discrimination dispute. The above can be problematic, if we consider the peculiarities of labor and discrimination disputes and the different goals and principles towards which their resolution is directed, that is, on which it rests. The lack of sensitivity shown by legislators to this issue will put both the victims of discrimination at work and illegal dismissal, as well as the direct enforcers of the rights, in an unenviable position. Trying to get out of the labyrinth of contradictory legal regulations, potential plaintiffs become victims of restrictive legal provisions and are left without the possibility of legal protection being provided to them. Therefore, there remains hope that the next edition of these legal regulations will bring clear and unambiguous solutions that will solve this complex legal issue.¹⁷

With regard to the method of resolving disputes arising from discrimination at work, Serbian law does not provide for the exclusive jurisdiction of a court or other (state) authority. Consequently, they are subject to arbitrability and mediatability, which means that they may be resolved through mediation and arbitration. It is confirmed by the Labor Act and the Act on Peaceful Settlement of Labor Disputes, which regulate the settlement of labor disputes in arbitration

¹⁶ See more: Tasić, A., Obradović, G. (2020) Posledice nezakonitog otkaza u slučaju diskriminatornog postupanja poslodavca. – Zbornik radova Pravnog fakulteta u Nišu, No. 89, p. 119–120.

¹⁷ Ibid., p. 133–134. According to Professor Tasić and Professor Obradović, this would not be a precedent, since the Croatian Act on Prevention of Discrimination states that special procedures for protection against discrimination in the field of work and employment will be considered as disputes arising from labour relations. A. Tasic, G. Obradović. Op. cit., 131.

proceedings, as well as by the Act on Mediation in Dispute Resolution¹⁸, which expressly provides for the possibility of settling labor disputes in mediation proceedings.

Arbitration settlement of disputes involving discrimination at work

1) Advantages and disadvantages of arbitration as a method for resolving disputes involving discrimination at work

Arbitration for individual labor disputes can be viewed in two ways, as a method of resolving a labor dispute (in which sense it implies entrusting the resolution of the dispute to a third impartial person or persons by making an arbitral decision) and as an institutional form of dispute resolution (in which sense it means that arbitration acts as a body, educated as a permanent or *ad hoc* body, either by the parties themselves or by third parties, with the task of deciding the disputed issue).¹⁹

In labor law theory and practice, several reasons are cited in support of arbitration as a method of resolving disputes involving discrimination at work, which directly derive from the powers and methods of work of the arbitration itself.²⁰ The main advantage of the arbitration method of resolving disputes in relation to court proceedings is that this method is of an informal or less formal nature than the judicial dispute settlement process, that it is more private and interactive, and that it does not take place in front of the public. The latter argument is particularly important for discrimination disputes, because not disclosing the identity of the parties to the dispute and not publishing the decision suits employers in order to protect their business reputation, and allows employees to present their needs and interests in a confidential atmosphere and without “difficult words”, which is extremely important for continuation of the employment relationship.²¹ Namely, arbitration is a procedure based on respect for the privacy of employees and employers. In arbitration proceedings involving discrimination at work, the

¹⁸ Zakon o posredovanju u rešavanju sporova (Act on Mediation in Dispute Resolution), Sl. glasnik RS, br. 55/2014.

¹⁹ Dragićević, M. (2018) Rešavanje individualnih radnih sporova arbitražom – uporednopravni prikaz. – Pravo i privreda, No. 7–9, p. 537–538; Miljković, M. (1997) Arbitraža za individualne radne sporove – za i protiv. – Pravo i privreda, No. 11–12, p. 19; Jovanović, P. (1997) Arbitražno rešavanje radnih sporova. – Zbornik radova sa Savetovanja o radnim odnosima na Brezovici, p. 77–78.

²⁰ Miljković, M. Op. cit., 17–28; Kovačević-Perić, S., Boranijašević, V. (2017) Arbitraža za radne sporove. – Pravo i privreda, No. 4–6, p. 650–654; Uzelac, A. (1997). Arbitraža i radni sporovi. – Pravo i porezi, No. 4, p. 408–411.

²¹ Kovačević, Lj. Op. cit., 447–448.

public is excluded, and third parties cannot be present during the proceedings, as is the case in court proceedings. Also, in a large number of cases, arbitrators are obliged to protect the confidentiality of all data related to the case. In this way, arbitration protects the reputation of both parties, and it is impossible for any information to reach the public. The special advantage of this system is that it protects individuals whose professional reputation could be called into question, as well as persons who are employed in high positions in the company, because it does not spoil the image that the company has in the public.²² In addition, the voluntary nature of this method of labor dispute resolution establishes the legitimacy of the acceptability of the final decision of the arbitrator, which will not be questioned, because it is based on a previously reached mutual agreement to accept it as final and binding.²³ People who have knowledge and experience in a specific field are most often chosen as arbitrators, and are more flexible in making decisions, because they take into account all the details of a specific case. A significant advantage of arbitral settlement of labor disputes in relation to the court is in efficiency, which is related to another rule on arbitration – the rule on single-stage, which means that an arbitration decision ends a discrimination dispute with legal force.²⁴ Finally, in support of this method of resolving disputes involving discrimination at work, it should be pointed out that the procedure is cheaper and faster. Thus, in Serbian law, in the case of arbitration settlement of disputes involving discrimination at work before the Republic Agency for Peaceful Settlement of Labor Disputes (hereinafter referred to as the Agency), each party to the dispute bears its own costs, while the costs of the arbitrator are borne by the Agency.²⁵ Regarding the length of the arbitration procedure, in Serbian law it is a rather short period of 10 or 30 days, which is unpredictably shorter than court proceedings which often last for years.²⁶

²² Tarasewicz Y. (2012) *International Labour and Employment Arbitration: A French and European Perspective*, American Bar Association, International Labour and Employment Law Committee, Paris, p. 13.

²³ Vujasinović Dučić, D., Šošić, M., Brajković, R., Kiković, S., Budimčević, S. (2013) Istraživanje o mirnom rešavanju radnih sporova u Beogradu, Novom Sadu i Nišu, Inicijativa za razvoj i saradnju, Beograd, p. 15, <http://idcserbia.org/wp-content/uploads/2013/08/Istra%C5%BEivanje-o-mirnom-re%C5%A1avanju-radnih-sporova-u-Beogradu-Novom-Sadu-i-Ni%C5%A1u-.pdf>, 15.

²⁴ Lubarda, B. (2013) Radno pravo – rasprava o dostojanstvu na radu i socijalnom dijalogu, drugo izdanje, Pravni fakultet u Beogradu, Centar za izdavaštvo i informisanje, Beograd, 952–953.

²⁵ Zakon o mirnom rešavanju radnih sporova (Act on Peaceful Settlement of Labour Disputes), art. 14.

²⁶ Zakon o radu (Labour Act), art. 196, paragraph 5; Zakon o mirnom rešavanju radnih sporova (Act on Peaceful Settlement of Labour Disputes), art. 36.

On the other hand, arbitration settlement of disputes involving discrimination at work has its negative sides. They are most often expressed through the absence of public control, the difficulties of the parties regarding the selection of arbitrators and therefore the long duration of the constitution of the arbitration panel. Arbitration settlement of discrimination disputes exposes the risk of being misused by the employer, as a stronger subject of the employment relationship who tries at all costs to avoid negative publicity due to the adoption of the claim, as well as the costs of court proceedings and legal representation.²⁷ Also, the fact that the private atmosphere in which disputes are settled denies the general public the possibility of insight into decisions that can affect the change in the public's attitude towards discrimination can also be objected to this method of resolution. Peaceful settlement of disputes has much less capacity to contribute to the development of practice in the field of protection against discrimination at work, than judicial practice can, for example. in the sense of specifying the concepts of direct and indirect discrimination of employees, distinguishing discrimination from abuse at work, etc.²⁸ As a certain disadvantage of this method of dispute resolution, one can point out the absence of a two-stage arbitration decision and the dilemmas that accompany the possibility of exercising the right to a legal remedy against the arbitration decision before the court, as well as the problems related to the execution of the arbitration decision, especially the absence of sanctions for parties who do not approaches to its execution. Finally, shortcomings are sometimes manifested in the slowness of proceedings due to possible insufficient knowledge of the law on the part of the arbitrator, on the one hand, or due to the lack of firmness and impartiality of the arbitrator, on the other hand.²⁹ There is also often a danger that deciding on the basis of fairness turns into arbitrariness.

2) The legal regime of arbitration in labor disputes and basic dilemmas in the Republic of Serbia

The arbitral settlement of labor disputes in the Republic of Serbia is governed by the Labor Act (2005) and the Act on Peaceful Settlement of Labor Disputes (2005).

According to the provisions of the Labor Act, *all types* of individual labor disputes can be resolved in arbitration proceedings. On the other hand, under the

²⁷ Kovačević, Lj. Op. cit., 449.

²⁸ France, L., Kelly, T. (2003) Mandatory arbitration of civil rights claims in the workplace: No enforceability without equivalency. – Montana Law Review, Vol. 64, No. 2, p. 490.

²⁹ Šimac, S. (2006) Mirenje – alternativni način rješavanja sporova. – Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 27, No. 1, p. 619.

Act on Peaceful Settlement of Labor Disputes, *only several types* of individual labor disputes may be resolved by arbitration, which includes disputes involving discrimination at work. Thus, there is a dual system of consensual or arbitration settlement of individual labor disputes.

According to the provisions of the Labor Act, the procedure for the settlement of disputed issues by agreement or arbitration between the employer and the employee can be foreseen by a general legal act (collective agreement and labor rulebook) and individual employment contract, therefore it is an optional form of right from the employment relationship. The parties to the dispute are the employee and the employer, while disputed issues are resolved by an arbitrator, who is determined by agreement between the parties to the dispute. Proceedings before the arbitrator can be initiated within three days from the date of delivery of the decision to the employee, while the arbitrator is obliged to make a decision on the disputed issue within 10 days from the date of submission of the request for the amicable settlement of the disputed issues. The decision of the arbitrator is final and binding on the employer and the employee. During the duration of the procedure before the arbitrator, in the case of termination of the employment contract, the employee's employment is suspended, and if the arbitrator does not make a decision within the period provided by law, the decision on the termination of the employment contract becomes enforceable. However, it is important to emphasize that if the employer does not act on that decision, the employee cannot request enforcement in court proceedings, because, according to the Act on Enforcement and Security Interest, it does not have the status of an enforceable document.³⁰

On the other hand, *under the provisions of the Act on Peaceful Settlement of Labor Disputes*, arbitration proceedings are initiated by a proposal that the disputing parties may submit jointly or individually to the Agency.³¹ Unlike the arbitration settlement of an individual labor dispute according to the provisions of the Labor Act, where any business-capable person from among experts in the field of labor law can be chosen as an arbitrator, in arbitration proceedings before the Agency, only a person from the Directory of conciliators and arbitrators can be appointed as an arbitrator, and by agreement of the disputing parties in the joint proposal, that is, within three working days from the day of acceptance of the individual proposal. If the disputing parties do not

³⁰ Zakon o izvršenju i obezbeđenju (Act on Enforcement and Security Interest), Sl. glasnik RS, br. 106/2015, 106/2016 – autentično tumačenje, 113/2017 – autentično tumačenje, 54/2019 i 9/2020 – autentično tumačenje, 10/2023 – dr. zakon, art. 41.

³¹ Zakon o mirnom rešavanju radnih sporova (Act on Peaceful Settlement of Labour Disputes), art. 10.

appoint an arbitrator by agreement, the director of the Agency shall appoint him by decision.³²

The arbitrator is obliged to schedule a hearing within three days, in which he takes statements, presents evidence and ensures that all facts relevant to the decision are presented. The hearing is public, except in disputes involving discrimination and harassment at work. During the procedure, the arbitrator is required to indicate to the disputing parties the possibility of a peaceful settlement of the dispute.³³ The procedure before the arbitrator shall end within 30 days of the opening of the hearing, by the adoption of the arbitrator's decision: 1) which is based on the agreement of the parties to the dispute; 2) by which the arbitrator decides on the subject matter of the dispute; 3) if the arbitration procedure has become impossible; and/or 4) the arbitrator's decision to suspend the proceedings in compliance with the law.³⁴ Therefore, this means that the dispute can be resolved amicably, i.e. that the arbitrator will not, in any case, make a decision on the basis of presented evidence arising from the established factual situation. An important exception from the above is the rule that a dispute involving discrimination at work (and harassment at work) can be ended exclusively by an arbitrator's decision based on the agreement of the disputing parties. Therefore, the latter rule is an exception to the rule that the procedure before the arbitrator ends with a decision by which the arbitrator decides on the subject matter of the dispute, on the basis of the presented evidence arising from the established factual situation. This significantly changes the position of the employee because, if there is no agreement on the settlement of the dispute, the arbitrator suspends the proceedings, and court proceedings can be conducted on the same legal matter.³⁵ Therefore, in proceedings involving discrimination at work and harassment at work, the powers of arbitrators are narrowed, since in these proceedings they cannot determine the factual situation, but only guide the disputing parties towards an amicable settlement of the dispute. The aforementioned rule was apparently introduced by the legislator due to the delicacy and special nature of this type of dispute, as well as the difficulty of proving behavior that constitutes discrimination or harassment at work, for which the 30-day period is quite short. However, this rule in practice confuses the disputing parties, because when initiating arbitration proceedings, they expect the decision of the arbitrator by which he decides on the subject of the dispute. As a result of the above, the disputing parties often insist on

³² Ibid., art. 12.

³³ Ibid., art. 31–33.

³⁴ Ibid., art. 35a, paragraph 1, art 36.

³⁵ Kovačević, Lj. Op. cit., 455.

establishing certain facts that confirm the correctness of their actions in the specific case, expecting the arbitrator to confirm the above with his decision. No appeal is allowed against the arbitrator's decision: it is final and enforceable on the day it is delivered to the disputing parties, except for the arbitrator's decision suspending the proceedings due to the lack of agreement between the disputing parties on the resolution of the dispute involving discrimination or harassment at work. If the arbitrator's decision stipulates that the action that is the subject of execution can be performed within a set time frame, the decision becomes enforceable upon the expiry of the stipulated deadline.³⁶ Therefore, it can be noted that the procedure for arbitration settlement of labor disputes before the Agency is far more formal than the procedure for arbitration settlement of disputes according to the provisions of the Labor Act. For this reason, according to the provisions of the Act on Peaceful Settlement of Labor Disputes, the decision of the arbitrator, which was made based on the agreement of the disputing parties, as well as the decision of the arbitrator by which the arbitrator decides on the subject of the dispute, has the force of an enforceable document.³⁷ Thus, this Act is formally aligned with the Act on Enforcement and Security Interest,³⁸ as well as the Arbitration Act, which stipulates that a domestic arbitration decision has the force of a domestic court decision.³⁹

In this context, the question arises about the possibility of filing a legal remedy against the arbitrator's decision, in terms of the constitutional guarantee of the right to a legal remedy against a decision deciding on a right, obligation, or interest based on law. In the practice of domestic courts, this issue was treated differently, where in the first years of the application of the Act on

³⁶ Zakon o mirnom rešavanju radnih sporova (Act on Peaceful Settlement of Labour Disputes), art. 36.

³⁷ Ibid., art. 35a, paragraph 2. As Reljanović and Misailović rightly note, the enforceability of the arbitration decision is a disputed issue, bearing in mind that the purpose of the peaceful dispute resolution procedure is precisely for the disputing parties to be satisfied with its solution and to implement it on a voluntary basis. As it may not always be possible, the decision of the arbitrator can be considered an enforceable document (and regulated as such), but it should always be kept in mind that it should be regulated that if one of the parties exercises the right guaranteed by law to address the court after the arbitration, it must stop enforcement procedure – otherwise, the subject of court decision-making may also be compensation for damage caused by the execution of an arbitration decision that the court judges to be inconsistent with the mandatory norms of the legal system. Reljanović, M., Misailović, J. (2021) Rešavanje radnih sporova, Institut za uporedno pravo, Beograd, p. 66.

³⁸ Zakon o izvršenju i obezbeđenju (Act on Enforcement and Security Interest), art. 41, paragraph 1, item 8.

³⁹ Zakon o arbitraži (Arbitration Act), Sl. glasnik RS, br. 46/2006, art. 64.

Peaceful Settlement of Labor Disputes, the disputing parties were denied the right to seek judicial protection regarding the arbitration decision, although the Arbitration Act introduced the possibility to file a lawsuit for set aside domestic arbitration awards.⁴⁰ Despite the above, we are of the opinion that the provisions of the Arbitration Act should be interpreted in such a way that judicial control of the arbitration decision is possible even when the arbitration decision was made in proceedings before an arbitrator from the Directory of conciliators and arbitrators maintained by the Agency (thus, in accordance with the Act on Peaceful Settlement of Labor disputes). This further means that the arbitration settlement of individual labor disputes is not incompatible with the possibility of the parties to use a legal remedy against the arbitration decision, in the manner established by law. In terms of the Arbitration Act, a lawsuit (legal action) for the annulment of an arbitration decision can be used as an appropriate legal remedy, in connection with which the court conducts a subsequent and limited control of a procedural nature.⁴¹ In addition, (*de lege ferenda*) the parties in a dispute brought before the Agency should be provided additional protection. For example, in line with similar solutions in comparative law, it may be provided by instituting a second-instance arbitration panel at the Agency level. Such a solution potentially leads to the prolongation of the final settlement of the dispute, but it is certainly the only one possible in the context of constitutional norms and standards for the enjoyment of human rights.⁴² Also, it must be borne in mind that efficiency in itself means nothing if an effective procedure is decided contrary to the law, or the existing conflict only deepens, with the simultaneous creation of an even more complex legal relationship between the parties to the dispute.⁴³

3) *The situation in practice*

In domestic legal life, judicial settlement of labor disputes (including discrimination disputes) takes precedence. This can be explained, first of all, by a peculiar legal culture, in which judicial settlement of disputes appears as an inviolable method, despite all problems that burden its application. In addition, there is insufficient awareness of the subjects of the employment relationship about

⁴⁰ Kovačević, Lj. Op. cit., 455.

⁴¹ Zakon o arbitraži (Arbitration Act), art. 57–63.

⁴² In this sense, it is important to keep in mind that arbitration, although it can be established by agreement of the parties to the dispute, can never act outside the legal system in which it takes place, because the arbitrator is obliged to take care of both the interests of the parties to the dispute and the public interest, that is, the preservation of the principle of the rule of law. Reljanović, M., Misailović, J. (2021), Op. cit., p. 66.

⁴³ Ibid.

the possibilities and advantages of peaceful settlement of disputes, their distrust in arbitrators, as well as the imprecise regulation of the procedure governing the peaceful settlement of labor disputes in Serbia. Although the Act on Peaceful Resolution of Labor Disputes prescribes certain rules of procedure before an arbitrator, it is not expressly specified which (general) rules should be applied to procedural issues which are not regulated by this Act: the rules of general administrative procedure, or the rules of civil procedure. Moreover, there is a lack of rules on the work of arbitrators, the absence of two-tier arbitration decision-making, and problems related to the execution of the arbitral award, especially the absence of sanctions for parties that do not proceed with the execution of the arbitration agreement.

According to the data obtained from the director of the Republic Agency for Peaceful Settlement of Labor Disputes, in the period from 2005 to April 2024, a total of 22,539 labor disputes were initiated before the Agency: a total of 22,211 cases were individual labor disputes and 482 were collective labor disputes.

Detailed electronic records of procedures before the Agency have been kept since 2017, which means that all information refers to the period from 1st January 2017.

In the period from 1st January 2017 to date, a total of 5,455 individual labor disputes and 127 collective labor disputes were resolved on the merits. In the observed period, there was a total number of 61 proceedings on the subject matter of discrimination at work, 52 of which were resolved in administrative proceedings, 5 were resolved on the merits, and 4 proceedings are underway.

Mediation as a method of resolving disputes involving discrimination at work

1) Advantages and disadvantages of mediation as a method for resolving disputes involving discrimination at work

Mediation is one of the alternative methods for a peaceful settlement of disputes, the application of which allows the parties to the dispute to resolve the mutual dispute in a constructive and friendly manner and reach a solution that is acceptable to both parties, often with a neutral third party – a mediator, who helps the parties to reach acceptable solution.⁴⁴ Since this procedure is

⁴⁴ Petrušić, N. (2010) Evropski standardi i principi rešavanja sporova putem medijacije. – Vukadinović, G., Kartag-Odri, A., (ed.) Evropska zajednica naroda i univerzalne vrednosti, Novi Sad, p. 3.

not adversarial, the parties work together to find an acceptable solution that corresponds to the interests of each of them.⁴⁵

There are numerous advantages of resolving disputes through mediation compared to litigation, the main ones being that mediation provides a cheaper and better service to the parties to the dispute. The advantages of mediation include full control of the conflicting parties, saving money, adaptability and saving time, guaranteed confidentiality and privacy, the fact that the agreement suits the users and the preservation of good interpersonal relations.⁴⁶ Also, significant advantages of mediation are that in mediation, all the details of the dispute are brought to light, and not only their legal interpretation; the parties directly and freely exchange their views on the subject of the dispute; the possibility of conflicts between the parties and their attorneys is reduced; the appearance of emotional frustration, which usually accompanies them before the court, is avoided; no one is declared a winner or a loser by the agreement reached (win-win solution); mediation offers many possibilities for dispute resolution; uncertainty regarding law and facts is excluded; the risks of an unfavorable court decision are excluded; an agreement reached through mediation gives the parties less reason to dispute it later, and the parties most often execute the agreement voluntarily, which excludes the need for conducting an often lengthy and expensive enforcement procedure.⁴⁷

Although the suitability of mediation as a method for resolving disputes involving discrimination at work largely depends on the circumstances of the specific case, it can be concluded that mediation can be a suitable, and in some cases even a powerful method for resolving this type of dispute. This is independent of the fact that disputes involving discrimination at work are often accompanied by mutual misunderstanding of the parties to the dispute, that the area of protection against discrimination is regulated by binding legal norms and that it does not concern the rights that the parties can freely dispose of, nor is it an area in which a settlement, understood in the strictly legal sense of the word, could be allowed. Despite all of the above, disputes involving discrimination at work seem suitable for solving with this method, because the outcome of the procedure may concern the elimination of the causes that led to the deterioration of the relationship between the employee and the employer.⁴⁸

⁴⁵ Kovačević, Lj. Op. cit., 455.

⁴⁶ Džamonja Ignjatović T., Žegarac N. (2007) Medijacija u sistemu socijalne zaštite. – Godišnjak Fakulteta političkih nauka, Beograd, p. 403–404.

⁴⁷ Šimac, S. Op. cit., p. 628–629.

⁴⁸ Uzelac, A. (2004) Mirenje kao alternativa suđenju. – Uzelac, A *et al.* (ed.) Mirenje u građanskim, trnovačkim i radnim sporovima, p. 24.

In contrast to the judicial settlement of disputes, which often prolong and even deepen the conflict between the employee and the employer, mediation opens the door to preserve and continue communication and cooperation between the employee and the employer, even after discrimination, and can also act preventively, in terms of preventing the emergence of new conflicts.⁴⁹ This method of dispute resolution leads to the reconciliation of conflicting interests and reaching an agreement based on the needs of the parties to the dispute, while in the case of arbitration and judicial dispute resolution, instead of the parties to the dispute, the decision is made by a third party, based on the relevant legal norms. Moreover, the parties to the dispute may feel some of these benefits even if no agreement is reached between them, since the mere approximation of positions can lead to a reduction of mutual tensions, while the (remaining) disputed issues can be resolved by other methods.

On the other hand, the basic disadvantage of mediation is related to the risk that this method will be misused by the employer, as a strong point of the preserving the employment relationship, because some employers resort to mediation in order to cover their responsibility for discriminatory behavior and avoid immediate (costs of proceedings and legal representation) and indirect costs of participating in the litigation (early realization of your claim, which, consequently, allows the working environment to continue functioning without the burden that burdens it in the case of lengthy proceedings).⁵⁰ In addition, mediation is not an acceptable method of resolving disputes involving discrimination at work if the parties do not agree on all the circumstances of a particular case, or one of them refuses to actively participate in the procedure, or participates in it in order to delay or block the procedure. The same applies if, in a specific case of discrimination, there is a clear need for urgent intervention (of state authorities) in the deteriorating relations between the employer and the employee, primarily in the form of a temporary measure, when the mediation procedure may be either useless or even harmful to one of the parties. Finally, in discrimination disputes, the meaning of the principle of neutrality is disputed, i.e. obligation of the mediator to act neutrally in the procedure. The aforementioned means that he should be neutral in relation to the subject of the dispute, in the sense that he must not have a soft hidden interest regarding the disputed relationship, but he should not be neutral towards discrimination. Instead, the mediator is expected to show that it is a phenomenon that is both

⁴⁹ Petrušić, N. et al. (2014) Priručnik za primenu medijacije u okviru službe Poverenika za zaštitu ravnopravnosti, Poverenik za zaštitu ravnopravnosti, Beograd, p. 21.

⁵⁰ Uzelac, A. (2004) Op. cit., p. 23.

morally unacceptable and, consequently, to reject an agreement that would be contrary to the basic principles of protection against discrimination.⁵¹

2) *The legal regime of mediation in labor disputes in the Republic of Serbia*

According to the currently valid legal regulations, mediation in the Republic of Serbia is regulated by the Act on Mediation in Dispute Resolution. With its entry into force, the Mediation Act⁵² ceased to apply, as the first act in the Republic of Serbia that regulated mediation exclusively. The adoption of the new Act on Mediation in Dispute Resolution was imposed by the need to improve and advance the previous normative framework of mediation in resolving disputes, which was established by the previous Mediation Act, in order to promote the application of mediation in disputed relationships in which the parties can dispose of their claims and indirectly achieve positive effects in the functioning of the judicial system in Serbia.⁵³

According to Act on Mediation in Dispute Resolution of the RS, labor disputes are among the disputes that are resolved through mediation.⁵⁴ On the other hand, the Act on the Prohibition of Discrimination (*The Anti-Discriminations Act*) of the RS stipulates that the Commissioner for the Protection of Equality may propose the implementation of the mediation procedure to reach an agreement (in the course of proceedings before this body until the adoption of an opinion), in compliance with the law regulating the mediation procedure.⁵⁵ It further means that there are no formal impediments to using a mediation procedure to resolve disputes involving discrimination at work, in case the parties voluntarily try to resolve the dispute through mediation with the help of one or more mediators, who help the parties reach an agreement.

The mediation procedure is initiated by entering an agreement on joining mediation, or submitting it to the court or another authority where such an agreement may be concluded. This agreement must be in writing, concluded by the parties and mediator, and must contain the choice of mediator, mutual rights and obligations in accordance with the principles of mediation, established mediation costs and other matters of importance for conducting mediation.⁵⁶

⁵¹ Kovačević, Lj. Op. cit., 459.

⁵² Zakon o posredovanju (Mediation Act), Sl. glasnik RS, br. 18/2005.

⁵³ Obrazloženje Zakona o posredovanju u rešavanju sporova, http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/1354-14Lat.pdf

⁵⁴ Zakon o posredovanju u rešavanju sporova (Act on Mediation in Dispute Resolution), art. 3, paragraph 3.

⁵⁵ Zakon o zabrani diskriminacije (Act on Prohibition of Discrimination), art. 38.

⁵⁶ Zakon o posredovanju u rešavanju sporova (Act on Mediation in Dispute Resolution), art. 18–19.

The mediation procedure is carried out by one or more mediators, which is determined by the parties' mutual agreement. If the parties do not appoint a mediator by agreement, they can request that the mediator be appointed by the court, or another authority before which the proceedings are conducted, from the list of registered mediators kept by the Ministry of Justice. The parties are free to agree on the method of conducting mediation by referring to specific rules of procedure, or in another way.

The mediation procedure ends: 1) when the parties conclude a mediation agreement (on resolving the dispute through mediation); 2) when the mediator decides suspend the procedure because mediation procedure is no longer purposeful and expedient; 3) when one party withdraws from the procedure, except in case where several parties participate in the mediation and they decide to continue the mediation process after the withdrawal of one party; 4) after the expiry of the period of 60 days from the date of conclusion of the agreement on joining the mediation, unless the parties agree otherwise.

The content of the agreement on dispute resolution through mediation is determined by the parties in the mediation procedure. The agreement is drawn up in writing and signed by the mediator, the parties to the mediation procedure and the attorneys attending the mediation. According to the Act on Mediation in Dispute Resolution, an agreement on dispute resolution through mediation can have the force of an enforceable document if the following conditions are met: 1) it contains a statement by the debtor agreeing that the creditor, based on the agreement on dispute resolution through mediation, can initiate enforcement proceedings after the claim is due (enforceability clause); 2) that the signatures of the parties or the mediator have been certified by a court or a public notary.

The cited provision represents a very radical change, which implies that the creditor can, on the basis of an agreement to resolve the dispute through mediation, provided that it contains an enforceability clause and that the signatures of the parties and mediators are certified by a court or a notary public, collect their claim in enforcement proceedings, without the need for litigation. This provision, however, is not binding for every agreement to settle a dispute through mediation, but giving the agreement the character of an enforceable document is still at the disposal of the parties to the dispute. This is a positive news for the parties in the dispute, because in this way the conduct of litigation is completely eliminated if the parties so wish, which saves the parties money in a situation where the debtor agreed to settle the debt, but later did not do so, after which according to the old legal solution, the creditor still had to initiate civil proceedings. However, some authors believe that such a legal solution can make it difficult to apply mediation as a method for peacefully resolving cases of discrimination within the office of the Commissioner for

Protection of Equality, because it will further deter the parties from mediation, which the Commissioner refers them to, and to whom they turn for opinions and recommendations. Out of fear that the path to litigation is thus closed to them, as well as that it is not in accordance with the principle of formal legality prescribed in Art. 8 of the Act on Enforcement and Security Interest, which implies that the enforcement court is bound by the enforcement document, and that when passing a decision on enforcement, it is not authorized to examine its material and procedural legality, nor does it have procedural instruments for that.⁵⁷ In principle, the biggest debates among the authors are about the way in which the agreement acquires the status of an enforceable document, and not about whether it should have the said status.⁵⁸

With regard to mediation costs, it is stipulated that each party shall bear its own costs, and that joint costs shall be borne equally, unless otherwise agreed. The common costs of mediation consist of the reward for the work of the mediator and the reimbursement of the costs incurred by the mediator in connection with the mediation process.⁵⁹

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⁵⁷ Petrušić, N., Mišljenje o pojedinim odredbama Radne verzije Zakona o posredovanju u rešavanju sporova, del. br. 011–00–49/2013–02 od 15.09.2013 godine, Poverenik za zaštitu ravnopravnosti, <http://www.ravnopravnost.gov.rs/>.

⁵⁸ Mojašević, A. (2014) Ekonomska analiza pojedinih rešenja iz Zakona o posredovanju u rešavanju sporova. – Zbornik radova Pravnog fakulteta u Nišu, No. 66, p. 269.

⁵⁹ Zakon o posredovanju u rešavanju sporova (Act on Mediation in Dispute Resolution), art. 29.

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Prohibition of Intersectional Discrimination in Serbia – Reflections on the World of Work

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Even though the issue of discrimination in the world of work has been, at least to say recognized, for decades, the complexity and the wideness of this issue requires constant re-examination of the existing norms and guarantees which are relevant in terms of implementing the principle of equality and non-discrimination, as one of the key labor law principles. In that regard, “new” forms of discrimination are being “discovered” and are starting to gain more attention, which is the case, among other forms of discrimination, with intersectional discrimination. Namely, the concept of intersectional discrimination is based on the intersectionality theory and refers to discrimination based on two or more personal grounds that intersect and reflect on a victim’s situation with a synergistic effect. The paper focuses on the issue of intersectional discrimination in Serbia, from the employment law perspective and in this regard deals with legal framework, as well as the issue of recognizing intersectional discrimination in practice by briefly addressing case law of the Serbian courts and focusing on the opinions and recommendations of the Commissioner for the Protection of Equality in Serbia. In that sense, the goal of the paper is to prove that, even though the issue of intersectional discrimination has been recognized in Serbian legislation, there still remains a lot to be done when it comes to recognizing and combatting this form of discrimination in practice.

Keywords: *discrimination, intersectionality theory, intersectional discrimination, equality, world of work, Serbian legislation, Employment Act, Act on Prohibition of Discrimination, Commissioner for the Protection of Equality*



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1. Introductory remarks

What is and why should we deal with the issue of intersectional discrimination?

In the last couple of years, the theory of intersectionality, and intersectional discrimination, as a notion and a concept based on this theory, is starting to gain more and more attention. Even though this theory exists not only for a couple of years, but for a couple of decades now, the intersectionality theory that unveils marginalization, stigmatization and discrimination “produced” by the intersection of different personal grounds remains “controversial” to this day.¹

It started developing in the late 1980s, and has, since, shown, at least some of the, “missing” aspects in the provisions and guarantees that prohibit discrimination.² Namely, this theory has pointed out that such norms are, as a rule, built on the single-axis approach, i.e., focused only on one personal ground, as a potential basis for discrimination.³ What is more, even when they include several personal grounds, they are most often interpreted as prohibiting discrimination based on every personal ground *separately*.⁴ Theory of intersectionality, without

¹ Afeworki Abay, R. (2023) Dekolonialisierung des Wissens: Eine partizipative Studie zu Diskriminierung und Teilhabe an Erwerbsarbeit von BIPOC mit Behinderungserfahrungen. Bienfeld University Press, p. 70.

² This theory was first developed in the papers of Kimberlé Crenshaw, who focused on the situation of African-American women and the struggles they are faced with, and which are often a “product” of intersection of gender, race and class. In this regard, she argued that the situation of African-American women cannot and should not be looked upon and analyzed from the perspective of (only) one personal ground, but rather from an intersectional perspective that takes into account multiple and different personal grounds that intersect, leading to an exponentially worsened situation of the victim of discrimination. Crenshaw, K. (1989) Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. – University of Chicago Legal Forum, Vol. 1989, No. 1, 139–167, pp. 139–167 and Crenshaw, K. (1991) Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color. – Stanford Law Review, Vol. 42, No. 6, 1241–1299, pp. 1241–1260.

³ In order to understand intersectionality and the situation in which the victims of intersectional discrimination find themselves in, it is necessary to decompose the understanding that each (marginalized) group is homogenous. Capesciotti, M., Paoletti, M. (2023) In-Work Poverty and the Gender Paradox. – Ratti, L., Schoukens, P. (eds.) Working Yet Poor: Challenges to EU Social Citizenship, 75–97, p. 76.

⁴ One of the court cases that have inspired the “birth” of the intersectionality theory is the *DeGraffenreid v. General Motors* (U.S. District Court for the Eastern District of Missouri – 413 F. Supp. 142 (E.D. Mo. 1976) May 4, 1976), which is an employment law case dealing with a situation in which, according to the intersectionality theory, the employer has discriminated African-American women in the process of determining redundant workers. They claimed to have been discriminated based on, not one personal

reconsidering the necessity and importance of such norms, however highlights the fact that such norms “are blind” when it comes to those who are victims of discrimination based on several personal grounds that exist simultaneously and are intersected.⁵ In other words, victims of intersectional discrimination, which is to be defined as discrimination based on more several grounds intersected in a manner that creates a synergistic effect, often remain “invisible” to the society and without the right to legal protection.⁶

The said is true for anti-discrimination norms in (different branches of) law, and especially when it comes to employment law norms which are meant to provide protection from discrimination in the world of work. On the other hand, the risk of discrimination, i.e., any form of discrimination including intersectional discrimination, is especially emphasized precisely in this sphere.⁷ What is more, it is important to have in mind that the situation in which a person finds himself/herself/themselves in different and other spheres of life is often closely related and a reflection of the person’s situation in the world of work.⁸ Therefore, dealing with intersectional discrimination in the world of work is an issue relevant for every individual in practice, but also an issue that touches upon the social justice, as a key, but also the most abstract goal of labor law.⁹

Having in mind this context requires a closer look into the legal norms dealing with the issue of discrimination in the world of work. In that sense, it is interesting and important to see the first steps in terms of recognizing intersectional discrimination in employment at a universal level – in the opinions of the expert

ground, but in fact based on different and multiple personal grounds (gender and sex on one hand and race on the other) that intersect. However, the court did not support their stance by referring to a lack of a specific (one) personal ground that is (was) the ground for discrimination in this case.

⁵ Makkonen, T. (2002) Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore. Institute for Human Rights, Åbo Akademi University, pp. 16–17.

⁶ Center for Intersectional Justice (2019) Intersectional Discrimination in Europe: Relevance, Challenges and Ways Forward. European Network Against Racism, p. 5. Pappalardo, C. (2023) Critical Race Feminism: a Different Approach to Feminist Theory. – Vujadinović, D., Álvarez del Cuillo, A., Strand, S. (eds.) Gender Perspectives in Law. Springer, 53–73, pp. 53–60. In this regard, Mršević even argues that discussing the female experience is “worthy” only if we constantly have in mind the experiences of women who are victims of multiple and intersectional discrimination. Mršević Z. (2011) Ka demokratskom društvu – rodna ravnopravnost. Institut društvenih nauka, Beograd, 2011, p. 26.

⁷ Teschke-Bährle, U. (2006) Arbeitsrecht – Schnell erfasst. Springer, pp. 2–3.

⁸ Kovačević, Lj. (2021) Zasnivanje radnog odnosa. Pravni fakultet Univerziteta u Beogradu, p. 134.

⁹ Arauco, V. P. *et al.* Strengthening Social Justice to Address Intersecting Inequalities Post-2015. <https://cdn.odi.org/media/documents/9213.pdf>, 5.01.2024.

and independent bodies of the Organization of the United Nations (UN)¹⁰, as well as in the International Labor Organization (ILO) legal instruments.¹¹ Such “trend” can also be seen at the European level, especially in the European Union sources of law.¹² What is especially interesting is that the intersectional discrimination is explicitly recognized in the legal framework in the Republic of Serbia, which shall be elaborated in more detail in continuation. However, the risk of this form of discrimination has not (yet) been adequately recognized in the case law of the domestic courts, which is not surprising, having in mind that the European Court of Human Rights¹³, as well as the Court of Justice of the European Union¹⁴

¹⁰ In that regard see Campbell, M. (2016) CEDAW and Women’s Intersecting Identities: A Pioneering Approach to Intersectional Discrimination, Working Paper Vol. 2, No. 3, <https://globalnaps.org/wp-content/uploads/2018/08/cedaw-and-women-s-intersecting-identities-a-pioneering-approach-to-intersectional-discrimination.pdf>, 08.01.2024 and Application and limitations of intersectionality by the Committee on the Elimination of Racial Discrimination (CERD) and how the Committee has used this concept to identify and unravel different layers of inequality, <https://rm.coe.int/speaking-notes-p-tlakula-2022-ecri-annual-seminar/1680a850ee>, 09.01.2024.

¹¹ See Preamble of the C190 – Violence and Harassment Convention, 2019 (No. 190) International Labour Conference – 109th Session, 2021 and Resolution concerning inequalities and the world of work (11 December 2021).

¹² The mentioned can be seen in the preamble of the Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, 25.10.2022, *Official Journal of the European Union*, L 275, as well as art. 3 para. 2, art. 16 para. 3 and art. 23 para. 3 of the Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, 17.5.2023, *Official Journal of the European Union*, L 132. A very important, although non-binding legal instrument in this regard is the European Parliament resolution of 6 July 2022 on intersectional discrimination in the European Union: the socio-economic situation of women of African, Middle-Eastern, Latin-American and Asian descent (2021/2243(INI)).

¹³ For more regarding the stances of the European Court of the Human Rights and the risk of intersectional discrimination see *Dahlab v. Switzerland* (15.02.2001, App. 42393/98), *S.A.S. v France* (01.07.2014, App. 43835/11) or *V.C. v Slovakia* (08.11.2011, 18968/07).

¹⁴ Similar to the situation in regard to European Court of the Human Rights, the Court of Justice of the European Union has also been criticized for not recognizing the risk of intersectional discrimination, particularly when it comes to employment. Some cases to take into consideration from the intersectional perspective are the following: *S. Coleman v Attridge Law and Steve Law*, ECLI:EU:C:2008:415; C-123/10, 20.10.2011, *Waltraud Brachner v Pensionsversicherungsanstalt*, ECLI:EU:C:2011:675; Case 335/11 and Case 337/11, 11.04.2013, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, ECLI:EU:C:2013:222. Case 363/12, 26.9.2013, *Z. v A Government department and The Board of management of a community school*, ECLI:EU:C:2013:604; Case 443/15, 24.11.2016, *David L. Parris v Trinity College Dublin and Others*, ECLI:EU:C:2016:897; Case C-157/15, 14.03.2017, *Samira Achbita and*

have also, so far, mostly failed to recognize the risk of such discrimination. The situation is, to a great extent, different, when it comes to opinions and recommendations of the Commissioner for the Protection of Equality in Serbia (in further text: the Commissioner), which also speaks of steps forward in terms of recognizing intersectional discrimination in practice in Serbia.

2. Intertwining of laws and the concept of intersectional discrimination in Serbia

2.1. General remarks

In order to analyze the legal framework relevant for the issue of (intersectional) discrimination in employment in Serbia, one must firstly take a closer look at the context that is the world of work in Serbia.¹⁵ In this regard, we shall take a glance at the research conducted by the Commissioner in 2019. The conducted research indicates that, out of the questioned respondents, even 92% of the employers, 86% of the unemployed persons and 84% of the employees considers not only that discrimination in Serbia exists, but that it is widely present (despite the lack of data which shows the existence of discrimination in such a great extent). What is more, the research showed that women, young and older workers indicate the existence of discrimination in employment in an even higher percentage, which speaks of the need for intersectional perspective when dealing with the issue of discrimination in the world of work.¹⁶ Furthermore,

Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, ECLI:EU:C:2017:203 and Joined Cases C-804/18 and C-341/19, 15.07.2021 and *IX v WABE eV and MH Müller Handels GmbH v MJ*, ECLI:EU:C:2021:594.

¹⁵ In this regard, it is important to mention that the Statistical Office of the Republic of Serbia, regularly, publishes data on employment in each quartal of each year. However, such data are not always of great value when dealing with the issue of intersectional discrimination. On one hand, such data do not precise and differentiate based on personal grounds, while on the other hand that use the term “employees” for workers working based on an employment contract, but also for the ones working based on other contracts. For example, see: <https://www.stat.gov.rs/sr-latn/oblasti/trziste-rada/registrovana-zaposlenost/>. In this regard, it seems that of greater significance are the themed publications of the Statistical Office, such as the publication focusing on the situation of women and men in employment in the Republic of Serbia, that highlights the still existing inequalities which put women in a worse position in comparison to men. In this regard see Republički zavod za statistiku (2023) *Žene i muškarci u Republici Srbiji*. Republički zavod za statistiku, pp. 76–95.

¹⁶ Poverenik za zaštitu ravnopravnosti (Commissioner for the Protection of Equality) (2019) *Diskriminacija na tržištu rada* (Posebni izveštaj Poverenika za zaštitu ravnopravnosti). Poverenik za zaštitu ravnopravnosti, p. 1. Such data in the Republic of Serbia speak of the globally existing close and “unbreakable” relation between discrimination and socio-economic relations. For more in this regard see Marko, J. (2014) *Vom Diskriminierungs-*

besides gender, family duties, and disability, as especially present grounds for discrimination, other personal grounds, such as age, are, in accordance with the (demographic) trends starting to gain more “popularity”, especially looked at from the intersectional perspective.¹⁷

In line with the mentioned, it should also be taken into account that the reports from 2023 point to and emphasize the risk of *multiple* and *intersectional* discrimination. In that sense, the Commissioner has, only in 2023, received 142 complaints where multiple grounds of discrimination are listed, even though the Commissioner notices that sometimes complaints include multiple grounds because the persons filing a complaint are not certain about the ground for discrimination that should be listed.¹⁸ Having in mind the mentioned, it is not surprising that we are often witnesses of testimonies, such as the following one, from the 36-year-old woman:

“When I went for a job interview, they commented on my appearance. Why do I have an ear piercing? Why don’t I look more elegant? And why am I not the same in the photo and in reality? And then they asked me about my private life – who I live with and what is my marital status”.¹⁹

That being said, it is important to have in mind that factors such as neo-liberal thinking, the aging of the population as well as migration, technological development and digitalization, are influencing and creating the contemporary world of work, leading to destabilization and deregulation.²⁰ Such factors, and trends which are closely related to those factors, such as flexibilization of em-

verbot zu “effektiver” Gleichheit? Zur Notwendigkeit interdisziplinärer Forschung von JuristInnen und SoziologInnen. – Philipp, S. et al. (eds.) *Intersektionelle Benachteiligung und Diskriminierung*, 19–43, p. 23.

¹⁷ Ibidem., p. 11.

¹⁸ Poverenik za zaštitu ravnopravnosti (Commissioner for the Protection of Equality) (2024) *Redovan godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2023 godinu*. Poverenik za zaštitu ravnopravnosti, pp. 221–223.

¹⁹ Đan, A., Vrbaški, S. (2019) *Rodna diskriminacija u oblasti rada i zapošljavanja u Srbiji*. Kvinna till Kvinna, Bograd, p. 25.

²⁰ As stated, “in a globalizing world, questions of working life remain central to most people. These questions place at the centre individuals and their well-being, and they offer perspectives of vulnerabilities to society that voices of the globalization of economy tend to sideline. But while norm-setting for international economic relations has been considered central to global governance, norm-setting for the governance of the social dimension of globalization has been greeted with less enthusiasm”. Halonen, T. (2021) *Harnessing Globalization: An Everlasting Challenge*. – Halonen, T., Liukkunen, U. (eds.) *International Labour Organization and Global Social Governance*. Springer, 1–17, p. 17. The said is true globally speaking, but also in relation to the situation in the Republic of Serbia, as the labour market and the world of work in Serbia is (also) rapidly changing in this direction.

ployment and the emergence of new forms of employment²¹, lead to a growing risk of discrimination in employment, which can be considered especially true for intersectional discrimination.

All of the mentioned creates a wider picture of context in Serbia. However, we should not look at this picture (only) from a negative perspective as the very fact that the issue of discrimination has its place in the public discourse and narrative is a step forward, comparing to situation(s) present a decade or two ago.²²

2.2. Prohibition of discrimination in the employment legislation in Serbia

When dealing with the issue of discrimination in the world of work, in the Republic of Serbia, it is key to consult the Employment Act.²³ According to this act, i.e., law, both direct and indirect discrimination “for reasons of sex, birth, language, race, color of skin, age, pregnancy, health condition, i.e. disability, ethnic origin, religion, marital status, family obligations, sexual orientation, political or other belief, social background, financial status, membership in political organizations, trade unions, or any other personal characteristic”²⁴. Therefore, we can see that discrimination is prohibited based on an open-ended list of personal grounds as potential bases for discrimination. Furthermore, the Act defines both direct and indirect discrimination²⁵ and clearly stipulates that discrimination is prohibited in relation to the following: “employment conditions and choice of jobseekers for performing a specific job; conditions of work and all the rights deriving from employment; education, vocational training and specialization; job promotion, as well as the termination of the employment contract”.²⁶ What is especially important is that the mentioned act also regulates situations in which making a difference based on a personal ground is justified, i.e., is not considered

²¹ For more regarding the flexibilization of work and new forms of work in Serbia see Jašarević S. (2012) *Fleksibilizacija rada – rešenje ili zabluda*. – Zbornik radova Pravnog fakulteta u Novom Sadu, Vol. 46, No. 4, 173–192 and Jašarević, S. (2015) *Nove forme rada u Evropskoj uniji i Srbiji*. – *Radno i socijalno pravo*, Vol. XIV, No. 2, 1–22, p. 17.

²² Šolić, N., Vasić, M., Todorović, K. (2019) *Diskriminacija u Srbiji – praksa i izazovi*. Komitet pravnika za ljudska prava, Ministarstvo inostranih poslova Republike Bugarske, p. 30.

²³ Employment Act (“Off. Herald of RS”, Nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017–Decision of the CC, 113/2017 and 95/2018 – authentic interpretation).

²⁴ Art. 18 of the Employment Act.

²⁵ According to Art. 19 of the Employment Act, direct discrimination is defined as “any conduct caused by some of the reasons specified in Article 18 of the present Act whereby a person seeking employment, as well as an employed person, is placed in a more disadvantageous position comparing to other persons in the same or similar situation”, while indirect discrimination “exists when a specific, seemingly neutral provision, criterion or practice, places or would place in a more disadvantageous position comparing to other persons – a person seeking employment, as well as an employed person, because of a specific characteristic, status, orientation or belief referred to in Article 18 of the present Act”.

²⁶ Art. 20 of the Employment Act.

to be discrimination. Such are the cases in which a personal ground is a real and decisive condition for performing a job, i.e., where it is a business necessity.²⁷ On the other hand, the Act also touches upon the so-called positive actions measures by providing the possibility to introduce special protection and measures when it comes to vulnerable categories of workers.²⁸ That being said, it can be concluded that the Employment act is written in accordance with international standards and that it embodies the principle of equality and non-discrimination, as one of the key employment law principles, through multiple guarantees. However, despite the solid legal framework it establishes when it comes to prohibition of discrimination in the world of work, it fails to recognize even the risk of discrimination based on two or more personal grounds, as a wider category that includes intersectional, as well as sequential and additive multiple discrimination.²⁹ Furthermore, even though it provides for an open-ended catalogue and recognizes explicitly different personal grounds in this catalogue, such a provision is interpreted as prohibiting discrimination based on each of the personal grounds *separately*.

Besides the Employment Act, the prohibition of discrimination is also regulated in many and different acts dealing with special regimes of labor law in Serbia.³⁰ No matter how developed the system of anti-discrimination is the

²⁷ Art. 22 para. 1 of the Employment Act.

²⁸ Art. 22. Para 2 of the Employment Act stipulates the following: “provisions of the law, bylaw and employment contract relating to special protection and assistance to specific categories of employees, and particularly those on the protection of persons with disabilities, women in the course of maternity leave and leave for tending the child, special care for the child, as well as the provisions relating to special rights of parents, adoptive parents, guardians and foster parents – are not considered to be discrimination”. In that regard, Jovanović points out the causal nature of the relation between discrimination and positive discrimination as the existence of discrimination creates the need for provisions dealing with positive discrimination. Jovanović, P. (2018) *Načelo jednakosti u radnom pravu*. – Zbornik radova Pravnog fakulteta u Novom Sadu, Vol. 52, No. 1, 17–39, p. 27.

²⁹ Fredman, S. (2016) *Intersectional Discrimination in EU Gender Equality and Non-discrimination Law*. European Commission, pp. 27–30.

³⁰ For example, the Civil Servants Act (“Off. Herald of RS”, Nos. 79/2005, 81/2005 – amended, 83/2005 – amended, 64/2007, 67/2007 – amended, 116/2008, 104/2009, 99/2014, 94/2017, 95/2018, 157/2020 i 142/2022), in arts. 9 and 11 also provides for a guarantee of equal possibility in terms of accessing job opportunities, i.e., jobs, but also in terms of promotions and “climbing the ladder”. Furthermore, the Act on Employees in Public Services (“Off. Herald of RS”, Nos. 113/2017, 95/2018, 86/2019, 157/2020 and 123/2021), in arts. 10, 17 and 58 also deals with the issue of discrimination by prohibiting discrimination towards everyone, employees and more broadly workers, working in public services, but also in relation to jobseekers applying for a job in a public service. Similar is stipulated also in the Act on Employees in Autonomous Provinces and Municipalities (“Off. Herald of RS”, Nos. 1/2016, 113/2017, 95/2018, 114/2021, 92/2023, 113/2017, 95/2018, 86/2019, 157/2020 and 123/2021), where the importance of equal access to jobs is also emphasized in art. 19. On the other hand, the Act on Prohibition of Discrimination of Persons with Disabilities stipulates, in arts. 1 and 2, the principle of equality and non-discrimination

employment legislation is, it can be seen that it does not recognize the risk of intersectional discrimination, therefore leaving the victims of such discrimination with the option of relying on one personal ground as a basis for discrimination, or often without any possibilities as the victim is not discriminated based on any ground in particular, but based on intersection of different grounds.³¹

2.3. Prohibition of (intersectional) discrimination in the Act on Prohibition of Discrimination

Besides the employment legislation, the issue of discrimination in employment is also regulated in the Act on the prohibition on discrimination³². Therefore, it can be said that dealing with the issue of prohibition of discrimination in the world of work in employment, as well as anti-discrimination legislation, i.e., the Employment Act and the Act on Prohibition of Discrimination, which speaks of the efforts aimed at tackling this issue. However, at the same time, it can be argued that regulating this issue in two different acts, without a clear relation between the two, can create confusion and influence legal certainty.

Namely, the Act on Prohibition of Discrimination defines discrimination and different forms in which discrimination can occur.³³ Particularly relevant in this regard is that this act has a section dealing precisely with discrimination in employment and work. This section includes guarantees of prohibition of discrimi-

(“Off. Herald of RS”, Nos. 33/2006 i 13/2016), while the same is stipulated in art. 2 of the Act on Professional Rehabilitation and Employment of Persons with Disabilities (“Off. Herald of RS”, Nos. 36/2009, 32/2013 and 14/2022). Besides the mentioned, the Act on Employment and Unemployment Insurance (“Off. Herald of RS, Nos. 36/2009, 88/2010, 38/2015, 113/2017, 113/2017 and 49/2021) is also built upon the principle of equality and non-discrimination, which is clearly stipulated in the Arts. 5 and 35.

³¹ In this context, it is often that the courts search for the “main” ground of discrimination, instead of looking at the case from an intersectional perspective. Kovačević, Lj. (2023) Intersectional Discrimination of Women with Disabilities in the World of Work: Advantages and Challenges of Applying an Intersectional Approach? – Kovačević, Lj., Vujadinović, D., Marco, E. (eds.), Intersectional Discrimination of Women and Girls with Disabilities and Means of their Empowerment. University of Belgrade Faculty of Law, 329–371, p. 347.

³² Act on the Prohibition of Discrimination (“Off. Herald of RS”, Nos. 22/2009 and 52/2021).

³³ In accordance with this act expressions discrimination and discriminatory behaviour refer to: “any unjustified distinguishing or unequal treatment, i.e. omission (exclusion, restriction or giving preference) relating to persons or groups and relating to the members of their families, or persons close to them, in an open or covert manner, which is based on the race, colour of skin, ancestors, nationality, national affiliation or ethnic origin, language, religious or political beliefs, sex, gender identity, sexual orientation, financial standing, birth, genetic peculiarities, health condition, disability, marital and family status, convictions, age, appearance, membership in political, trade union and other organisations, and other actual, i.e. presumed identity characteristics)” (art. 2 para. 1 subpara. 1 of the Act on Prohibition of Discrimination).

nation in relation to the opportunities in the labor market, as well as the rights from the employment relationship, while such prohibition refers to jobseekers, employees and workers working in non-standard forms of employment.³⁴

With that in mind, it should be emphasized that a great step forward was taken in the year 2021 when the Act on Prohibition of discrimination was amended and such amendments, among other, referred to the issue of discrimination based on two or more personal grounds. Namely, the mentioned act has, prior to the amendments, recognized this issue, however it referred to this type of discrimination as “multiple or cross discrimination”³⁵. After the amendments, this issue has been regulated in more detail and with making a distinction between “multiple discrimination”, in cases where individual personal characteristics can be differentiated and “intersectional discrimination” in cases where such grounds cannot be separated and differentiated.³⁶ What is more, this act stipulates that such forms of discrimination are to be considered *severe forms of discrimination* which influences the penalty for the perpetrator. Taking into account that the said act undoubtedly applies to the world of work, it can be stated that, firstly recognizing the issue of discrimination based on more personal grounds, and now specifically the issue of intersectional discrimination, is a great step forward.

3. Recognizing and addressing intersectional discrimination in practice

3.1. Case law in Serbia and the risk of intersectional discrimination

When dealing with the case law in the world of work, in Serbia, it is important to not forget that, even though discrimination based on more grounds was addressed by the Act on Prohibition of Discrimination earlier, the crucial moment refers to the amendments that have introduced a clear prohibition and

³⁴ Art. 16 of the Act on Prohibition of Discrimination.

³⁵ Here, we can find a terminological dilemma in terms of translation from Serbian to English. Namely, the previous term that was used was „ukrštena diskriminacija“, which can be translated both as intersectional and cross discrimination, while the term now is „intersekcijaska diskriminacija“ which stems from an English word intersectional (discrimination).

³⁶ Art. 13 para. 1 subpara. 5 of the Act on Prohibition of Discrimination. In light of the mentioned, it should also be stated that, following the amendments to this act, the prohibition of intersectional discrimination was also introduced to the Gender Equality Act, in art. 4 para. 6 (“Off. Herald of RS”, No. 52/2021). This is especially important and a great step forward, when we have in mind, that even today, the issue of intersectional discrimination is more an issue present in legal theory and discussions than in legal guarantees. Marten, E., Walgenbach, K. (2017) Intersektionale Diskriminierung. – Scherr, A., El-Mafaalani, A., Yüksel, G. (eds.) Handbuch Diskriminierung. Springer, 157–173, p. 162.

definition of intersectional discrimination. Such amendments were introduced approximately three years ago, which is a relatively short period of time, still enough time to start with implementation of such guarantee in practice by re recognizing the risk of intersectional discrimination. That being said, we shall not address in detail the court procedure relevant for the cases that address the issue of discrimination in employment. However, we should have in mind that both the Employment Act and the Act on prohibition of discrimination, when it comes to cases where discrimination has potentially occurred refer to shifting of burden of proof meaning that the potential victim of discrimination only has to prove that it is likely that discrimination has occurred while the burden of proof shifts to the potential perpetrator.³⁷

Having in mind the previous analysis of anti-discrimination norms in the Employment Act, we could argue that such a norm, which lists many personal grounds as potential grounds for discrimination and even has an open-ended catalogue, at least creates the possibility for claiming the existence of discrimination based on more than one personal ground, and in that sense, intersectional discrimination. Any dilemmas and uncertainties caused by the deeply rooted single-axis approach that would indicate interpreting this norm as a norm that prohibits discrimination based on each personal ground separately become less relevant when we have in mind the clear definition and prohibition of intersectional discrimination in the Act on Prohibition of Discrimination. As dilemmas and opened questions remain when it comes to the relation between the two acts and in regard to the type of dispute remain, what we can conclude is that Serbian legislation provides for the possibility to claim intersectional discrimination in employment. However, the existence of the legal basis does not mean that the risk of intersectional discrimination is also recognized in practice. Namely, in order to recognize this risk, it is necessary to apply the intersectional approach, as a key tool for recognizing and addressing intersectional discrimination.³⁸ It is not easy to apply such an approach, as it is very abstract, and extremely challenging to apply, especially when we have in mind that in cases of intersectional

³⁷ The Employment Act stipulates, in art. 23. para. 1 that “a person seeking employment, as well as an employed person, may file a lawsuit against the employer for damages before a competent court, in conformity with the law”. The same act also touches upon shifting the burden of proof, i.e., stipulates in Art. 23 para. 2 that “if in the course of the proceedings the plaintiff made it probable that discrimination in terms of this Act took place, the burden of proof that there was no conduct that constitutes discrimination lies with the defendant”, while the same shifting of burden of proof is regulated in art. 45 para. 2 of the Act on Prohibition of Discrimination.

³⁸ Künzel, A. (2006) *Feministischen Theorien und Debatten*. – Foljanty, L., Lembke, U. (eds.) *Feministische Rechtswissenschaft: Ein Studienbuch*, Nomos, 44–65, p. 55.

discrimination there is no comparator, at least in the strict sense of the word.³⁹ Certainly, it is not an issue that cannot be overcome, for example by the use of *flexible* or *contextual* approach, that allows for widening the number and scope of comparators. Such comparisons require taking into account multiple and different comparators, or the whole context, in order to understand whether a person has been a victim of intersectional discrimination (in the world of work).⁴⁰

Generally speaking, it should be noted that there are numerous cases, especially in the last couple of years, in which the Serbian courts have dealt with the issue of discrimination in employment. As it can be presumed, in some cases, the courts have taken the stance that discrimination has occurred, while in others no existence of discrimination was found. For example, such is the case in which the applicants claimed that they were discriminated by the employer in the process of determining redundancy, i.e., claimed that they have been dismissed based on union membership. However, it was shown that the trade union was established once the dismissals were already handed out to the plaintiffs, so the Supreme Court took the stance that, even though violations of rights were founded and applicants were reintegrated, there was no discrimination in this case. When addressing this issue, the Court took the stance that “sometimes it happens that a person is treated unequally, but that behavior cannot be characterized as discrimination because it is not based on the personal characteristics of that person”.⁴¹

Despite the existence of many cases in which Serbian courts have dealt with the issues of discrimination in employment, the risk of intersectional discrimination (in the world of work) is, generally speaking, not recognized. What is especially interesting in this regard is that the only case, available to the author, in which intersectional (or cross) discrimination is mentioned is a case of the Supreme Court from 2012. Namely, it is a case that dealt with a jobseeker who was not employed as a director of music school (despite applying for a job four times), while nobody else from the applied candidates for not chosen to be employed. While the plaintiff claimed that he was discriminated, the employer argued that the jobseeker who had filed a suit was not chosen due to the fact that

³⁹ In that sense, intersectionality can be considered a tool that “allows us to consistently identify, elevate and work with marginalized groups in any spaces”. Njoya, W. (2021) *Economic Freedom and Social Justice: The Classical Ideal of Equality in Contexts of Racial Diversity*. Palgrave Macmillan, p. 227.

⁴⁰ Atrey, S. (2018) *Comparison in Intersectional Discrimination*. – *Legal Studies*, Vol. 38, No. 3, 379–395, pp. 379–395.

⁴¹ Judgement of the Supreme Court of Cassation (Vrhovni kasacioni sud), Rev2 1933/2019, 04.07.2019. One remark that we would make here is that the official name of the court was, until May 2023 the Supreme Court of Cassation, when it was changed to Supreme Court.

his application was incomplete and that he did not have the necessary knowledge and skills for performing the job in question. What is especially interesting is that this situation, based on which the plaintiff filed a lawsuit happened in 2007 and 2008, before the currently existing Act on Prohibition of Discrimination (from 2009) came into force. Therefore, the Court took the stance that this act cannot apply retroactively. However, it has relied on the anti-discrimination norms of the Employment act, and addressed the concept of intersectional (or cross) discrimination, even though concluding that such discrimination has not occurred. On the other hand, there are certain cases in which we believe that the court(s) have not recognized the potential risk of intersectional discrimination, i.e., have failed to address in a particular situation which occurred in the world of work from an intersectional perspective. Such are the cases where we can speak of potential risk of intersectional discrimination based on gender and age, such as the case in which the employer has discriminated older women who would not retire. More precisely, in a case dealing with women who have one condition for retirement fulfilled, but could, according to their age, still be employed, the employer has decided to “punish” them by transferring them, with a justifiable reason, to other jobs with lower salaries, while *de facto* they continued to perform the work that their previous job required.⁴² The Supreme Court considered there was age-based discrimination in the case at hand, while not taking into account the gender perspective which should be taken into account, due to (at least) two reasons. On one hand, there are still different rules regarding the conditions that women and men and Serbia retire (even though there is a process of equalizing the conditions), while on the other hand, there are especially emphasized stereotypes, all over the world including Serbia, regarding older women.

On the other hand, the risk of intersectional discrimination seems to, not only exist, but be especially present, when it comes to women as mothers.⁴³ In that sense, we argue that an intersectional perspective should be introduced in

⁴² Judgement of the Supreme Court of Cassation, Rev2 2089/19, 26.09.2019.

⁴³ In that sense, given the fact that women are often discriminated for being mothers or planning to become mothers, there is a term “motherhood penalty” (for example see Correl S. J., Benard, S., Paik, I. (2007) Getting a Job: Is There a Motherhood Penalty? – American Journal of Sociology, Vol. 112, No. 5, 1297–1339). On the other hand, but in the same line of thinking, we should be aware that “the workplace is the environment where cultural and organizational norms and prejudices most clearly limit or enhance fathers’ child-care and in-home family engagement. Many organizational cultures make engaged parenthood difficult. Even when organizations offer policies designed to reduce work-family conflicts, such as paid family leave and flexible work arrangements, they are commonly underutilized, particularly by fathers”. Grau Grau, M., Riley Bowles, H. (2022) Launching a Cross-disciplinary and Cross-national Conversation on Engaged Fatherhood. – Grau Grau, M., Las Heras Maestro, M., Riley Bowles, H. (eds.) Engaged Fatherhood for

a case in which the plaintiff sued because she was, because of being pregnant, been discriminated. Namely, as a teacher working in a school, she has, without a justifiable reason, with an annex to the original employment contract, been moved to another workplace, i.e., school, farther away, which put her in a worse position. The Court took the stance that it is irrelevant whether the employer had the intention to discriminate, as the plaintiff was discriminated due to pregnancy.⁴⁴ However, the Court has failed to address the intersectional discrimination in this case, and which stems from the intersection of sex and gender on one hand and maternity on the other.

3.2. Intersectional discrimination in employment in the opinions and recommendations of the Commissioner for the Protection of Equality

When it comes to recognizing the risk of intersectional discrimination in general and especially in employment, situation is quite different when we analyze the opinions and recommendations of the Commissioner in the complaints procedure, in comparison to case law in Serbia. In that sense, we should have in mind that the independent body of the Commissioner was founded more than 10 years ago, based on the Act on Prohibition of Discrimination and that it has, so far, had significant role in dealing with cases of discrimination in employment, but also raising awareness when it comes to discrimination in employment.⁴⁵

In that sense, Commissioner has, in multiple cases, even though not using the precise term, pointed out to the risk of intersectional discrimination in employment.⁴⁶ In that light, the Commissioner has, in more than a few cases, emphasized the risk of discrimination based on multiple grounds, and we would add intersectional discrimination, when it comes to questioners in which employers requested jobseekers to answer questions regarding many and different personal

Men, Families and Gender Equality: Healthcare, Social Policy, and Work Perspectives. Springer, 1–15, p. 8.

⁴⁴ Judgement of the Appellate Court in Niš, Gž1. 2925/17, 13. 11. 2018. Similar is the case, Rev2 2580/2016, 16.6.2017. in which the Supreme Court of Cassation concluded the plaintiff was, without a justification, denied the right to return to work after pregnancy.

⁴⁵ In that regard, it should be emphasized that the Commissioner has a great role in fighting discrimination when acting upon complaints through opinions and recommendations. Besides its role in individual cases, the Commissioner also plays a role in fighting against discrimination through recommendations to public authorities and legislation initiatives and opinions.

⁴⁶ Namely, these cases can be found on the website of the Commissioner, under the section “multiple discrimination”, so we understand here the term multiple discrimination in a wider sense, so that encompasses any form of discrimination based on two or more personal grounds, including intersectional discrimination.

grounds. For an example, in a case from 2013, the Commissioner concluded that it is discriminatory for an employer to have a questionnaire which requires jobseekers to answer questions regarding personal grounds, with especially “problematic” questions relating to name of the father, marital status, children and military service.⁴⁷ The Commissioner concluded that such a questionnaire is discriminatory, and it should be added that it bears the risk of intersectional discrimination. Similar case referred to an employer who, on its website, had a questionnaire that included personal questions regarding marital status, children and future plans, nationality, religious beliefs, membership in political organization and previous conviction. When asked about these questions, the employer listed “justifications”, such as the one that knowing someone’s nationality and religious beliefs is important in terms of holidays, the questions relating to children are important from the perspective of preparing gifts for the children of the employees, while the employer claimed that the question relating to previous conviction was often present when applying for a job in state organs and that, besides that, a couple of years earlier, two employees, who were previously convicted, have stolen something from the employer.⁴⁸ The Commissioner has, however, found the existence of discrimination in this case and did not consider these justifications valid.

Also, in the case from 2014, the employer requested jobseekers to answer questions referring to the name of the father, marital status, children and military service. The Commissioner took the stance that this information was not in any sense crucial and necessary in terms of the job that would be performed so that, by requesting the jobseekers to answer such questions, the employer has acted in a discriminatory manner which shall not be repeated in the future.⁴⁹ In a different case, from the same year, the Commissioner found the questionnaire that required information regarding marital status and children, as well as the photo of the jobseekers, was also discriminatory.⁵⁰ Furthermore, similar was the case from 2016 in which the online questionnaire which required jobseekers to answer questions regarding marital status, financial status and previous conviction. When asked about these questions, the employer defended himself by stating that the

⁴⁷ Commissioner for the Protection of Equality, Opinion and recommendation No. 07-00-624/2013-02, 23.12.2013.

⁴⁸ Commissioner for the Protection of Equality, Opinion and recommendation No. 07-00-606/2013-01, 17.12.2013.

⁴⁹ Commissioner for the Protection of Equality, Opinion and recommendation No. 07-00-33/2014-02, 10.3.2014.

⁵⁰ Commissioner for the Protection of Equality, Opinion and recommendation No. 07-00-130/2014-02, 9.06.2014.

website which contains this questionnaire was set up more than 10 years ago and was actually taken from a website of another employer (bank), and what is more, that in practice the employer only required the jobseekers to send a CV, and in fact not to complete the said questionnaire. In line with the mentioned, the employer emphasized that the process of choosing jobseekers is always based on professional reasons and not on distinction made on the basis on personal ground(s). Nevertheless, the Commissioner also pointed out the risk of discrimination that such a questionnaire bears.⁵¹

The conclusion we can draw from the mentioned is that it is especially important to look at the mentioned cases from an intersectional perspective, as such questioners create room for discrimination based on multiple personal grounds that intersect, i.e., for multiple axes of oppression to come into force. Even though the Commissioner has not qualified such cases by using the term intersectional discrimination, it has nonetheless recognized the multiplicity of intersecting risks that exist in such questionnaires.

Also, the Commissioner found that there was discrimination in the case where a woman experienced the “motherhood penalty”, when being transferred to a lower position (from a business secretary to a cashier) in a bank where she worked. The employer claimed that such a decision was based on a review of the performance, however, there was no such review of the applicant in the period of two years when she was on maternity leave and leave for nursing a child. The Commissioner found that there was discrimination in this case, based on sex and family duties.⁵² Similar was the case in which a female employee, who worked in a prison in the Serbian city Leskovac, claimed that she was discriminated based on sex, as well as the marital and family status. Namely, she was denied equal treatment in terms of having to right to upgrade to a category of higher salary (of civil servants) because of the fact that she was not graded during the time when she was on maternal and leave for nursing a child. The Commissioner took the stance that the employee was discriminated based on more personal grounds and by the fact that the employer considered in a negative manner the years in which she was not graded due to being on a leave.⁵³ In regard to maternity and sex, also interesting is the case relating to social security sphere. It is a case in which a pregnant Albanian citizen was married to a Serbian citizen who was insured as

⁵¹ Commissioner for the Protection of Equality, Opinion and recommendation No. 07-00-134/2016-02, 21.4.2016.

⁵² Commissioner for the Protection of Equality, Opinion and recommendation No. 07-00-30/2015-02, 15.6.2015.

⁵³ Commissioner for the Protection of Equality, Opinion and recommendation No. 07-00-440/2017-02, 19.1.2017.

an unemployed person, while health insurance was denied to her, so the Commissioner found such a rule to be discriminatory.⁵⁴

In other cases, the Commissioner took the stance that there was no (intersectional) discrimination, however, we would like to emphasize that importance of such cases is also reflected in the fact that they are looked upon from an intersectional perspective. For an example, such is the case in which a job-seeker, who is a female engineer, claimed that National employment service, in its intermediary role in terms of employment in a precise company, discriminated by only inviting males younger than the age of 35 to the job interview in one company. The Commissioner has considered this case and required information about the gender, as well as the age of jobseekers which had job interviews in the said company in the previous year. The data showed that both male and female jobseekers were invited to interviews (100 female and 71 male candidates), while the statement about the age discrimination was also proven not to be true, so Commissioner found no discrimination in this case.⁵⁵ In another employment law case, from 2023, an employee claimed that she was discriminated based on nationality or ethnic origin, sex, age, as well as membership in political, union or other organizations. Namely, the employer gave the employee a warning with a threat of dismissal, which she claimed was discriminatory, while the facts of the case have proven that she has, in fact, committed a breach of her work duties by failing to insert data correctly, which was her job. Therefore, it was proven that no discrimination has occurred, but that the employer has in fact, with justification, recalled the labor law provisions dealing with breach of work duties.⁵⁶ In another case, where the Commissioner also found that no discrimination has occurred, the employee, who worked as a police officer, claimed that he was discriminated based on health status, membership in a union, as well as sexual orientation, given that fact that the employee belongs to LGBTQ+ population. In this case, the employee claimed that he was discriminated based on different personal grounds in different situations – that his health condition was not considered when he was given the task of securing the football game, that he was insulted because of his sexual orientation on various occasions and that he was treated as absent without justification for participating in a strike. So, if discrimination had occurred in this case, such discrimination would be multiple and not intersectional in the sense

⁵⁴ Commissioner for the Protection of Equality, Opinion and recommendation No. 07-00-97/2013-02, 21.6.2013.

⁵⁵ Commissioner for the Protection of Equality, Opinion and recommendation No. 07-00-485/2014-02, 12.6.2015.

⁵⁶ Commissioner for the Protection of Equality, Opinion and recommendation No. 07-00-315/2023-02, 18.9.2023.

that different personal grounds can be separated as grounds for discrimination. However, the Commissioner has in fact found evidence that discrimination in this case has not occurred and that the person who the employee claimed that he was discriminated by was not in fact in position to decide about certain rights and obligations, so that the employee claimed that discrimination has occurred in order not to be transferred in another police unit.⁵⁷ The Commissioner also took the stance that there was no discrimination in the case where a jobseeker claimed that she was discriminated when she applied for a job in the preschool for her age and family status, considering that she has had a gap in her CV which referred to a period when she was raising her child. However, the data painted a different picture as they showed that many women working in this preschool were mothers, and that decision made by the employer was made based on professional criteria and test results.⁵⁸

Based on the mentioned, we can see that the issue of discrimination based on multiple grounds (and, as we claim, intersectional discrimination) is very present in opinions and recommendations of the Commissioner, while dealing with such issues speaks of generally great role of the Commissioner when it comes to recognizing and combatting different forms of discrimination in employment. On the other hand, Commissioner has, as an independent body, a relatively limited scope of powers. Nevertheless, and to end on a positive note, it is not often the case that cases of employment in discrimination are looked at through the intersectional lenses and the fact that there are first steps in this regard in Serbia is not to be disregarded.

4. Concluding remarks

What have we done so far and what should we do further on?

It seems that everything previously said can be gathered in a conclusion that Serbia is on a good path when it comes to fighting (intersectional) discrimination in the world of work.⁵⁹

⁵⁷ Commissioner for the Protection of Equality, Opinion and recommendation No. 07-00-549/2014-02, 24.03.2015.

⁵⁸ Commissioner for the Protection of Equality, Opinion and recommendation No. 1633, 29.12.2011.

⁵⁹ With this in mind, we should also be aware that applying intersectionality and recognizing intersectional discrimination is important, but also necessary, in order to speak of inclusivity and diversity, in the workplace and the world of work. Fritzsche, K. (2022), Zur Begründung des Diskriminierungsverbots: Historische Erfahrungen, philosophische Argumente und menschenrechtliche Entwicklungen. – Scherr, A. et al (eds.) Handbuch Diskriminierung. Springer, 2–21, p. 17.

Namely, it is very commendable that the (anti-discrimination) legislation in Serbia recognizes the issue of intersectional discrimination, and the importance of introducing this notion and concept in legislation is, at least to say, twofold. On one hand, it is a logical and an important step that further builds the already developed and solid legal framework dedicated to the issue of prohibition of discrimination, which testifies of the constant efforts to develop such a framework. On the other hand, the importance of such a “step” is also reflected in the fact that the issue of intersectional discrimination is still, today, after decades of the first mention of intersectionality and intersectional discrimination, often not recognized in sources of law, at international and national level(s). Certainly, in the moment in time in which the UN, ILO, as well as the EU and taking first steps in recognizing the risk of this form of discrimination, having the explicit provision that tackles intersectional discrimination in the national legislation of Serbia is a great achievement.

Contrary to the mentioned, practice speaks of the need to introduce the issue of intersectional discrimination in the sphere of applying the law, i.e., to recognize the risk of the existence of this form of discrimination through institutional mechanisms. For that to happen, it is crucial to dedicate more attention to this issue and raise awareness, as it is an issue that touches upon each and every individual. Certainly, this does not mean that every individual is or was a victim of this form of discrimination, but rather that a situation of every individual can be grasped upon in terms of identities and relations of power, i.e., dominance and subordination, and therefore accessed from the intersectional perspective. That being said, it is crucial to take further steps regarding the recognition of risk of intersectional discrimination, and in accordance with that, accessing the reality of the world of work from an intersectional perspective.

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Marital Property and Legal Regime of the Immovable Property Acquired by a Lifetime Support Contract

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In the last two decades, Serbian courts have often been dealing with a following question: what is the regime of immovable property acquired by a lifetime support contract, concluded by one spouse (provider of support) and a third party (recipient of support)? Is it a separate property of the provider of support or a marital property of the provider of support and his/her spouse? The analysis of Serbian court practice, as well as the practice of notary and law offices, proves that a large number of open questions, illogicalities and different points of view arise because this question is not expressly regulated by law. There are many reasons to support the opinion that it is a separate property and vice versa – there are also many arguments that justify the idea of the joint property regime of spouses. The greatest danger for legal security lies in the fact that, after the death of the recipient of support, the provider of support is registered as the exclusive owner of the acquired immovable property. Therefore, looking at the data in the real estate cadaster, one can only get the impression that the immovable property represents the separate property of the provider of support. However, there is a strong possibility that it is actually in the regime of joint property of the provider of support and his/her spouse. The dilemma can only be solved before the courts. In the meantime, if the provider of support would try to dispose of any right on the acquired immovable property, the question arises whether he/she would need the consent of his/her (former) spouse. The authors of this paper try to explain how courts and notaries, according to their jurisdiction, act in the mentioned situation.

Keywords: *Lifetime support contract. Immovable property. Joint ownership. Separate property. Spouses. Extramarital partners. Reliable principle. Legal certainty*



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Introduction

The marital property regime of spouses has always been a ground for a large number of disputes.¹ In the last two decades in particular, Serbian courts have more than usual been dealing with a question: what is the regime of the immovable property acquired by a lifetime support contract if only one spouse concluded it as a provider of support?² Namely, it has been noticed that the fulfillment of the obligation to support can greatly affect the other spouse: firstly, the funds used for the fulfillment of the obligation to support are usually in the joint property regime; secondly, the obligation to support is complex³ – the recipient of the support is often in a need for daily care, which means that the provider of the support also has to invest other resources, such as his time and dedication; finally, the other spouse is often quite involved, especially if there is a community of life with the recipient of support – either by helping the fulfillment of the obligation to support, or by enabling the provider of support to fulfill it by himself.

Therefore, is the immovable property acquired by a lifetime support contract, which was concluded by only one spouse or extramarital partner, his exclusive property or marital property of the provider of support and his spouse?

Before embarking on the analysis of Serbian court and notarial practice, all in the light of current legal regulations, it should be mentioned that conclusion of lifetime support contract often creates a solid ground for discrimination.

First and in general, it can lead to bypassing Serbian legal rules on necessary heritage and therefore discrimination of some heirs, usually female heirs.⁴ This is due to the fact that the property specified as a subject of this contract (most often – immovables) is not included in the inheritance of the recipient of support, which is why there are many simulated lifetime support contracts, concluded with the only intention to discriminate some heirs.

Second and more important for our research, Serbian court practice shows that we have many cases in which only one spouse is formally acting as a provider of a support (usually the husband), even though the other spouse is in reality fully involved in performance of the obligation to support (usually the

¹ More about certain legal issues that arise regarding the disposal of jointly owned property in Dabic Nikicevic S. (2024) *Raspolaganje zajednickom imovinom bračnih i vanbračnih partnera – problemi u praksi*, Zamac M. (ed.) *Aktuelni problemi u radnom, gradjanskom, privrednom i procesnom pravu*, Glosarijum, 84–106.

² For the sake of simplicity, everything said about spouses in this paper refers also to extramarital partners.

³ Antic O., Balinovac Z. (1996) *Komentar Zakona o nasledjivanju*, Nomos, p. 497.

⁴ Antic O., Balinovac Z. Op. cit. 507.

wife). Sometimes the only reason why the wife was not formally determined as a contracting party, side by side with her husband, as providers of support, are patriarchal reasons – so that the husband is the one who would get the right of ownership on the immovables – even though it is expected, at the time of the conclusion of the contract, that the other spouse would be fully involved in the performance of the lifetime support contract.

Serbian court and notarial practice facing a challenge

Acquiring property by a lifetime support contract is specific, to put it mildly: from the moment of its conclusion until the death of the recipient of support (which is the moment of acquisition) a long period of time can pass, even measured in years. It may be the case that the marriage of the provider of support and his spouse lasts all that time, but it may also happen that their marriage does not exist in the moment of conclusion or execution of the contract.

If one were to consider that the immovable property acquired by a lifetime support contract is in joint ownership regime of the provider of support and his spouse, then all Serbian legal rules regulating marital property should apply, including Art. 176 para. 2 of the Law on Family which introduces the fiction that it is considered that the registration in the real estate cadaster was made in the name of both spouses even when it was actually made in the name of only one of them.⁵ In other words, even when only one spouse is registered as the owner of the immovable property, because he is a contractual party, it does not necessarily mean that the immovable property is actually in the regime of his exclusive ownership, because there may be a possibility that the property is jointly acquired. Legal certainty is, therefore, seriously endangered.⁶

Having in mind the urgent need to protect legal certainty, in such a manner that the regime of joint ownership of immovable property be clearly seen from the real estate cadaster, Serbian legislator introduced a protective mechanism in the Law on procedure for registration in the real estate cadaster and the infrastructure cadaster. Namely, according to Art. 7 of this Law, joint ownership of immovable property should be registered in the name of all joint-owners and the public notaries have a duty to obtain data on the existence of marriage at the time of creation of the registration document (i.e. the conclusion of the contract).⁷

⁵ Art. 176 para. 2 Law on Family, *Official Gazette RS*, No. 18/2005, last changes in 6/2015.

⁶ The rule on fiction also applies to extramarital partners. Art. 191 para. 2 Law on Family.

⁷ The exception exists only if both spouses state that the immovable property is a separate property of one of the spouses or if it is acquired through inheritance or a lucrative legal transaction or if the spouses concluded the marriage contract. Art. 7 para. 5–7 Law on procedure for

However, when it comes to the lifetime support contract, the contract itself is not sufficient for registration of ownership rights since the acquisition of the property is conditioned upon the death of the recipient of support. In addition, at the moment of conclusion of the contract, one cannot know for sure whether the immovable property will be acquired, let alone in which regime it will be if the provider of support is married.

How do things look in Serbian practice?

The provider of support concludes a lifetime support contract before the public notary⁸ and on the basis of that document he can request to secure his right by adnotation in the real estate cadaster.⁹ Upon the death of the recipient of support, the provider of support can request to register his right of ownership by submitting a lifetime support contract and a death certificate for the recipient of support to the real estate cadaster. Therefore, from the look at the real estate cadaster, one can only learn that the owner of the immovable property in question is the provider of support. The question of his marital status does not arise at all, neither at the conclusion of the lifetime support contract nor at the registration of the property rights, after the death of the recipient of support.¹⁰

However, the question of the regime of the immovable property acquired on the basis of a lifetime support contract may actually be raised afterwards, sometimes even long after the provider of support has registered as the owner of the immovable property.

One of the situations in which this question is usually raised is in a possible court proceeding initiated by the other spouse, requiring from a court to determine that the immovable property is in the regime of joint ownership. Only during

registration in the real estate cadaster and the infrastructure cadaster, *Official Gazette RS*, No. 41/2018, last changes in 92/2023.

⁸ Art. 195 para. 1 Law on Inheritance, *Official Gazette RS*, No. 46/95, last changes in 6/2015 and Art. 82 para. 1 Law on Public Notaries, *Official Gazette RS*, No. 31/2011, last changes in 106/2015.

⁹ Art. 199 Law on Inheritance.

¹⁰ As far as we know, some notary offices orally instruct the parties, at the time of the conclusion of the lifetime support contract, that the immovable property in question might be in the regime of joint ownership of the provider of support and his spouse. On the other hand, some law offices advise the (future) provider of support that his spouse should make a formal statement that the immovable property would represent the provider's separate property. <https://statt.rs/sr/da-li-nepokretnost-koja-se-stekne-ugovorom-o-dozivotnom-izdrzavanju-predstavlja-zajednicku-imovinu-supruznika/>, 26 April 2024. However, this might only not solve the problem if the marriage exists at the time of the conclusion of the contract.

these proceedings may the court be in a position to conclude that the immovable property is actually a joint property of the spouses, if the conditions created by Serbian courts are met.

Another situation arises when the provider of support tries to dispose of the right of ownership, when Serbian public notaries teach the parties that the immovable property in question might potentially be jointly owned by the provider of support and his spouse. In such circumstances, Serbian public notaries ask for the “consent” of the spouse of the provider of support,¹¹ for the transfer of his right of ownership to a third party, or his statement that the immovable property belongs only to the provider of support. Such action is for precautionary reasons: to avoid situations where the immovable property is sold/encumbered without the consent of the spouse. Similar to this, in probate proceedings after the death of the provider of support, public notaries also advise the parties that the immovable property in question may potentially be in the joint property regime of the deceased provider and his spouse. If, on the other hand, the provider of support outlives his spouse, the spouse’s heirs could raise the question of the regime of the immovable property in question, that is, claim that it is joint property.¹²

However, when it comes to immovable property acquired in an extramarital union, its regime exists “under the radar” of public notaries.

Criteria for determining the regime of immovable property acquired by a lifetime support contract

In Serbian judicial practice, there is almost a unique opinion – if the provider of support acquired the immovable while he was married, it is generally considered that it is in the regime of joint ownership.¹³ However, it is much more difficult for the courts to justify their decisions than to judge. As in many other

¹¹ More on the wrongfulness of the widely used term „consent“ when it comes to the statement of the other spouse, see Dabic Nikicevic S., Dolovic Bojic K. (2019) *Raspodjela jednog (van)bracnog druga nepokretnoscu u zajednickoj svojini*, *Pravo i privreda*, br. 7–9, 407–436, pp. 419–422.

¹² If the heirs for any reason would not draw attention to the fact that the immovable property is (potentially) in the joint property regime, it might happen that they do not inherit it. Such situation happened in Serbian practice: no probate proceedings were conducted at all upon the death of the provider’s spouse because it was considered that there was no immovable property. „Status imovine stečene po osnovu ugovora o doživotnom izdržavanju za vreme trajanja bračne zajednice“, Questions and answers – Lawyer in Judicature, 28 March 2022, *ParagrafLex*. In the same sense in Decree of the Appellate court in Belgrade, Gz 3631/2014 on 18 May 2016, *ParagrafLex*.

¹³ Instead of many decisions cited in this paper, See: the decree of the Appellate Court in Novi Sad, Gz 1016/2022 dated 7.9.2022; the decree of the Supreme Court of Serbia, Rev.

cases where there is a lack of a clear legal norm, the courts here too have reached for the principle of fairness¹⁴ and found criteria by which a fair decision would be reached. We dedicate the next part of the paper to that.

As the majority of the mentioned judicial criteria are based on certain features of the lifetime support contract, before we start analyzing them, it is necessary to first state that the lifetime support contract is a named, bilaterally binding, onerous, causal, aleatory and a contract that is concluded with regard to the personal characteristics of the contracting party (contract *intuitu personae*), in the form prescribed by law and with permanent execution of benefits.¹⁵

1. Is acquisition by a life support contract an acquisition based on work?

In order to talk about joint property at all, the important question is whether acquisition based on a lifetime support contract can be considered as acquisition based on work.¹⁶ As we have already pointed out, the lifetime support contract has specific characteristics: it is aleatory, it is concluded mainly between relatives

1235/2006 dated 21.6.2006; the decree of the Appellate Court in Nis, Gz 2 141/2021 dated 18.11.2021; decision of the Appellate Court in Belgrade, Gz 3631/2014 dated 18.5.2016. It seems that even in theory the prevailing view is that it is the joint property of the spouses. See Alincic M., Bakarevic Abramovic A., Hrabar D., Jakovac-Lazic D., Korac A. (2001) *Obiteljsko pravo*, Narodne novine, p. 478; Draskic D. (2007) *Porodicko pravo i prava deteta*, Faculty of Law in Belgrade and Official Gazette, p. 397–398.

¹⁴ The application of the principle of fairness can sometimes lead to the violation of fundamental rules in the regulation of property relations. More in Dolovic Bojic K. (2022) *Pravni rezim nepokretnosti stecenih sredstvima iz ugovora o kreditu zaključenog pre ili u toku trajanja braka*, *Pravo i privreda*, Vol. 60, br. 2, 297–316, p. 301.

¹⁵ Djurdjevic D. (2023) *Institucije naslednog prava*, University of Belgrade – Faculty of Law, p. 251; Antic O., Balinovac Z. Op. cit. 496–501; Radic D. (2016) *Imovinski odnosi u braku*, Faculty of Law University of Banja Luka, pp. 383.

¹⁶ That question arises because Article 171 paragraph 1 of the Family Law stipulates that the property acquired by the spouses through *work* during the duration of their married life is their joint property. It is interesting that the theory states that immovable property acquired on the basis of a lifetime support contract is the joint property of the spouses, but not on the basis of work, but on another basis. Namely, in the first case, it is pointed out that marital property also includes “ownership of movable and immovable property acquired through work, money, or on the basis of a life-long or life-long support contract”. Alincic M., Bakarevic Abramovic A., Hrabar D., Jakovac-Lazic D., Korac A. Op. cit. 478. In the second case, it is similarly pointed out that “in addition to the property acquired by the spouses through work during their joint married life, “the joint property also includes ... property acquired through a lifetime support contract”. Draskic D. (2007) *Family law and children’s rights*, Faculty of Law in Belgrade and Official Gazette, p. 397–398. In this sense, the County Court in Varaždin also reasoned: “And in the opinion of this court, the property acquired by a contract on lifetime support, which contract was concluded by one spouse and the recipient of support, is property acquired on a different legal basis from

or other close persons, and we often see elements of a gift in it, especially if the period of support was very short.¹⁷

In relation to the question raised, in our judicial practice, the prevailing argument is that the property acquired through a lifetime support contract should be considered a joint property, among other things, due to the fact that it is an *onerous* contract.¹⁸ But not only that: fulfilling the obligation to support is also seen as a kind of work,¹⁹ bearing in mind that it generally requires a certain degree of engagement in providing care to the recipient of support.²⁰

It is indisputable that the obligation of the provider of support entails performing various tasks around the recipient of support: providing adequate nutrition, care in case of illness, appropriate living conditions, even the community of life itself if so agreed. However, a lifetime support contract is more than that. It is

the property that the spouses acquired through work during the duration of the marriage union...”. Decree no.: Gz 1360/06–02 dated 27 November 2006.

The same questions are asked in comparative law practice. See: Aralica T. (2017), *Bračna stečevina i drugi imovinski odnosi bračnih drugova u sudskoj praksi*, Novi informator, p. 28.

¹⁷ Of course, in that case, the question of the validity of the deal can be raised due to the appearance of the contract (isn’t it rather a simulated deal behind which a gift is hidden?) or the absence of randomness, but that goes beyond the scope of this paper. About the impact of the absence/appearance of randomness on the validity of random contracts, more in Dabic Nikicevic S. (2023) O prekomernom ostecenju kod aleatornih ugovora, Radovic V. (ed.) *Uskladjivanje poslovnog prava Srbije sa pravom Evropske unije*, 420–451, p. 420.

¹⁸ See for example: The decree of the Appellate court in Novi Sad, Gz 1016/2022 dated 7.9.2022, *ParagrafLex*; The decree of the Supreme Court of Serbia, Rev. 1235/06 dated 21.6.2006, *ParagrafLex*; The decree of the Appellate court in Nis, Гж2 141/2021 dated 18.11.2021, *ParagrafLex*; The decree of the County Court in Belgrade, Gz. 2576/03 dated 30. 6. 2003, *IngPro*; decision of the County Court in Kraljevo Gz 1778/92 dated 11.1.1993, extract from the decision available at Pocuca M. (2011) *Lifetime Support Contract*, Faculty of Law for Commerce and Judiciary University of Commercial Academy, pp. 58.

¹⁹ In the literature, it is emphasized that no discrimination should be made regarding the type and nature of work, but all forms of work should be respected. Mladenovic M. (1981) *Porodичno pravo*, Privredna stampa, p. 649; Cvejic Jancic O. (2009) *Porodичno pravo*, Faculty of Law in Novi Sad, p. 134.

²⁰ The decree of the Appellate Court in Nis, Gz2 141/2021 dated 18.11.2021, *ParagrafLex*: “... *Life support contract is an encumbrance contract by which property is acquired as compensation for services rendered in various forms of assistance and maintenance of the recipient of support.*” The decree of the County Court in Belgrade, Gz. 2576/03 dated 30. 6. 2003, *IngPro*: property acquired on the basis of a lifetime support contract is “the result of their joint work, regardless of who of them, due to a special relationship with the recipient of support, concluded the contract with him”. See the decree of the Appellate Court in Novi Sad, Gz 1016/2022 dated 7.9.2022, *ParagrafLex*, in which the court refers to the “work contribution” of the support provider’s spouse, and determines how much the value of work and performing tasks around the support recipient would cost if a third party was hired for help and care at home.

about the relationship of trust that exists between the provider and the recipient of support, which is based on a series of reasons that determined the recipient of support to choose a very specific person to be his support provider. Hence, the obligation of the provider of support could not be understood only as work. The question that necessarily arises is: is this enough for the compensation acquired on the basis of a lifetime support contract to be in the regime of joint ownership, because it is, after all, at least partially, acquired by work?

With the reasoning just presented, it seems that we are getting closer to the understanding that the immovable acquired in this way should be in the special property regime. However, as a counterargument, it must be stated that the weight of the entire commitment of the provider of support to the fulfillment of the obligation – regardless of whether it can be called work in the classical sense of the word or something more than that – is necessarily felt by his spouse, because as a result, the provider has less time to devote to him, their family and/or household.²¹

In the end, several questions could be asked in connection with the aforementioned understandings presented in judicial practice.

First of all, if the effort and dedication of the provider of support in providing care to the recipient could really be seen as a kind of work, what impact would have the fact that the provider used funds from his own property to fulfill the support obligation? Would the immovable acquired on the basis of the contract in that case be considered a separate property of the provider, because funds from separate property were used, or a joint property of the provider and his spouse, bearing in mind that, at least in part, it comes from “work“?²²

²¹ Vukotić M. (2021) Pravne posledice smrti davaoca izdržavanja – *Anali Pravnog fakulteta u Beogradu*, Vol. 69, No. 1, 207–230, p. 213.

²² There are views that the acquired immovable property should be in the special property regime of the provider of support only exceptionally – if the provider of support used funds from his separate property to fulfill the support obligation and if he fulfilled this obligation only by „payment“, and not by actions that could be characterized as work. See: The decree of the Supreme Court of Bosnia and Herzegovina Federation No.: 58 0 P 065705 16 Rev dated 26.04.2018. Radic D. Op. cit. 149.

For the position that real estate is in the regime of special property if the provider of maintenance invested funds from special property, and vice versa, See: Grujić N. (2011) Provider of support in lifetime support contracts, *Gazette of the Bar Association of Vojvodina*, Vol. 71, No. 6, 327–352, p. 340.

The duty of care and concern for the recipient is what serves to demarcate the life support contract and, for example, the life annuity contract. More about that See: Comment of the Inheritance Act, 502; Subotic-Konstantinovic N. (1968) Ugovor o doživotnom izdržavanju, *Naucno delo*, pp. 170.

In addition, if we would consider the engagement of the provider of support as a kind of work,²³ then why does the judicial practice insist that it is necessary to prove that the other spouse actually contributed to the fulfillment of the support obligation? Namely, we are talking about a criterion that was created by judicial practice, which will be discussed in the next subheading.

2. The actual contribution of the other spouse in fulfilling the obligation to support

Our analysis shows that Serbian courts have created an additional criterion for determining the regime of the property acquired by a lifetime support contract: if it may be proved that the other spouse actually contributed to the fulfillment of the obligation to support, the immovable property will represent marital property regardless of the fact that the other spouse was not formally a contracting party.²⁴ That criterion applies not only when it comes to spouses, but also when it comes to extramarital partners²⁵ and members of the family community.²⁶

And vice versa, the acquired immovable property is not in the regime of marital property, if the other spouse did not participate in the performance of the obligations to support.²⁷

The reasons for this seem to be twofold. First of all, the reasons of fairness: the courts consider it fair that the immovable property acquired by a lifetime support contract be considered as marital and not separate property, when the other spouse participated in the performance of the obligation to support. The marital property regime seems like a reward for the other spouse, a recognition of its efforts to fulfill the obligation to support,²⁸ having in mind that he is very often, whether he wants it or not, involved in the fulfillment of the obligation,

²³ “As support can be given in other ways, not only in money, it is clear that any form of work undertaken by the spouses during the community of life with the aim of fulfilling a contractual obligation towards the recipient of maintenance, is work that acquires joint property”. Radic D. Op. cit. 148.

²⁴ Decision of the Appellate Court in Nis, Gz 2584/2020 dated 17.12.2020., *ParagrafLex*; The decree of the Supreme Court of Serbia, Rev. 1235/2006 dated 21.6.2006, *ParagrafLex*; The decree of the Appellate Court in Novi Sad, Gz 1016/2022 dated 7.9.2022, *ParagrafLex*.

²⁵ The County Court of Pozarevac Gz. 12/96 dated 30.12.1996, excerpt from decision available in Pocuca M. Op. cit. 58–59.

²⁶ The acquired immovable property is considered as joint property, if the contract obligations were fulfilled by all members, regardless of who concluded the contract as the provider of support. Decision of the Appellate court in Novi Sad, Gz 1016/2022 on 7 September 2022, *ParagrafLex*.

²⁷ Decision of the Supreme court of Serbia, Rev. 1055/03 on 25 December 2003, *IngPro*.

²⁸ See, for instance, Decision of the District court in Belgrade, Gz. 2576/03 on 30 June 2003, *IngPro*.

especially if there is a community of life with the recipient of support.²⁹ In addition, such reasoning upholds the preservation of solidarity and equality between spouses, particularly since it was noticed that “patriarchal reasons” lie behind the decision that only one spouse (husband) be formally designated as the provider of support.³⁰ A second reason seems to be a need find some kind of compromise: if we were to consider the immovable property acquired in this way as a marital property, then it should only be when it is proven that the other spouse somehow contributed to the acquisition.

However, the creation of such criterion opens numerous dilemmas and questions.

To begin with, not only that such a criterion has no legal basis, but its meaning and justification are also debatable: if the fulfillment of the obligation to support is seen as a type of work, the property acquired in this way should be considered as marital property given the fact that it resulted from the “work” of the provider of support. Why should we then ask for the contribution of the other non-contracting spouse?

The second group of questions concerns the content of the actual contribution as a criterion. What can be considered as actual contribution? Does this imply that it is necessary to establish that the other spouse (non-contracting party) actually performed the obligation to support? Or should things be viewed more broadly, so that the actual contribution encompasses all acts that enable the provider of support to fulfill his obligation?³¹

²⁹ Decision of the Appellate court in Novi Sad, Gz 1016/2022 on 7 September 2022, *ParagrafLex*; Decision of the Supreme court of Serbia, Rev. 1235/2006 on 21 June 2006, *ParagrafLex*.

³⁰ Decision of the Appellate Court in Novi Sad, Gz 1016/2022 on 7 September 2022, *ParagrafLex*: „The plaintiff was not determined as the provider of support, but only her husband and brother-in-law, because the defendants objected ... for patriarchal reasons. The plaintiff participated in negotiations with the heirs of the deceased.... during those negotiations accepted that it would also provide support to the recipient and fulfill the obligations of the provider of support... on an equal basis with the defendants.“

³¹ The most common cases in Serbian court practice are cases in which the provider’s spouse equally with him, or even significantly more than him, participated in fulfilling the obligation to support. See Decision of the Appellate court in Novi Sad, Gz 1016/2022 on 7 September 2022, *ParagrafLex*; Decision of the Supreme court of Serbia, Rev. 1235/2006 on 21 June 2006, *ParagrafLex*; Decree of the Supreme court of Serbia, Gzz. 513/01 on 21 February 2002, *IngPro*; Decision of the Appellate court of Nis, Gz2 141/2021 on 18 November 2021, *ParagrafLex*; Decision of the District court in Belgrade, Gz. 2576/03 on 30 June 2003, *IngPro*.

However, there are decisions from which it seems that the court had gone one step further, considering that it should also be taken into account when the other spouse “contributed to the realization of the contract by enabling the defendant (provider of support, authors’

Accepting the narrower understanding seems more logical, but it could lead to unfair outcomes. On the other hand, if the actual contribution is understood more broadly, then it would be difficult to find a case where one could say there was no contribution from the other spouse.

Furthermore, the actual contribution as a criterion opens up a question of measure: how much contribution is enough to consider the immovable property as marital property? And what if the other spouse actually contributed much more than the provider of support? Does this mean that their share will also be bigger?³²

Finally, some questions arise also from the fact that between the moment of conclusion of a lifetime support contract and the moment of acquisition of property rights, a rather long period of time can pass. However, this will be discussed in a separate subheading, after we analyze how can *intuitu personae* character of the lifetime support contract affect its regime.

3. The influence of the personal character of the lifetime support contract on the real estate regime acquired on that basis

In connection with the problem of determining the immovable property regime, it is important to ask the question: what is the impact of the fact that the lifetime support contract is an *intuitu personae* contract? In Serbian judicial practice, there is almost no reference to the question raised. Only exceptionally can one come across decisions in which the court considers the impact that the personal character of the contract can have on the regime of the immovable acquired on the basis of it. Thus, according to the Appellate Court in Nis,³³ it must first of all be taken into account that for the lifetime support contract “the personal characteristics of the provider of support are of particular importance, because his obligation consists of a series of obligations that can be reflected in the provision of services, the provision of things and financial resources, but also in moral obligations, such as visits, providing attention and care to the recipient of support...” In addition, the court points to one more thing: by concluding a contract with only one spouse, did the recipient of support not “clearly express his position that he does not want to be in a contractual relationship with the other spouse”?

remark) to fulfill his obligations”. Decree of the Appellate court of Nis, Gz 2584/2020 on 17 December 2020, *ParagrafLex*.

³² The Supreme Court of Serbia stated in one decision that the length of the period during which the spouses (actually) performed the obligation to support and the quality of the individual engagement of each of them should be taken into account. Decision of the Supreme Court of Serbia. Gzz. 513/01 on 21 February 2002, *IngPro*.

³³ Decree of the Appellate court of Nis, Gz 3177/2018 on 16 January 2019, *ParagrafLex*.

For these reasons, the Appellate Court in Nis considers that the property acquired on the basis of the support “should be part of the separate property of the provider of support”, regardless of the fact that the other spouse occasionally fulfilled some obligations. On the basis of such participation, third parties (i.e. the spouse) may ask for compensation.

The theory presents different understandings regarding the personal nature of the support obligation. Although the lifetime support contract is labeled as (strictly) personal,³⁴ it is considered that the obligation to support is “not of a purely personal character”³⁵ because it is generally *non-transferable*³⁶ and *relatively inheritable*.³⁷ This relativizes, to a certain extent, the personal character of the lifetime support contract. The recipient of support can refuse to be cared for by a third party instead of the provider, but there is an exception not only when the contract so provides, but also when the recipient establishes a community of life with the provider and members of his family, in which case he cannot object that the members of the provider’s family perform the obligation.³⁸ This is one of the reasons why, in the opinion of some authors, the lifetime maintenance contract should be “depersonalized” as much as possible, and the personal nature of the contract should be discussed only in certain, exceptional, situations.³⁹

In finding the answer to the question, it is important to refer to the content of the obligation of the provider of support: it is not the same whether the contract stipulates that the provider can hire third parties to fulfill the obligation or all care and concern for the recipient of support will be on the provider himself. The personal character of the support obligation is more emphasized in the second case, but that does not mean that it is not there in the first case. Even when some tasks are undertaken by a third party, the provider of support fulfills this obligation indirectly because it is up to him to consider what is necessary for the recipient of maintenance, and then to provide and organize all the necessary help and care for him, and choose a third party who will do concrete work.

Finally, it is important to say one more thing. Even if it is considered that it is important to the recipient who is the provider of support (who will take care

³⁴ Djurdjevic D. Op. cit. 251.

³⁵ Mladenovic M. Op. cit. 679.

³⁶ Djurdjevic D. Op. cit. 259–260.

³⁷ See Article 204 para. 1 of the Inheritance Act, which stipulates that in the event of the death of the support provider, his obligations pass to his spouse and descendants who are invited to the inheritance, if they agree to it. Common-law partners do not have the right to inherit the position of support provider.

³⁸ Djurdjevic D. Op. cit. 259.

³⁹ Vukotić M. Op. cit. 220.

of him), it should not have such an impact that immovable must necessarily be considered a separate asset. Because that would then mean that it actually matters to the recipient who will acquire his real estate. This changes the nature of the concluded contract.⁴⁰ Namely, if the recipient of support clearly expresses his intention to conclude a contract with only one spouse, but does not object to the fact that the other spouse (or a member of the family union) actually contributes to the fulfillment of the maintenance obligation, does this not indicate that behind such a lifetime support contract something else is hidden, e.g. a gift?⁴¹

4. At what point must there be a marriage (community of life) between the provider of support and his spouse?

As already mentioned, when it comes to a lifetime support contract as a legal basis for acquisition of ownership rights, a specificity lies in the fact that the time period from the moment of conclusion of the contract to the moment of the death of the recipient of support can be quite long.⁴² Therefore, the question arises at what moment precisely should the marriage (that is, the community of life) between the provider of support and his spouse exist, so that the immovable property could be considered as marital property?

The Serbian courts have based their predominant opinion – that the immovable property acquired in such a manner should be considered as marital property – on relatively “clear” circumstances, in which the marriage between the provider of support and his spouse existed both in the moment of the conclusion of the contract and the moment of the death of the recipient of support. However, what if the marriage did not exist in some of the relevant moments (conclusion of the contract, the execution of the contract or the death of the recipient of

⁴⁰ Such a contract would then have elements of a gift, that is, as stated in the theory, it would come close to an inheritance contract. Vukotić M. Op. cit. 220.

⁴¹ This can be seen from the Decision of the Appellate Court in Nis, Gz 3177/2018 dated 16.1.2019. *ParagrafLex*: “In the specific case, the recipient of support under the contract, after the conclusion of the lifetime support contract, also concluded a gift contract with the defendant, which included the same property, so in such a contract, the latter additionally expressed her position on to whom her property should belong”.

⁴² Art. 194 para. 1 Law on Inheritance. By concluding the contract, the provider of support does not actually acquire the right of ownership, but rather the right of acquisition – a legally protected expectation that under certain conditions he will acquire the right of ownership promised to him as compensation for support. The registration of the provider’s ownership right in the real estate cadaster has only a declarative effect. Subotic– Konstantinovic N. Op. cit. 45; Albijanic M. (1996) Ugovor o doživotnom izdržavanju – osvrt na odredbe novog Zakona o nasledjivanju – *Pravni život*, No. 10, from-to, p. 492; Vukotić M. Op. cit. 210; Antic O., Balinovac Z. Op. cit. 509.

support)? What kind of legal rights has the other spouse in case he had actually participated in the fulfillment of the obligation to support?

The Serbian Supreme Court of Cassation had an opportunity to rule on a such case:⁴³ the lifetime support contract had been concluded during the marriage of the provider of support and his spouse and performed for several years, but the death of the recipient of support happened after the marriage ended. The Supreme Court of Cessation was of the opinion that the immovable property acquired in such circumstances was in the separate property regime since „*the marital property could only be the property acquired during the community of life*“, and that the other spouse might, in terms of contribution in the fulfillment of the obligation to support, only ask for compensation.

The Serbian highest judicial instance had the opportunity to express its opinion on another variant of the problem. Namely, before the Supreme Court of Serbia there was a case in which the community of life of the provider of support and his spouse existed both at the time of the conclusion of the contract and at the moment of the death of the recipient of support, but in the meantime, the community of life had been interrupted several times.⁴⁴ The court ruled that the acquired immovable property was in the regime of joint ownership, but their share in the property would depend on “the length of the period... and the individual engagement of each of them in fulfilling contractual obligations.”

It seems that the most important moment for the court is actually the moment of acquisition of immovable property, which is generally the moment of the death of the recipient of support. Such reasoning is based on the general rules of the acquisition of property. However, it could lead to relatively unfair outcomes⁴⁵ and even abuses.⁴⁶

Finally, it would be interesting to see what the attitude of our courts would be in two more variants.

⁴³ Decision of the Supreme Court of Cassation, Rev. 4762/2018 on 28 May 2020.

⁴⁴ Decree of the Supreme Court of Serbia, Gzz. 513/01 on 21 February 2002, *IngPro*: “*During the marriage, there had been several interruptions of the community of life... The plaintiff, together with the first defendant, fulfilled the obligations from both contracts during the period in which she was married to the first defendant.*”

⁴⁵ For example, the immovable property would not be in the joint property regime just because at the time of acquisition there was no community of life between the provider of support and his spouse, even though the contract was concluded while it lasted and was executed for a number of years. On the other hand, the immovable property would be in the joint property regime even though the community of life, for example, began immediately before the recipient's death.

⁴⁶ It would suffice that the provider of support intentionally ends the community of life before the death of the recipient, so that the immovable property would belong only to him.

First, what would the position of the court be had the lifetime support contract been concluded before the provider of support got married, but then executed during the marriage life of the provider of support until the death of the recipient of support? Would the court also consider that the immovable property is in the joint ownership regime, even though the other spouse actually contributed for only a very short period of time?⁴⁷

Second, what if an improper lifetime support contract was concluded, in which case the right of ownership is being transferred immediately after the conclusion of the contract?⁴⁸ It would be interesting to see whether the courts would consider that the immovable property acquired in this way is in the regime of joint ownership, because the acquisition of the immovable property coincided with the marriage between the provider of maintenance and his spouse, or whether it would be considered a separate property of the provider of support, bearing in mind that it could not be predicted whether the other spouse would actually contribute to the fulfillment of the contract.

Bearing all in mind, it is more than obvious that this legal matter – determining the legal regime of the property acquired by a lifetime support contract – cries out for explicit legal regulation. The fairest solution seems to be that the joint ownership regime exists only when the marriage existed both at the time of the conclusion of the contract and at the time of the recipient's death. In all other cases, the other spouse would only have the right to ask for compensation.

5. Tacit consent as a criterion

At the end of this part of the paper, it is useful to mention that some other questions were raised before the Serbian courts that could affect the resolution of that dilemma.

Namely, in the case before the Appellate Court in Novi Sad, the question arose: if the community of life of the provider of support and his spouse existed at the time of the conclusion of the contract on lifetime support, hadn't the provider's spouse, by the fact that he was not formally designated as a contractual party (i.e. one of the providers of support), given "a tacit consent that the property contracted by that contract as a compensation to the providers of support

⁴⁷ „The fact that the lifetime support contract was concluded before or after the marriage of the provider is of influence in such way that the size of his spouse's share in the property acquired by the lifetime support contract is determined depending on it.“ “Pravo supružnika davaoca izdržavanja na udeo u pravu svojine na nepokretnosti stečenoj po osnovu ugovora o doživotnom izdržavanju”, Questions and answers – Lawyer in judicature, *ParagrafLex*;

⁴⁸ Djurdjevic D. Op. cit. 271.

belongs exclusively to the defendants (providers, prim. author) as their separate property“?⁴⁹

The Appellate Court in Novi Sad gave a negative answer, guided primarily by the circumstances of that case. Namely, in that particular case, it was established that the providers of support were against the fact that the spouse of one of the providers was not “*mentioned in the contract as the provider of support, for patriarchal reasons*”, while it was also established that the spouse had that desire,⁵⁰ which was proven and later, from the fact that he actually contributed equally to the fulfillment of the maintenance obligation.

It would be interesting, however, to see how the courts would rule if the spouse was actually able to be named in the contract as the provider of support, but refused to do so – whether that fact would be important in determining that it is separate property or the subsequent change of mood of that spouse and actual contribution to the fulfillment of the support obligation would still lead to the immovable property being considered joint.

If we return to the mentioned case, the Appellate Court was actually of the opinion that it was a matter of joint property precisely because the participation of the spouse of one of the providers in the performance of the support obligation was not opposed not only by the other contractual party⁵¹ but also by the providers themselves. Moreover, there was an oral agreement on this already at the stage of concluding the contract on lifetime support, that the spouse of one of the providers will actually contribute to the fulfillment of the support obligation. Based on such circumstances of the case, the court states, that “*the immovable properties acquired through the performance of the aforementioned activities... therefore represent the joint property of the family community*“.⁵² Therefore, regardless of the fact that the providers objected to the spouse of one of them being a formal legal contracting party, thus actually expressing their will that the immovable property belongs only to them as property, the fact that they did not object to the spouse of one of them actually contributing to the fulfillment of

⁴⁹ Decree of the Appellate Court in Novi Sad, Gz 1016/2022 dated 7.9.2022, *ParagrafLex*.

⁵⁰ “*Contrary to the allegations of the complaint, the plaintiff did not express tacit consent that the property contracted by that contract as compensation to the maintenance providers belongs exclusively to the defendants as their separate property within the family union. It was established that the wish of the plaintiff was to be mentioned in the contract, but that the defendants opposed it.*” Decree of the Appellate Court in Novi Sad, Gz 1016/2022 dated 7.9.2022, *ParagrafLex*.

⁵¹ In that case, the lifetime support contract was concluded as a contract in favor of a third party, where the recipient of the support is actually the beneficiary of that contract.

⁵² Decree of the Appellate Court in Novi Sad, Gz 1016/2022 dated 7.9.2022, *ParagrafLex*.

the obligation – moreover, it was verbally agreed and expected – it is sufficient that, with the fulfillment of other conditions, the real estate is in the regime of joint ownership.

The intention of the court was obviously to provide protection to the provider's spouse, when for discriminatory reasons he himself was not listed as a contractual party, even though he actually contributed to the fulfillment of the obligation.

However, the question remains whether it is justified to give greater importance to that fact – that there is a factual contribution – than who the contracting party is, what was the will of the contracting party, and whether common funds or funds from separate assets were engaged for the performance of the support provider's obligation.

Conclusion

The dilemma regarding the regime of immovable property acquired on the basis of a lifetime support contract arises when the provider of support was married at the time of the conclusion of the contract, its execution and/or at the time of the death of the recipient of support. Practice shows that after the conclusion of a lifetime support contract, only a record of the existence of that contract is entered in the cadaster, and that after the death of the recipient of support, the provider of support is registered as the sole owner of the contracted immovable as compensation for the support performed. And that's where the problem arises. Based on the inspection of the record, and later the registration of ownership rights, third interested parties cannot gain knowledge that the immovable in question may not be the exclusive property of the provider of support but, possibly, the joint property of him and his spouse.

The issue of the regime of immovable property acquired on the basis of a lifetime support contract appears before our courts most often only when the spouse of the support provider, who is not a party to the contract, sues the support provider with a claim for determination, and in the proceedings points out that it is a matter of joint real estate. In the absence of clear legal criteria, we notice that the courts, in an effort to find the fairest solution, give themselves a free hand and resort to the creation of individual criteria that give importance to crucial parameters for examining whether the real estate in question is in the regime of separate or joint ownership. The burden of the lifetime support contract, and the observation of the support obligation as a kind of work, the actual contribution of the other non-contracting spouse, the origin of the funds used to fulfill the support obligation – these are just some of the criteria that the courts resort to in

deciding. However, such judgments and how they can be criticized, especially with regard to the importance that the court gives to certain criteria, such as the requirement that there is an actual contribution from the other spouse. Apart from the question of its legal basis, its legitimacy and content are also debatable. Especially if one takes into account the definition of matrimonial assets, according to which everything acquired by work is to be considered the joint property of both spouses, which the court should primarily take into account and accordingly decide on the regime of immovable property acquired through lifetime support.

On the other hand, if it has not already received a judicial epilogue, before notaries the question of the regime of immovable property most often appears when the provider of support, who after the death of the recipient registered his right of ownership in the real estate cadaster, tries to dispose of the acquired right of ownership. In an effort to prevent the emergence of serious problems and jeopardy of legal security, (considerate) notaries warn the potential acquirer that the real estate may be jointly owned, if the provider of support was married, and for a valid disposition they also require a declaration of the will of the (former) spouse as another co-owner. However, there is uneven treatment among them in what is perhaps a key matter – the determination of the relevant moment in which it is necessary for the provider of support to be married in order for the acquired immovable property to be considered joint: while some notary offices take the moment of acquisition of property rights as relevant, others require that the marriage existed both at the time of the conclusion of the contract on life support and at the time of registration of property rights in the cadaster.

So, no matter how much it seems that the position that acquired immovable property in the common property regime is widely accepted, there remains a bitter taste of the knowledge that the practice, both judicial and notarial, is uneven, which leads to the fact that legal certainty, as in many cases so far, is seriously shaken. Therefore, it seems that explicit legal regulation of this matter is more than necessary. Namely, although the courts will most often rule that it is a joint property, the fact is that they use a longer list of criteria, whereby some of them are given different importance, which will sometimes result in different decisions in the same or similar situations. As for the work of notary offices, the only criterion that is taken into account is that the provider of support was married, and even there is a discrepancy regarding the relevant moment: the fact that some require marriage only at the moment of acquiring property, leads to the fact that in large number of cases, it requires the “participation” of the other spouse in the disposal of real estate; and vice versa, the requirement of others that the marriage exists for the entire duration of the lifetime support contract significantly reduces

the number of situations in which the other spouse will be called upon to declare whether they agree to the transfer of a certain right to immovable property.

Finally, although the described procedure of public notaries can to some extent prevent the occurrence of certain problems in the case of disposal of such acquired immovable property, their power is limited and it may happen that potential dangers pass under their “radar”. An example of this is if the provider of support was in an extramarital union, in which case, as a rule, the question of the regime of the acquired immovable property in case of its disposal is almost never raised.

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Protection from Discrimination in Case of Termination of Employment Relations in the Republic of Belarus

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The prohibition of discrimination is one of the basic principles of labor law. Being a guarantee of the most important human right – equality, the principle of prohibition of discrimination contributes to the realization of the social essence of equality – the creation of equal opportunities for the comprehensive development of all members of society, the smoothing of inequalities that inevitably arise in society and assistance to vulnerable segments of the population. One of the main problems of labor law at the present stage is ensuring equality and protection from discrimination.

Keywords: *discrimination, labor relations, labor law, national legislation, discrimination in the field of labor, international law, International Labor Organization*



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The prohibition of discrimination is one of the basic principles of labor law. A number of articles of the Labor Code of the Republic of Belarus (hereinafter referred to as the Labor Code) are devoted to this principle, and the scope of regulatory regulation has been increased. Being a guarantee of the most important human right – equality, the principle of prohibition of discrimination contributes to the realization of the social essence of equality – the creation of equal opportunities for the comprehensive development of all members of society, the smoothing of inequalities that inevitably arise in society, and assistance to vulnerable segments of the population. One of the main problems of labor law at the present stage is ensuring equality and protection from discrimination.

Discrimination is not perceived as acutely in any other sphere as in the field of work, since it is in this sphere that a person has the opportunity to realize his abilities and provide the necessary standard of living for himself and his family. The elimination of discrimination is necessary so that all people can freely choose the direction of their professional activities, develop opportunities, and receive appropriate remuneration.

Defining the concept of discrimination, we note that this term is not directly contained in the dictionary of S.I. Ozhegov, the specified dictionary contains the concept of “discriminate”, which is defined as “restrict rights, deprive of equality”.

The doctrine of labor law gives a slightly different definition. Black’s legal dictionary speaks of discrimination as a phenomenon of granting certain privileges to a group unreasonably chosen from the general mass of people who have the same right to these privileges [1, p. 1511]. Stephen Gifis’s Law Dictionary also defines discrimination as unequal treatment of subjects in an equal legal position [2, p.450]. If we talk about discrimination in relation specifically to employment relations, then, for example, the dictionary of Canadian law defines an act of discrimination as an action by an employer that adversely affects an employee’s employment relations in such areas as promotion, going on vacation, dismissal, strike, transfer to a lower-paid position, transfer of a workplace to another territory, demotion payment, change of working hours, announcement of a reprimand [3, p.237].

It should be noted that in international law and world public opinion, the inadmissibility of discrimination was entrenched mainly after the end of the Second World War. Since then, the understanding of what discrimination is has changed a lot. Awareness of the differences between modern societies, the role of gender and sexual orientation, changing moral values, greater accessibility of services and information, as well as increased international and national mobility are only some of the factors that have increased awareness of the differences in the treatment of different people. The notion of discrimination as primarily intentional adverse treatment of individuals has given way to a broader definition that encompasses even traditional differentiation. Recently, it has been realized

that discrimination can be indirect, for example, when the same treatment has disproportionately unfavorable results for members of a certain group of people.

The principle of non-discrimination is reflected in various international acts, both global and sectoral in nature. The first group includes the Universal Declaration of Human Rights, adopted on December 10, 1948, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the Covenant on Civil and Political Rights of 1966, the Covenant on Economic, Social and Cultural Rights of 1966, the UN Charter of June 26, 1945, etc.

It should be noted that the Universal Declaration of Human Rights does not define the concept of discrimination, but Article 7 establishes the norm that “all people have the right to equal protection from any discrimination that violates the Declaration and from any incitement to such discrimination” [4].

The sectoral acts include the ILO Convention No. 111 “On Discrimination in Employment and Occupation” adopted on June 15, 1958 and the ILO Declaration “On Fundamental Principles and Rights at Work” adopted on June 18, 1998, and some other acts.

Referring, for example, to the 1958 Convention on Discrimination in Employment and Occupation (hereinafter referred to as Convention No. 111), we will see the following definition of discrimination:

- 1) any distinction, exclusion or preference based on race, skin color, sex, religion, political beliefs, national origin or social affiliation that leads to the destruction or violation of equality of opportunity or treatment in the field of work and occupation;
- 2) any other distinction, exclusion or preference leading to the destruction or violation of equality of opportunity or treatment in the field of work and occupation, determined by the relevant member in consultation with representative organizations of entrepreneurs and workers, where they exist, and with other relevant bodies.

Regulation at the international level has an impact on the regulatory and legal frameworks of a regional and local nature. When forming their own legislation in this area, States focus on existing international legal acts. The Republic of Belarus is no exception. At the level of the Constitution of the Republic of Belarus (hereinafter referred to as the Constitution), the state guarantees the rights and freedoms of citizens of Belarus provided for by the state’s international obligations [5]. Article 8 of the Constitution proclaims the priority of generally recognized principles of international law and the obligation of the Republic of Belarus to ensure compliance with their legislation.

The issue of discrimination in labor law is directly related to such an institution of labor law as termination of an employment contract. It is worth noting that the current labor legislation of the Republic of Belarus, as well as the

Labor Code of the Belarusian SSR (hereinafter referred to as the Labor Code), establishes a number of grounds for termination of an employment contract. Of course, a number of these grounds have been integrated into the TC.

Thus, on the basis of Article 35 of the Labor Code, the grounds for termination of an employment contract are:

- 1) agreement of the parties;
- 2) the expiration of a fixed-term employment contract, except in cases where the employment relationship actually continues and none of the parties has demanded its termination;
- 3) termination of the employment contract at the request, or at the request of the employee, or at the initiative of the employer;
- 4) transfer of an employee, with his consent, to another employer or transfer to an elected position of an employee;
- 5) refusal of the employee to transfer to another location together with the employer; refusal to continue work due to changes in essential working conditions, as well as refusal to continue work due to a change in the owner of the property and (or) reorganization (merger, affiliation, division, allocation, transformation) of the organization, the surrender of the property complex leasing or transfer to trust management of shares (shares in the authorized fund) of the organization;
- 6) circumstances beyond the control of the parties;
- 7) termination of the employment contract with a preliminary test.

We also note some additional grounds for termination of an employment contract with certain categories of employees under certain conditions, reflected in Article 47 of the Labor Code. So, in addition to the grounds provided for by this Code, an employment contract with certain categories of employees may be terminated in cases of violation by the head of the organization without valid reasons of the procedure and deadlines for payment of wages and (or) benefits, commission of guilty actions by an employee directly servicing monetary and material assets, if these actions are grounds for loss of trust in him on the part of the employer, the commission by an employee performing educational functions of an immoral offense incompatible with the continuation of this work.

Thus, based on the above norm, we can state the absence of discriminatory grounds (both general and special) for termination of an employment contract in the Republic of Belarus.

Let us note some provisions of the Labor Code of the BSSR of 1972 on this issue. Thus, Article 29 of the Labor Code of the BSSR of 1972 established an exhaustive list of general grounds for termination of an employment contract. Article 33 of the Labor Code of the BSSR 1972 It was special and regulated the termination of an employment contract at the initiative of the administration: an

employment contract concluded for an indefinite period, as well as a fixed-term employment contract before the expiration of its validity, could be terminated by the administration of an enterprise, institution, organization only in stipulated cases, the first of which was the liquidation of an enterprise, institution, organization, reduction in the number or staff of employees. The Labor Code of the BSSR of 1972 provided that dismissal under paragraph 1 of Article 33 was not allowed if it was impossible to transfer an employee to another job. The dismissal of an employee was also prohibited during the period of disability, as well as during the employee's stay on vacation, except in the case of complete liquidation. Article 34 of the Labor Code of the BSSR of 1972 provided for a legislative guarantee on the preferential right to remain at work while reducing the number of employees, and Article 35 of the Labor Code of the BSSR of 1972 established a ban on termination of an employment contract at the initiative of the employer without the consent of the factory, factory, local committee of the trade union. According to Article 36 of the Labor Code of the BSSR of 1972, upon termination of an employment contract under paragraph 1 of Article 33 workers and employees were paid severance pay in the amount of two weeks of average earnings [6, pp. 13–14].

The Labor Code of the BSSR of 1972, as amended on 06.01.1998, already provided for a two-month warning period for employees, as well as the employment service about the upcoming release of an employee according to paragraph 1 of Article 33 of the Labor Code of the BSSR of 1972. The amount of severance pay upon termination of an employment contract in connection with the liquidation of an enterprise, institution, organization, implementation of measures to reduce the number (staff) of employees, the termination of the entrepreneur's activity amounted to at least three times the average monthly earnings [7, pp. 15–17].

Thus, assessing the current state of development of the institution of termination of an employment contract, in the history of legal regulation of labor relations, there is a tendency to expand and specify the grounds for termination of an employment contract, accompanied by an increase in the number of grounds for dismissal, their procedures and, accordingly, the establishment of certain additional guarantees of workers' labor rights.

Article 2 of the Constitution states that a person, his rights, freedoms and guarantees of their realization are the highest value and goal of society and the state [5]. At the same time, the state is responsible to the citizen for creating conditions for the free and decent development of the individual. This principle applies to a variety of relationships regulated by various branches of law, including labor relations. Belarusian legislation enshrines the general principle of non-discrimination at the constitutional level. Thus, article 22 of the Constitution states that “everyone is equal before the law and has the right, without any

discrimination, to equal protection of rights and legitimate interests.” Part 1 of Article 41 of the Constitution states that “citizens of the Republic of Belarus are guaranteed the right to work as the worthiest way of self-affirmation of a person, that is, the right to choose a profession, kind employment and work in accordance with vocation, abilities, education, vocational training and taking into account social needs, as well as healthy and safe working conditions” [5].

Nevertheless, it is worth noting that the Basic Law does not contain a separate norm prohibiting discrimination in labor relations, as well as a definition of discrimination as such. Currently, anti-discrimination legislation is fragmented.

The formation of the idea of equality and non-discrimination owes much to the ILO Declaration “On Fundamental Principles and Rights at Work and Mechanisms for their Implementation” in 1998. Indicating among the four fundamental principles “non-discrimination in work and occupation”, the Declaration obliges all ILO member States, regardless of the fact of ratification of an ILO convention, but only by virtue of joining the Charter of the organization and the 1944 Philadelphia Declaration of the ILO, “to observe, promote and implement” these principles [8]. Thus, compliance with the previously adopted Convention No. 100 on Equal Remuneration for Men and Women for Work of Equal Value of 1951 and Convention No. 111 on Discrimination in Employment and Occupation of 1958 becomes mandatory for ILO member States.

Based on all the above, it can be concluded that the Republic of Belarus is quite successfully implementing the fundamental principle of international law into its legislation. It is worth noting that the principle of priority of human and civil rights and freedoms is reflected not only in the Constitution, but also in many sectoral normative legal acts.

It is worth saying that in the same way as Convention No. 111, the TC defines exceptions. Thus, any differences, exceptions, preferences and restrictions based on the requirements inherent in this work and due to the need for special state care for persons in need of increased social and legal protection (women, minors, the disabled, victims of the Chernobyl disaster, etc.) are not considered discrimination [9].

The current situation leads in practice to a misunderstanding of the essence of discrimination, the vulnerability of workers and, as a result, to the fact that there are practically no disputes about discrimination in the field of work in judicial statistics. For a convincing comparison: in 2015, the U.S. Equal Employment Opportunity Commission registered 89,385 claims of discrimination in the field of labor relations.

In addition to the most well-known direct discrimination, it is now realized that discrimination can be indirect, for example, when the same treatment has disproportionately unfavorable results for members of a certain group of people. For example, excessive physical performance requirements are more favorable

for healthy men than for disabled people and women. Indirect discrimination is possible with different treatment. Thus, in many countries, domestic workers are de jure or de facto excluded from the protection rules guaranteed to other employees. This discrimination is hidden and more difficult to prove.

A. M. Lushnikov and M. V. Lushnikova emphasize that it is necessary to isolate the so-called intersecting, or intersectional, discrimination based on a combination of discrimination based on unchanging and changing characteristics. The former includes, first of all, gender and race. There may be an intersection within this group of features (for example, in relation to a pensioner of a non-titular nation, a black woman). Changing human characteristics include, first of all, religious beliefs, political orientation, sexual orientation, age, social status, and health status (disability). “Intersecting” discrimination often has a cumulative effect and is not equal to a simple sum of discriminations, but to their enhanced version. In this regard, an intersectional analysis is important to identify new forms of discrimination or factors that reinforce it. At the same time, the endless fragmentation of workers into categories, groups and subgroups can obscure the problems of legal protection of a particular employee. The endless struggle against stereotypes in the light of boundless political correctness can and already does have a completely predictable reverse effect (radical feminism, “black” racism, etc.) [10, p. 218].

Analyzing the labor legislation of the Republic of Belarus, we note that Article 262 of the Labor Code prohibits the involvement of women in heavy work and work with harmful and (or) dangerous working conditions, as well as underground work, except for some underground work (non-physical work or work on sanitary and household services). It is prohibited to involve women in the performance of work related to lifting and moving heavy loads manually, exceeding the limits set for them.

In the same way, Article 274 of the Labor Code establishes a ban on employing persons under the age of eighteen in heavy work and in work with harmful and (or) dangerous working conditions, in underground and mining operations. It is also prohibited for minors to lift and move heavy loads manually that exceed the limits set for them.

It is worth noting that based on the above-mentioned norms, it can be stated that the modern Belarusian legislator has taken all measures to prevent discrimination in labor relations, primarily to prevent discrimination against employees.

The normative legal acts of the Republic of Belarus strictly prohibit discrimination on any grounds, including gender, age, race, nationality, religion, disability and other social characteristics.

Thus, in accordance with art. 14 of the Labor Code, discrimination is defined as “restriction of labor rights or obtaining any advantages depending on

gender, race, national and social origin, language, religious or political beliefs, participation or non-participation in trade unions or other public associations, property or official status, age, place of residence, physical or mental disabilities of a nature that does not interfere with the performance of relevant work duties, other circumstances that are not related to business qualities and are not conditioned by the specifics of the employee's work function."

According to paragraphs 1 and 8 of Part 1 of Article 21 of the Law of the Republic of Belarus "On Employment of the Population of the Republic of Belarus" dated June 15, 2006 No. 125-Z, employers are obliged to participate in providing employment assistance, preventing the establishment of discriminatory conditions limiting guarantees of the right to work. At the same time, employers are prohibited from specifying discriminatory conditions in information about available jobs (vacancies).

Despite the existence of the principle of prohibition of discrimination in the field of work, the facts of discrimination occur in practice. Discrimination manifests itself in one form or another everywhere every day. The sphere of labor relations is a convenient starting point for the liberation of society from discrimination.

In conclusion, it should be said that non-discrimination in labor law plays an important role in ensuring equal opportunities for all employees. Discrimination in the workplace can lead to infringement of human rights and dignity, as well as create a negative atmosphere in the team. Legislation aimed at preventing discrimination contributes to the creation of a fair and safe working environment where every employee has equal opportunities for professional growth and development. Therefore, it is important to strictly observe the principles of non-discrimination in employment, as well as in determining working conditions. This is the only way to ensure equal rights and opportunities for all employees and create a harmonious and effective working community.

In many ways, the point of view of the Constitutional Court of the Republic of Belarus (hereinafter referred to as the Constitutional Court) is interesting, according to which the Constitutional Court considered in open session the case "On compliance with the Constitution of the Republic of Belarus with the norms of the Labor Code providing for the possibility of termination of an employment contract in connection with the achievement of retirement age by an employee", which is reflected in the eponymous The conclusion of the Constitutional Court dated September 23, 1994 No. Z-1/94.

It should be noted that, in accordance with Article 181 of the Labor Code of the Republic of Belarus dated June 23, 1972 (hereinafter referred to as the Labor Code), with employees who have reached retirement age and are entitled to a full pension, the employer can:

- 1) to maintain an employment relationship for an indefinite period;

- 2) conclude, by agreement of the parties, a fixed-term employment contract (up to two years) with its subsequent extension or renegotiation in the same manner;
- 3) terminate the employment contract in accordance with paragraph 11 of Article 33 of the Labor Code.

The Constitutional Court concluded that the provisions of Article 181 of the Labor Code and paragraph 11 of Article 33 of the Labor Code do not comply with the Constitution of the Republic of Belarus and are discriminatory in relation to the social community, which are persons who have reached retirement age.

In this regard, the Constitutional Court decided to declare the norms of Article 181 and paragraph 11 of Article 33 of the Labor Code of the Republic of Belarus inconsistent with the Constitution of the Republic of Belarus, providing for the possibility of termination of an employment contract at the initiative of the employer in connection with the employee reaching retirement age. To consider them invalid from the date of adoption of this Conclusion.

Turning to international labor law, we note that according to article 6 of the International Covenant on Economic, Social and Cultural Rights, the States participating in it recognize the right to work, including the right of everyone to the opportunity to earn a living by work that they freely choose or to which they freely agree, and must take appropriate steps to ensure this right. Article 2 of the said Covenant obliges States to guarantee the exercise of the proclaimed rights without discrimination of any kind.

It should also be noted that paragraph 3 of ILO Recommendation No. 162 “On older workers” provides that each State should take measures to prevent discrimination against older workers in the field of work and occupation. According to paragraph 5 of the Recommendation, “older workers, without age discrimination, should enjoy equal opportunities and treatment on an equal basis with other workers, in particular with regard to access to work of their choice.” Paragraph 5 of ILO Recommendation No. 166 “On termination of employment relations at the initiative of an entrepreneur” also provides that, “in addition to the grounds specified in article 5 of Convention No. 158 “On Termination of Employment Relations at the initiative of an entrepreneur”, the legal basis for termination of employment relations should not be “age, depending on national legislation and practice concerning retirement.”

It is also important that, having analyzed Article 35 of the Labor Code, which specifies the grounds for termination of an employment contract, the Belarusian legislator does not provide any discriminatory grounds, which in turn is an indicator of the high professionalism of the legislator of the Republic of Belarus.

Thus, we can state the absence of discriminatory grounds in the labor legislation of the Republic of Belarus, which contributes to the creation of equal conditions for all employees and ensures the protection of their rights. It is important to observe these norms and principles of equality in employment and during work in order to ensure fair and respectful treatment of all members of society.

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A Four-day working week model in harmony with new workplace technologies

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The four-day workweek model is currently challenging for most employers. The labor market must adapt to a new generation of employees who have different expectations and do not want to work traditionally from Monday to Friday. The new economic age calls for a four-day weekly model of working hours expected to improve employee productivity. Among other things, it is believed to have the potential to bring social, economic, as well as climate benefits. The huge potential of AI needs to be accentuated, which experts believe could accelerate the adoption of a four-day workweek. However, some industries will benefit more from AI than others – especially those that can use generative AI tools for such tasks including software development, content creation, marketing, legal services, etc. The ambition of the paper is to explore the introduction of the four-day working week model in healthcare, which is one of the strategic sectors, with an emphasis on possible threats of discrimination.

Keywords: *artificial intelligence, four-day workweek, labor law, healthcare professionals*



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Introduction

The labor market must adapt to a new generation of employees who have different expectations and do not want to work traditionally from Monday to Friday. This new generation of employees is accessible and open to innovative work structures, new skills and experimental thinking.

The four-day working week is a highly debated topic not only at national level, but also internationally.¹ Especially after the COVID-19 pandemic, the view of work and work-life balance has started to change. European Union legislation also places increasing emphasis on balancing personal and professional life, and one of the instruments for balancing this is the introduction of a four-day working week. Gradually, the perspective (e.g. Forbes magazine) is being promoted that it is not the “quantity” of time spent at work, but rather the quality of the work performed, that should be the basis for evaluating employees’ work performance. Thanks in particular to technological innovations, employees are able to perform work tasks more efficiently and in less time.

In June 2022, 61 UK-based companies participated in a pilot program to experimentally introduce a four-day workweek. In February 2023, when the first results were released, 92% of them said they were continuing to test the concept and 29% said they had introduced a permanent change. Organizations’ average revenue grew by 1.4%; Pilot companies also reported a 57% decrease in the likelihood of an employee leaving, as well as a significant 65% reduction in the number of days of paid sick pay.² Currently similar surveys are being conducted in other countries, e.g. from February 2024 in Germany. In February 2022, Belgium became the first country in Europe to adopt such a law. The new law went into effect on November 21, 2023, allowing employees to decide whether to work four or five days a week.³

The four-day workweek model is perhaps the dream of every employee, especially those who work in a strategic sector such as healthcare. Most healthcare

¹ E.g. Messenger, J. 2018. Working time and the future of work. Geneva: International Labour Organization.

² Bersin, J. 2023. How to Actually Execute a 4-Day Workweek. Harvard Business Review, December 08, 2023, online: <https://hbr.org/2023/12/how-to-actually-execute-a-4-day-workweek> (accessed March 12, 2024).

³ Joly, J., Hurst, L., Walsh, D. and Carbonaro, G. (2024). Four-day week: Which countries are embracing it and how is it going so far? – Euronews. Published on 02/02/2024. Online. Available from: <https://www.euronews.com/next/2024/02/02/the-four-day-week-which-countries-have-embraced-it-and-how-s-it-going-so-far#:~:text=In%20February%202022%2C%20Belgian%20employees,or%20five%20days%20a%20week> (accessed March 12, 2024).

employers operate around the clock, twenty-four hours a day and seven days a week. Many of them face problems in planning and organizing working time. They consider the introduction of the four-day working week model to be a utopia.

We believe that the introduction of a four-day working week has the potential to contribute to reducing various forms of discrimination in employment, but the introduction of this model alone is not enough. What is significant is how this method is implemented and what other measures are taken. In order to prevent possible discrimination against healthcare workers in access to innovative models of work, the specificities of the healthcare sector need to be examined.

Various models of working time organization appear in the literature in connection with the reduction of the number of days that an employee devotes to work. This can in principle:

- 1/ Reduction of established weekly working time, for example the standard 40 hours per week is reduced to 32 hours, while maintaining wages and productivity. This reduction in hours worked presupposes an increase in the efficiency of work performance during working hours.
- 2/ Redistribution of the established weekly working time, the standard number of 40 hours per week, to a smaller number of working days – e.g. 10 hours per week for 4 working days. Thus, the employee will work the same amount of working time, which will only be distributed differently within the working week.

In the case of healthcare workers, both theoretical models would be possible, as there are differences in the operation of outpatient and inpatient healthcare providers. In the case of institutional healthcare facilities, two- or three-shift operation is usually introduced, which poses a major challenge for the production of other models of redistribution of working time of healthcare workers. However, differentiation of job positions within the organizational structure of the employer organization or regular rotation of work teams is not excluded.

The systematic introduction of artificial intelligence and digital tools could be key to introducing a four-day working week in healthcare. New technologies in the workplace can help increase productivity and quality of work associated with high returns on employee satisfaction. Technology also brings a change in organizational and working culture and increased flexibility in the use of working time.

Problems in the organization of working time have been enormously manifested in the healthcare sector for many years. Masking overtime work endangers not only patient safety, but also the safety of healthcare workers themselves. The healthcare sector is also suffering from labor shortages, turnover and burnout. It

is reasonable to believe that the benefits of the 4-day working week brought by the above-mentioned foreign pilot studies would also be reflected in healthcare workplaces. It can be envisaged that changing the organization of working conditions, including working hours, and facilitating the performance of work tasks through artificial intelligence and other digital innovations, could increase the attractiveness of jobs in healthcare facilities.

Other societal benefits of global importance would include CO₂ savings, which are related to the reduction of employee transport to and from work. However, in addition to the positive impacts, innovations in the field of work organization and its legislative framework can also induce unintended side effects and risks that deserve adequate research.

1. Legislation

AI legislation is not keeping up with the pace at which AI is evolving. At global level, many countries, as part of international initiatives, are engaged in creating legal frameworks for artificial intelligence.

At European level, the European Commission has prepared the Artificial Intelligence Act, which is an important legislative framework aimed at regulating artificial intelligence within the European Union. The Proposal for a Regulation on artificial intelligence was announced by the Commission in April 2021. It aims to address risks of specific uses of AI, categorizing them into 4 different levels: unacceptable risk, high risk, limited risk, and minimal risk.⁴ European Union lawmakers reached a political agreement on the draft artificial intelligence (AI) act in December 2023.⁵ The main objectives of this act are to ensure the security and fundamental rights of both natural and legal persons. It should be emphasized that it balances the need for innovation with the need to protect public interests and individual rights in various sectors of the economy. In the context of employment and protection of workers, this Regulation should therefore not affect Union law on social policy and national labor law, in accordance with Union law, concerning employment and working conditions, including health and safety at

⁴ European Commission: Proposal for a Regulation laying down harmonised rules on artificial intelligence. April 21, 2022. Online. Available from: Proposal for a Regulation laying down harmonised rules on artificial intelligence | Shaping Europe's digital future (europa.eu) (accessed March 12, 2024).

⁵ Artificial intelligence act. 'EU Legislation in Progress' briefing. Online. Available from: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698792/EPRS_BRI\(2021\)698792_EN.pdf#:~:text=URL%3A%20https%3A%2F%2Fwww.europarl.europa.eu%2FRegData%2Fetudes%2FBRIE%2F2021%2F698792%2FEPRS_BRI%282021%29698792_EN.pdf%0AVisible%3A%200%25%20](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698792/EPRS_BRI(2021)698792_EN.pdf#:~:text=URL%3A%20https%3A%2F%2Fwww.europarl.europa.eu%2FRegData%2Fetudes%2FBRIE%2F2021%2F698792%2FEPRS_BRI%282021%29698792_EN.pdf%0AVisible%3A%200%25%20) (accessed March 12, 2024).

work and the relationship between employers and workers. At a general level, it emphasizes the wide implementation of AI literacy measures, and the introduction of appropriate follow-up actions could contribute to improving working conditions in EU member states.⁶

At EU level, the organization of working time is regulated quite broadly by Directive 2003/88/EC, with regard to the protection of employees' right to daily and weekly rest periods, breaks and overtime. The average working time for each seven-day period must not exceed 48 hours, including overtime.⁷ Depending on national legislation and/or collective agreements, the 48-hour average is calculated over a reference period of up to 4, 6 or 12 months.⁸ There is currently no uniform legislation at pan-European level regulating the four-day working week. It is up to the Member States to grasp the issue raised.

2. Automation and optimization of processes

One of the key ways AI can reduce the working week in healthcare is by automating time-consuming and routine administrative tasks. Many healthcare professionals spend a significant part of their working time filling out forms, entering data into the healthcare system, putting patients on different waiting lists, tracking stocks, etc. AI tools make it possible to automate these activities, freeing up the working time of healthcare professionals.

Artificial intelligence can be used to optimize work processes in healthcare, this can lead to more efficient use of the working time of healthcare professionals, such as planning operations, processing radio diagnostic images, diagnostics based on audio recording of speech or video examinations, searching for information to support clinical decision-making, etc. "It also seems increasingly clear that AI systems will not replace human clinicians on a large scale, but rather will aug-

⁶ European Parliament. (2024). European Parliament legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)). Online. Available from: https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf (accessed April 23, 2024).

⁷ According to Article 17 of the Directive, Member States may establish exceptions to the established working time conditions, the so-called opt-out, for example for medical facilities with continuous operation, many EU states have used them. Freel, L. (2020). Employment of healthcare workers: Conditions of employment of health workers in the Slovak Republic. Faculty of Law, UK, Bratislava, p. 52.

⁸ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. Online. ELI: <http://data.europa.eu/eli/dir/2003/88/oj> (accessed March 12, 2024).

ment their efforts to care for patients. Over time, human clinicians may move toward tasks and job designs that draw on uniquely human skills like empathy, persuasion and big-picture integration.”⁹

3. Digitalization of patient health records

Artificial intelligence is excellent at predictive analytics and diagnostics. As a result, it can be used to analyze and predict the health status of patients based on their medical history and data, which would be an above-standard help in early diagnosis and treatment of diseases.

The digitization of patient health records would provide space for the use of artificial intelligence to analyze large amounts of data, and identify and extract relevant facts that would help prevent problems and at the same time make it possible to find more efficient ways to solve them.

In the Slovak Republic, digitalization of healthcare provision has started to be implemented since 2010. The National Healthcare Information System (referred as eHealth) has been in place since 1 January 2018 and since that date patient health records have been kept primarily in electronic form. However, approximately 1/3 of doctors and healthcare providers, mostly in the outpatient sphere are still not electronically connected to the national healthcare information system.

A national legal basis of operation of state digital healthcare services and e-Health applications necessitates several technical and legal instruments, primarily established by the Act No. 153/2013 Coll. on the National Health Information System and on amendments and supplements to certain acts. These services are further supported by other legally binding regulations and by-laws. Key tools for digital healthcare services recently include the National Healthcare Information System, the citizen’s electronic identity card, electronic proof of residence for foreigners, electronic ID cards for healthcare professionals, and health informatics standards.¹⁰

However, this does not address the computerization or digitalization of previously created healthcare records or the history of healthcare provided. In addition, there is no workforce that would ensure comprehensive digitization of

⁹ Davenport, T, Kalakota, R. (2019). The potential for artificial intelligence in healthcare. – *Future Healthcare Journal*, Vol. 6, No. 2, pp. 94–98. doi: 10.7861/futurehosp.6–2–94.

¹⁰ Sopúchová, S. (2023). Regulation of digital healthcare services – (not) covered under the Digital Services Act? – *ACTA FACULTATIS IURIDICAE UNIVERSITATIS COMENIANAE* Vol. XLII, No. 2, 152–167.

all citizens of the Slovak Republic. A legal framework for the secure processing of patient health record data using AI applications has not yet been established at national level.

4. Prediction and support in decision-making processes

AI-enabled systems can identify patterns and risks associated with certain diseases before symptoms appear. Using predicted analytics, artificial intelligence can alert a healthcare professional to patients who are at high risk of complications, allowing preventive measures or changes in treatment regimens to be made before an acute condition develops. As a result, not only time and resources are saved, but patient care is improved and the overall financial burden on the healthcare system is reduced.

Artificial intelligence can also act as a support system for diagnosis and treatment. Using machine learning algorithms to analyze complex datasets, including medical images and genetic information. Artificial intelligence can provide recommendations that can help healthcare professionals make faster and more accurate decisions. This can significantly streamline diagnostic and treatment processes, reducing not only the hours needed to provide healthcare services, but also improving their quality.

5. Telemedicine

The concept of telemedicine has been defined by the European Commission as *“the provision of healthcare services through the use of information and communication technologies in a situation where the healthcare professional and the patient (or two healthcare professionals) are not in the same place. This presupposes the secure transmission of medical data and information in the form of text, audio, images or any other form necessary for the prevention, diagnosis, treatment and aftercare of patients.”*¹¹

Telemedicine offers space for the full spectrum of healthcare services such as tele-monitoring, tele-surgery, tele-radiology, tele-pathology, tele-dermatology, tele-cardiology ... etc.

¹¹ European Commission. (2008). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the committee of the regions on telemedicine for the benefit of patients, healthcare systems and society. COM (2008)689 final. Online. Available from: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0689:FIN:EN:PDF> (accessed March 12, 2024).

Through telemedicine, healthcare professionals can provide consultations and follow patients online, eliminating the need for physical presence in an outpatient healthcare facility. This may increase the number of patients who can be treated in a shorter time. At the same time, it allows doctors to have more flexible work schedules, including a better possibility of reconciling work and personal life.

As telemedicine allows healthcare professionals to work remotely, it also reduces the time spent traveling to and from the workplace or to the patient's home. It is also gentle on the patient, as it allows to monitor and evaluate the objective health condition of the patient in his home environment, using information communication means and "smart" devices.

The European Commission has unequivocally concluded that telemedicine can contribute to improving access to professional medical care in areas where there is a shortage of specialist doctors or where medical care is difficult to access. We are of the opinion that telemedicine can also help in areas where there are relatively enough doctors and other healthcare professionals, but their workload does not allow them to ensure a sufficient and balanced work-life balance.

The implementation of telemedicine as an innovative work institute would be capable of reducing the working hours of healthcare professionals. This would contribute to improving patient care, as well as increase the efficiency and flexibility of healthcare professionals. Last but not least, the efficiency and sustainability of the healthcare system would be ensured, which would bring significant benefits to the national economy.

Telemedicine could also be a tool for reconciling the work and family life of employees with young children, especially female physicians, on whom the burden of caring for the welfare of their children and older family members generally rests. It would make it possible to reduce inequalities or gender discrimination against women in employment.

6. Robotics

In many cases, robotic systems and AI-assisted technology platforms can be implemented to perform simple medical procedures or provide healthcare remotely, thereby reducing the need for medical personnel to be physically present in certain locations. This can also lead to more flexible work schedules. Healthcare robotics can contribute to reducing the working hours of healthcare professionals by automating certain processes and tasks. For example, surgical robots can assist surgeons in performing operations with greater accuracy and less invasive

procedures, which can lead to faster recovery of patients and less time spent in the department of a medical facility.

Similarly, automating certain diagnostic tests or administrative tasks can streamline the workflow, which in turn will allow healthcare professionals to devote more time to directly providing healthcare to patients.

Technological innovations can also improve the working environment and reduce the health risks associated with manual tasks, which can contribute to improving the physical health and psychological well-being of health professionals.

7. Advantages and risks of introducing a four-day working week

It would be a great benefit for healthcare providers who have employer status if healthcare were provided by healthcare professionals in good physical condition and psychological well-being. A shorter workweek is one tool that could help healthcare professionals in the healthcare sector increase their satisfaction and motivation, thereby eliminating burnout. Less exhausted and tired healthcare professionals can provide better and more efficient care for their patients.

When introducing a four-day working week, we should not forget the extreme difficulty of ensuring the continuity of healthcare provided. Even assuming the use of new technologies in operating modes, patient safety and the need to ensure a sufficient number of medical personnel must be taken into account. Unfortunately, not only in the Slovak Republic, but also in other Member States, there is a fatal shortage of healthcare workers.

Those circumstances are likely to lead to the need for recruitment. However, it may not always be about the need to recruit more healthcare professionals. Research is also likely to lead to the definition of new patterns in the field of work organization, but also in the division of labor.

Conclusion

The application of new technologies in the work environment of healthcare providers creates space for the introduction of a four-day working week. In the healthcare sector, the introduction of new working models is possible, but the specific factors and limitations associated with this professional field need to be explored and taken into account.

It all depends on the right management decisions and a combination of variables such as automation, more efficient workflows, flexible working models, optimization of work processes, digital literacy, etc. In particular, the digitalization

of medical records, the use of telemedicine and the use of robotics and automation in certain procedures can help reduce working hours in healthcare. As a result, the efficiency and quality of healthcare delivery can increase. Of course, the implementation of these technologies will require a cautious approach and careful planning. It will be necessary to ensure the security and protection of patients' data, but above all proper training of staff. Continued education of healthcare professionals in the field of artificial intelligence will also be extremely important, so that they can use these tools effectively and are not a source of work-related stress. Further training of workers at all levels will also be needed with a view to bridging the existing digital skills gap that naturally exists in each country, the so-called digital gap.¹²

According to recent literature, the most common self-reported contributors to burnout in healthcare professionals were excessive workload and insufficient time away from the office.¹³ The introduction of a four-day working week would have a positive impact on healthcare professionals, reducing their workload and eliminating chronic stress, which often leads to burnout.

“The aim of health systems is to improve health by: delivering effective and high-quality services in a manner that is equitable and responds to patients' needs.”¹⁴ The specificity of health care is also the need to ensure the availability of health care in real time so that the health needs of the population are saturated in terms of availability. In these considerations, it is important to emphasize patient safety and the quality of health care provision.

¹² In professional literature, the term „digital natives“ was established long ago, which refers to a population or generation for which it is not difficult to work with digital technologies and get used to constant updates. Dingli, A., Seychell, D. (2015). Who Are the Digital Natives?. In: *The New Digital Natives*. Springer, Berlin, Heidelberg. https://doi.org/10.1007/978-3-662-46590-5_2.

Digital skills researches repeatedly identify the so-called the „digital gap“ between the knowledge and user skills of members of different generations, both in families and on the labour market.

For example Porubčinová, M. (2020). *The Intergenerational Digital Gap with Regard to Silver Workers*. – Prognostic work. Vol. 12, no. 2, pp. 5–14. – Bratislava: Prognostic Institute of the SAS.

¹³ National Academies of Sciences, Engineering, and Medicine; National Academy of Medicine; Committee on Systems Approaches to Improve Patient Care by Supporting Clinician Well-Being. *Taking Action against Clinician Burnout: A Systems Approach to Professional Well-Being*. Washington (DC): National Academies Press (US); 2019 Oct 23. 4, Factors Contributing to Clinician Burnout and Professional Well-Being. Available from: <https://www.ncbi.nlm.nih.gov/books/NBK552615/> (Accessed April 10, 2024)

¹⁴ Kostičová, M. (2015). Health systems. – In: *Social Medicine*. 1. ed. Bratislava: Comenius University. p. 143–156, p. 143.

In conclusion, it can be stated that currently in the conditions of the Slovak Republic there is no comprehensive view and qualified professional discourse on the model of a four-day working week, with an emphasis on the use of artificial intelligence tools. It is more than desirable to create and appropriately set-up the legislative environment that would meet the needs of practice. In a specific sector such as healthcare, it is essential to seek legal instruments to address shortages and overburdens of healthcare workers and improve their working conditions. The colossal development of new technologies, insufficient regulation and the needs of application practice are an incentive and at the same time justify the validity and urgency of applied research.

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ПУБЛИЧНОПРАВНИ И
НАКАЗАТЕЛНОПРАВНИ
АСПЕКТИ НА
ДИСКРИМИНАЦИЯТА



Непърката дискриминация между свободата и равенството

Благой Делиев*

Най-укоримите антидискриминационни правонарушения не се извършват чрез „неравно третиране“. Именно за това те са по-трудно уловими от човешките закони. Концепцията за непряка дискриминация има амбициозната задача да помогне за предотвратяването, разкриването и санкционирането на такива случаи и така да допринесе за утвърждаване на съдържателното равенство във всички сфери на живот. Тя е едно разширение и същевременно ограничение на чистата забрана за дискриминация.

Нерядко обаче забраната за непряка дискриминация се оказва несъвместима с равенството и с правата, и така поставя под съмнения постиженията на либералната демокрация. Настоящият доклад се опитва да представи нюансите на това противоречие.

Ключови думи: *неблагоприятно третиране, поставяне в неблагоприятно положение, пряка и непряка дискриминация, привидно неутрални разпоредба, критерий или практика*



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The Indirect Discrimination Between Freedom and Equality

Blagoy Deliev

The most reprehensible antidiscrimination offenses are not committed by unequal treatment. They are elusive to human laws. The concept of indirect discrimination has the ambitious task of helping to prevent, detect and sanction such cases and thus contribute to affirming substantive equality in all spheres of life. It is an extension and at the same time a limitation of the pure prohibition of discrimination. Sometimes, however, the prohibition of indirect discrimination is incompatible with equality and rights, and thus undermines the achievements of liberal democracy. This report attempts to present the nuances of this controversy.

Keywords: *Less favorable treatment, Direct and Indirect Discrimination, Apparently neutral, provision, criterion or practice*



1. Забраната за неравно третиране по установен в закона критерий е оста, около която започва да се задвижва цялата юридическа защита от дискриминация през втората половина на XX в. По същество представлява определен прочит на класическия принцип на равенство пред закона. Когато определен критерий е ясно установен от закона, забраната по отношение на него важи еднакво спрямо всички, както следва да действа и самият закон. Например *„расова дискриминация“ е всяко различие, изключване, ограничение или предпочитание на основата на раса, цвят, потекло или национален или етнически произход* (чл. 1, § 1 от Международна конвенция за премахване на всички форми на расова дискриминация). На тази плоскост впоследствие се изгражда и дефиницията за пряка дискриминация. Правонарушението може да бъде лесно конструирано в престъпен състав, административно нарушение или деликт. От решаващо значение е политическият консенсус, който законодателят постига при „инкриминализирането“ на съответната разлика – дискриминационен признак. На либералната теория обаче е ясно, че чистата забрана за неравно третиране е само част от ефекта на равенството. Отвъд нея остават редица очевидни положения на дискриминация, в които се реализират не по-малко опасни предразсъдъци. Тук акцентът не е в третирането на основание защитената в закона разлика, а в *„разликата като резултат“*, който настъпва независимо или въпреки третирането. Когато работодател, ползвайки икономическата си свобода, индексира трудовото възнаграждение само на служители, полагащи труд на пълно работно време, това може да има за резултат непривилегировано засягане на онези работници, които предвид грижите за децата си като майки, полагат труд на непълно работно време. Изискването учениците да бъдат записвани само по постоянен или настоящ адрес в определени квартали, може да има за резултат сегрегиране на определени етноси, за които местоживеенето е определяща характеристика. Привидно обективните и оправдани практики, имащи за резултат настаняване на децата от определен етнос в специализирани училища, предназначени за деца с умствени увреждания може да бъде непряка дискриминация по *увреждане*. Налице е едно *въздействие, поставяне в неблагоприятно положение, изключване по признак*, което произтича от определено положение, към което дискриминиращият е съпричастен – норма, практика, поведение и пр.

2. Като знаково за обосноваването на концепцията за непряка дискриминация в САЩ се определя решението на Върховния съд по Делото *Griggs v. Duke Power Co* (1971).¹ Казусът касае поставянето от работодател

¹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 1971.

на изискване за успешно полагане на тестове за интелигентност спрямо кандидати за наемане на работа. Те имат подчертано различно въздействие върху кандидатите от афроамерикански произход, които постигали по-ниски резултати. Тестовите нямат връзка с професионалните изисквания и естеството на работата. Формално погледнато практиката на работодателя не нарушавала Закона за гражданските права от 1964 г., поради което долустоящите инстанции не открили нарушения. Въпреки това Върховният съд счита практиката за дискриминационна, защото законът забранява не само явната дискриминация, но и практики, които са справедливи по форма, но дискриминационни по действие. Критерий за оправдаване на практиките е доколко прилаганото на изискването е свързано с естеството на полагания труд. Ако не може да се докаже, че практиката е свързана с изпълнението на работата, то е дискриминационна, защото има за безусловен резултат изключването на кандидати, принадлежащи към определена раса. Председателят на състава съдия Бъргър подчертава, че законодателят задължава работодателите да съобразяват условията за наемане на работа с положението на кандидатите. *Законът не може да си позволи такова осигуряване на равни възможности в смисъла на поднасянето на млякото на щъркела и лисицата от известната басня на Езоп.*² Следват три десетилетия спорна практика по въпросите на непряката дискриминация, след което през 1991 г. Конгресът предприема изменения в антидискриминационното законодателство, които могат да бъдат свързани с легализиране на свободата срещу непряка дискриминация от работодателите. Във Великобритания легални дефиниции за непряка дискриминация започват да се появяват още през 70-те години на миналия век. Член 19 от Закона за равенството на Обединеното кралство от 2010 г. дефинира изрично непряката дискриминация, като установява изчерпателно условията, при които се счита, че разпоредба, критерий или практика са дискриминационни по отношение на определено лице.³

² Повече от 50 години продължават теоретичните дискусии доколко е било уместното използване на баснята за лисицата и щъркела, в която решаваща е ролята на намерението, което за дискриминационните нарушения не е от значение (Виж Douglas, J., 2015. *The Griggs Fable Ignored: The Far-Reaching Impact of a False Premise*, Hofstra Labor & Employment Law Journal, Employment Law Journal, Volume 33, Issue 1, art. 4. Достъпно на: <https://scholarlycommons.law.hofstra.edu/hlelj/vol33/iss1/4/>).

³ Чл. 19 Непряка дискриминация

(1) Едно лице (А) дискриминира друго лице (В), ако А прилага спрямо В разпоредба, критерий или практика, която е дискриминационна по отношение на съответна характеристика на В, която е обект на защита.

(2) За целите на ал. 1 разпоредба, критерий или практика е дискриминационна по отношение на съответна характеристика на В, която е обект на защита, ако:

Може да се каже, че концептуално защитата на правата на човека, изградена и прилагана в рамките на ООН и Съвета на Европа винаги е стъпвала върху равенството в неговите съдържателни и рационални рамки. Това се потвърждава от начина, по който е формулирана забраната за дискриминация в различните източници. Бидейки във формата на международни договори, голямата си част от тези стандарти са директно приложими и с предимство пред вътрешното законодателство. Въпреки това политическият консенсус в съответната държава членка е необходимо условие освен за присъединяването към тези актове, но и за тяхното прилагане. За непряка дискриминация се говори нееднократно в Общите коментари на институционалните тела, натоварени с контрол на различните източници на ООН.⁴

Сравнително късно в практиката на Съда в Страсбург започва да се появява понятието „непряка дискриминация.“ Това съвсем не означава, че такива прояви, които днес се окачествяват като непряка дискриминация, в миналото не са получавали защита и санкция в контекста на прилагането на Европейска конвенция за правата на човека.⁵ Непряка дискриминация

(а) А я прилага или би я приложил спрямо лица, с които В не споделя характеристиката – обект на защита,

(b) разпоредбата, критерият или практиката поставят или биха поставили лицата, с които В споделя характеристиката – обект на защита, в особено неблагоприятно положение в сравнение с лицата, с които Б не споделя характеристиката,

(с) разпоредбата, критерият или практиката поставят или биха поставили В в споменатото неблагоприятно положение и

(d) А не може да удостовери, че използването на разпоредбата, критерия или практиката е пропорционално средство за постигане на законосъобразна цел.

(3) Съответните характеристики – обект на защита са: възраст; увреждане; смяна на пола; брак и фактическо съжителство; раса; религия или вяра; пол; сексуална ориентация.

⁴ Например Комисията по контрол на Международната конвенция за премахване на всички форми на расова дискриминация подчертава, че непряката дискриминация е свързана с „мерки, които не са дискриминационни по номинална стойност, но са дискриминационни по факт и ефект (L. R. et al. v. Slovakia, Communication No. 31/2003, U.N. Doc. CERD/C/66/D/31/2003, 2005). В този смисъл Общ коментар 20 на Комисията по икономически, социални и културни права (General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) E/C.12/GC/20 (10 June 2009)) и Общ коментар от 31 август 2017 г. на Комитета за правата на хората с увреждания.

⁵ Като пример за непряка дискриминация в практиката на Съда по правата на човека се дава делото *D.H. and Others v. the Czech Republic [GC]* – 57325/00. Касае се за практика, при която в даден район деца от ромски произход са насочвани предимно към специализирани училища за деца с умствени увреждания, което има за обективен резултат малък процент на такива деца в общите училища. По делото *Opuz v. Turkey* (Application no. 33401/02). (За прояви, които биха могли да се определят като непряка дискриминация става въпрос и по делата: *Thlimmenos v. Greece*

по смисъла на чл. 14 от ЕКПЧ може да се прояви като непропорционално засягане на защитимо по Конвенцията право вследствие на прилагане на обща политика, мярка, фактически или правни положения. Този резултат се обективира като неблагоприятно засягане на лица и определена група. Може да се каже, че Съдът в Страсбург при тълкуването на чл. 14 от ЕКПЧ извлича и позитивни задължения за държавите страни по Конвенцията. Неприлагането на ефективни мерки, за да бъдат задоволени специфични нужди на определени категории лица, може да съставлява нарушение на чл. 14 от ЕКПЧ.

Курс към изрично дефиниране на непряката дискриминация обаче се възприема на ниво Право на ЕС. Причините за това трябва да се търсят отново в естеството на Общността, която разполага с автономни механизми да създава и налага законодателство с директно приложение за държавите членки. Равното третиране и забраната за дискриминация са сред основните принципи, заложили в първичното право на Съюза в обхвата на неговото приложение (чл. 10, чл. 18–19 от Договора за функциониране на Европейския съюз). Те търпят конкретни проявления (чл. 36–37, чл. 40, пар. 2, чл. 45, пар. 2, чл. 49, пар. 2, чл. 55, чл. 57, пар. 3, чл. 65, пар. 3, чл. 95, пар. 1 и 4, чл. 114, пар. 6, чл. 157, пар. 2–3, чл. 200, пар. 5, чл. 214, пар. 2 от Договора за функциониране на ЕС). Антидискриминационното „законодателство“ на ЕС е структурирано по *области на закрила и признаци*. Действа *изчерпателността на основанията*.⁶ Първото законодателно определение на непряка дискриминация се съдържа в Директива 97/80/ЕО на Съвета относно тежестта на доказване в случаи на дискриминация, основана на пола. *Непряка дискриминация съществува, когато разпоредба, критерий или практика, привидно неутрални, поставят в неизгодно положение значително по-голяма част от представители на даден пол, освен ако тази разпоредба, критерий или практика е целесъобразна и необходима и би могла да бъде обоснована от независими обективни фактори, които не са свързани с пола* (чл. 2, пар. 2 от Директивата). Четирите основни антидискриминационни

(Application no. 34369/97); Biao v. Denmark (Application no. 38590/10); Sampanis and Others v. Greece (Application no. 59608/09); Hoogendijk v. the Netherlands (Application no. 58641/00); Opuz v. Turkey (Application no. 33401/02); Hugh Jordan v. the United Kingdom (Application no. 24746/94); Zarb Adami v. Malta (Application no. 16631/04).

⁶ Изрично закрепените признаци, на база които е забранена пряка и непряка дискриминация са пол, полова ориентация, увреждане, възраст и религиозна принадлежност и расов или етнически произход. На практика обаче са обхванати и много други признаци свързани с първите.

директиви съдържат дефиниции за непряка дискриминация, а оттам подобни са възприети и в законодателствата на държавите членки.⁷

3. Макар да транспонира антидискриминационните норми на ЕС, българският Закон за защита от дискриминация (ЗЗДискр.) възприема подходът на защита от дискриминация, установен в ЕКПЧ.⁸ Той регламентира неизчерпателен списък на дискриминационните основания, а самата защита от дискриминация действа при упражняване на всички конституционни права (арг. чл. 4, ал. 1, вр. чл. 6, ал. 1 от ЗЗДискр.). Съгласно чл. 4, ал. 3 от ЗЗДискр. (ДВ, бр. 105 от 2016 г.) *непряка дискриминация е поставянето на лице или лица, носители на признак по чл. 4, ал. 1, или на лица, които, без да са носители на такъв признак, съвместно с първите търпят по-малко благоприятно третиране или са поставени в особено неблагоприятно положение, произтичащо от привидно неутрални разпоредба, критерий или практика, освен ако разпоредбата, критерият или практиката са обективно оправдани с оглед на законова цел и средствата за постигане на целта са подходящи и необходими*. Предисторията на измененията на закона е свързана с две преюдициални запитвания по отношение на Директива 2000/43 по идентични казуси, повдигнати пред Комисията за защита от дискриминация (КЗД). Става въпрос за практики електромерите на крайните потребители от населените предимно с роми квартали да се поставят на прекомерна височина, което ги прави недостъпни за нормален визуален контрол, докато на други места същите електромери се монтират на височина, позволяваща на потребителите винаги да виждат показанията.⁹

⁷ Директива 2000/78/ЕО за създаване на основна рамка за равно третиране при заетостта и упражняването на занятие (член 2, пар. 2, б. б); Директива 2000/43/ЕО относно прилагане на принципа на равно третиране на лица без разлика на расата или етническия произход (член 2, пар. 2, б. б); Директива 2006/54/ЕО за прилагането на принципа на равните възможности и равното третиране на мъжете и жените в областта на заетостта и професиите (член 2, пар. 1, б. б); Директива 2004/113/ЕО на Съвета от 13 декември 2004 година относно прилагане на принципа на равното третиране на мъжете и жените по отношение на достъпа до стоки и услуги и предоставянето на стоки и услуги, член 2, б. б).

⁸ Застъпва се виждането, че в ЗЗДискр. е въведен „смесен подход“ по отношение на релевантността на признаците. (Пушкарова, Ив., Попова, П., „Защитени признаци и дискриминация по асоциация“, публикация по Project VS/2010/008/0536 “Equality as a Path to Progress” Достъпно на http://kzd-nondiscrimination.com/progress2010_2011/index.php?option=com_content&view=article&id=12&Itemid=19).

⁹ В общия случай тези практики са счетени от Комисията едновременно като проява на пряка и непряка дискриминация по признак етническа принадлежност. (Решение № 143 от 28.03.2018 г. на КЗД; Решение № 741 от 8.02.2019 г. на АдмС – София по адм. д. № 4611/2018 г.; Решение № 5647 от 15.05.2020 г. на ВАС по адм. д. № 4334/2019 г., V о.).

След неуспеха на преюдициалното запитване на КЗД¹⁰ по друг, но идентичен казус, питане предприема и съдебен състав на Административен съд София град¹¹, по което СЕС се произнесе с решение по същество.¹² Законодателните изменения в ЗЗДискр. изпревариха произнасянето на Административния съд и КЗД. По казуса, по който АССГ прави преюдициалното запитване всъщност дискриминираният е лице, което не е с ромска принадлежност, но е собственик на търговски обект, който попада в квартал, в който живеят хора с такава принадлежност и в който електромерите са поставени на височина, която изключва визуален контрол от страна на потребителите. По този казус съдилищата са отменяли три пъти актовете на КЗД.¹³ В контекста на непърката дискриминация СЕС стига до следните заключения, част от които са: *не е допустима нормативна уредба, която изисква, за да се установи наличието на пряка или непърка дискриминация, основана на расов признак или етнически произход, засягане на права или законни интереси; не е допустимо национална разпоредба, която предвижда, че за да е налице непърка дискриминация, основана на расов признак или етнически произход, особено не неблагоприятно положение да е предизвикано поради съображения, свързани с расов признак или етнически произход; понятието за „видимо неутрална“ разпоредба, критерий или практика по смисъла на посочения текст означава разпоредба, критерий или практика, формулирани или прилагани привидно неутрално, тоест при отчитане*

¹⁰ Решение на СЕС по дело С-394/11.

¹¹ Определение на АССГ № 640/5.02.2014 г. по адм. дело 6150/2012 г.

¹² Дело С-83/14: Решение на Съда (голям състав) от 16 юли 2015 г.

¹³ През 2010 г. КЗД постановява решение, с което установява, че спрямо жалбоподателката е осъществена непърка дискриминация по признак народност (Решение № 77/6.04.2010 г.). С Решение № 7091/19.05.2011 г. по адм. д. № 5898/2010 г. на ВАС решението на КЗД е отменено. През 2012 г. КЗД постановява последващо решение, с което установява, че електроразпределителното дружество е извършило пряка дискриминация по отношение на жалбоподателката по признак „лично положение“. През 2017 г. след като прави преюдициално запитване по казуса, АССГ отменя и това решение на Комисията, като ѝ връща преписката за ново произнасяне (Решение № 5196 от 10.08.2017 г. по адм. д. № 6150/2012 г.). През 2019 г. КЗД постановява решение, с което счита, че не е установена дискриминация, като съображенията за това са, че третирането е оправдано с оглед запазване живота на потребителите (Решение № 174/22.03.2019 г.). С Решение № 561 от 30.01.2020 г., по адм. дело № 10746/2019 г. на АССГ потвърдено с Решение № 13045 от 21.10.2020 г. по адм. д. № 4671/2020 г. на ВАС, актът на КЗД е отменен за трети път. През август 2023 г. КЗД се произнася за четвърти път по казуса. В решението се установява, че електроразпределителното дружество е извършило пряка дискриминация по чл. 4 ал. 2 от ЗЗДискр. по „етническа принадлежност“ и нарушение по чл. 37, ал. 1 от ЗЗДискр. Решението подлежи на обжалване.

на фактори, различни от защитения признак и неравнозначни с него.¹⁴ За съжаление промяната на дефиницията не внесе необходимата яснота, за да бъде прилагана на практика.¹⁵

4. При непряката дискриминация не би могло да бъде изведен общо-важим фактически състав. Оттук е трудно да се каже каква е последователността на проявление – дали индивидът е засегнат по повод въздействието, което нормата или практиката имат към социалната група или засягането на индивида, създава пречка за реализирането потенциалните възможности на останалите членове на групата и така поставя цялата група в ошетенo положение. Имайки предвид практиката на Съда в Страсбург би могло да се говори по-скоро за дискриминационни прояви, които не нарушават забраната за неравно третиране, но въпреки това са дискриминация.

За целите на настоящия доклад тук ще бъдат маркирани някои от трудностите при отграничаването на пряката и непряката дискриминация, без значение, че те нито са противоположни, нито са симетрични, и само по необходимост биват употребявани от закона като „форми“ на нарушение на равенството. И при пряката, и при непряката дискриминация става въпрос за неоправдани ограничения/привилегии по смисъла на чл. 6, ал. 2 от Конституцията, чл. 14 от ЕКПЧ, чл. 4, ал. 1 от ЗЗДискр. и т. н. И двете „форми на дискриминация“ по правило засягат¹⁶ и са сами по себе си са засягане на основни права. Очевидно е, че и в двата случая макар и да не е необходимо доказването му, намерението на дискриминиращия има своето значение, но то не е критерий за разграничаване на едната форма от другата. При пряката

¹⁴ подобна мярка би могла да бъде обективно оправдана с желанието да се гарантира сигурността на електропреносната мрежа и надлежното отчитане на потребената електрическа енергия само при условие, че споменатата мярка не надхвърля границите на подходящото и необходимото за постигането на тези законни цели и че причинените неудобства не са несъразмерни спрямо така визираните цели. Това не е така, ако се констатира, което следва да провери запитващата юрисдикция, или че съществуват други подходящи и по-слабо ограничителни средства, позволяващи постигането на посочените цели, или, ако няма такива средства, че споменатата мярка уврежда несъразмерно законния интерес на крайните потребители на електроенергия, живеещи в засегнатия квартал, населяван основно от лица от ромски произход, да имат достъп до електроснабдяване при условия, които не са обидни или стигматизиращи и им позволяват редовно да проверяват своето потребление на електроенергия (Решение на АССТ № 5196/22.05.2017 г. по адм. дело 6150/2012 г.).

¹⁵ В този смисъл „уникална“ е идеята на българския законодател да вмести в дефиницията за непряка дискриминация хипотезата на съдискриминирането (дискриминация по асоциация), което е възможно както при пряка, така и при непряка дискриминация. Последното се подчертава от СЕС в двете решения по преюдициалните запитвания.

¹⁶ Това, че такова засягане не бива да се установява, не означава, че то не е част от същността на правото на недискриминация.

дискриминация сравнението „произвежда“ ограничение или привилегия. При непряката сравнението е резултат от някакъв друг факт, който сам по себе си не е съставомерно неблагоприятно третиране (а ако е това е без значение) по признак, защото ако беше, той щеше да бъде санкциониран като пряка дискриминация. Само в този контекст може да се приеме изводът, че пряка и непряка дискриминация не биха могли да бъдат осъществени с едно и също деяние спрямо едно и също лице.¹⁷ Вярно е, че непряката дискриминация може да разкрива случаи на привидно еднакво третиране в различни ситуации, в които ефектът от него води до неравнопоставеност.¹⁸ Това обаче могат да бъдат и случаи, в които основното третиране е напълно неоткриваемо и незабележимо и въпреки това да е налице дискриминационен резултат. Най-често обаче това са случаи, в които видимото неравно третиране по признак не е дискриминационно, но въпреки това то води до резултат, изразяващ се в неоправдано поставяне в положение на база защитен признак. Така например КЗД и Административен съд – София-град приемат, че чрез разпоредбите на чл. 164б от КТ¹⁹ и кореспондиращия му чл. 53а от КСО се осъществява непряка дискриминация по смисъла на чл. 4, ал. 3 от 3ЗДискр. по признак „възраст“ по отношение на осиновителите и осиновените деца над 5-годишна възраст в сравнение с осиновителите на деца под тази възрастова граница. *Когато един осиновител приеме в семейството си дете над 5-годишна възраст, той няма да отдели по-малко време, енергия, любов и отдаденост за това дете, отколкото осиновител на дете под 5-годишна възраст. Допълнително детето в по-зряла възраст може да се каже, че ще има нужда от дори по-голяма подкрепа заради по-дългото време, прекарано извън функционално семейство.*²⁰ Ако така или иначе е възможно да бъде осиновено дете и на такава възраст, ако настаняването на такова дете в детска градина, макар и задължително, може да не бъде гарантирано от държавата – тогава не са ли дискриминирани именно и тези деца след навършване

¹⁷ Решение № 7091/19.05.2011 г. по адм. д. № 5898/2010 г. на ВАС. По новата практика на ВАС и КЗД се признават определени случаи, в които дискриминацията е едновременно пряка и непряка. Решение № 5647 от 15.05.2020 г. на ВАС по адм. д. № 4334/2019 г., V о.

¹⁸ Пушкарова, И., 2010. *Непряка дискриминация*, публикация по Project VS/2010/008/0536 “Equality as a Path to Progress”. Достъпно на http://kzd-nondiscrimination.com/progress2010_2011/index.php?option=com_content&view=article&id=12&Itemid=19.

¹⁹ Съгласно чл. 164б от КТ (Нов – ДВ, бр. 104 от 2013 г., в сила от 1.01.2014 г., изм. – ДВ, бр. 30 от 2018 г., в сила от 1.07.2018 г.) (1) Работничка или служителка, която осинови дете до 5-годишна възраст, има право на отпуск за период от 365 дни от деня на предаването на детето за осиновяване, но не по-късно от навършване на 5-годишната му възраст, а съгласно чл. 53а. (Нов – ДВ, бр. 104 от 2013 г., в сила от 1.01.2014 г., изм. – ДВ, бр. 30 от 2018 г., в сила от 1.07.2018 г.).

²⁰ Решение № 4469 от 5.08.2020 г. на АдмС – София по адм. д. № 1115/2020 г.

на 5-годишна възраст по отношение на нуждата от период на адаптиране с осиновителя.²¹ Очевидно принципното третиране на нормата по възраст, което би съставлявало пряка дискриминация, е оправдано, доколкото то е по възраст, която законът свързва със задължение за започване на предучилищно образование, което не оправдава основанията за отпуск както на родителите, така и на осиновителите.²² Конкретният случай обаче би могъл да разгърне напълно основателно състава на непряка дискриминация, ако осиновяването е на дете на такава възраст и последното не посещава детска градина. Според ВАС обаче, въведената законова възрастова граница е обективно оправдана и по никакъв начин не може да обоснове извод за дискриминация. *Съдът неправилно не е съобразил и счел за ирелевантна разпоредбата на чл. 8, ал. 1 от Закона за предучилищното и училищно образование (ЗПУО), според която предучилищното образование е задължително за учебната година, която е с начало в годината на навършване на 5-годишна възраст на детето, като родителите избират една от формите по чл. 67, а държавата и общините се задължават да осигурят обхват на децата в детските градини и групите за предучилищно образование.*²³

В търсене на критерии за разграничение между двете форми на дискриминация някои автори определят, че при пряката дискриминация има отчетливо неравно третиране спрямо определено лице, докато при непряката дискриминация има непропорционално засягане на определена група. Оттук се заключава, че концепцията за пряка дискриминация е изградена върху индивидуално неравностойно положение, а тази за непряка върху групово неравностойно положение.²⁴ Ако се стъпи на делото *Thlimmenos v. Greece* лицето е било лишено от възможността да упражнява професия като експерт счетоводител поради осъждането си заради отказа да носи военна униформа, което пък е във връзка с принадлежността и самоопределянето му по религия. Очевидно засегнато е лицето, за което има данни, че искало, но му отказано да упражнява професията поради осъждането си за престъпление, свързано с убежденията му. Доколкото има обаче и други лица, които отговарят на останалите изисквания да упражняват професия като експерт счетоводители, принадлежат към това вероизповедание и имат осъждане във връзка с това верско самоопределяне и принадлежност, тези лица са в

²¹ Решение № 293 от 11.07.2018 г. на КЗД по преписка № 201/2017 г. Решението е отменено с Решение № 2713 от 26.02.2021 г. на ВАС по адм. д. № 11864/2020 г., V о.

²² Решение № 2713 от 26.02.2021 г. на ВАС по адм. д. № 11864/2020 г., V о.

²³ Решение № 2713 от 26.02.2021 г. на ВАС по адм. д. № 11864/2020 г., V о., докладчик председателят Диана Добрева.

²⁴ Collins, H., T. Khaitan, *Foundations of Indirect Discrimination Law*, 2018, Hart Publishing Oxford, Достъпно на <https://media.bloomsburyprofessional.com/rep/files/9781509912544sample.pdf>.

потенциална невъзможност да упражнят професията като жалбоподателя, за разлика от всички останали. В тази връзка ефектите на непърката дискриминация се обясняват с комплексното понятие за равенство във възможностите и преразпределителната справедливост.²⁵ Напълно основателно в теорията се възразява, че едно е да се приеме, че хората не трябва да бъдат третираны по-неблагоприятно поради принадлежността си към определена социална група, съвсем друго е да се каже, че третирането на даден индивид по-неблагоприятно на тази основа е равнозначно на по-неблагоприятно третиране на самата група, и че забраната на това по-неблагоприятно третиране непременно води до постигане на съществени цели за общо равенство.²⁶ Ето защо спазването на забраната за непърка дискриминация не следва да се уеднаквява с т.н. позитивни мерки. Свободата от непърка дискриминация не е форма на защита на колективни интереси или средство за компенсиране на колективни вреди. Да, това са възможни последици от ефективното спазване на забраната за непърка дискриминация, но те не бива да се превръщат в юридически критерий за Съда при преценката на случаите дали е нарушено индивидуалното право на недискриминация.

При непърката дискриминация не е необходимо доказването на връзка между характеристиката и поставянето в по-неблагоприятно положение, а връзка между правилото, критерия, нормата и поставянето в неблагоприятно положение. Затварянето на публична библиотека в определен град ограничава в еднаква степен всички, които желаят да ползват тази библиотека, но това е особено неблагоприятно за определени социални групи, които биха изпитали затруднения да си закупват книги, да ползват интернет – ученици, студенти, пенсионери и други социално уязвими групи. Тук връзката между привидно неутралния акт и поставянето в неблагоприятно положение е налична. Признакът при непърката дискриминация не е „причина“. И в теорията, и в практиката съществува спор по отношение на ролята на признака при непърката дискриминация, доколкото това има своите измерения в доказването и оборването на предположението за налична дискриминация. Признакът е част от неблагоприятното положение и той е обективиран в резултата от прилагането на правилото, критерия или практиката. Застъпва

²⁵ Collins, H., T. Khaitan, *Foundations of Indirect Discrimination Law*, 2018, Hart Publishing Oxford, Достъпно на <https://media.bloomsburyprofessional.com/rep/files/9781509912544sample.pdf> p. 36–38. Fredman, S., 2002. *Discrimination Law*, Oxford University Press, Oxford, p. 18.; Fredman, S., 2017 *Substantive equality revisited*, International Journal of Constitutional Law, Volume 15, Issue 4, October 2017, Pages 1174–1177. Достъпна на https://academic.oup.com/icon/searchresults?page=1&q=Sandra%20Fredman&fl_SiteID=5170&SearchSourceType=1&allJournals=1.

²⁶ Foran, M. P., 2019, *Discrimination as an Individual Wrong*, Oxford Journal of Legal Studies, 39 (4), 901–929, <https://core.ac.uk/reader/334954860>, p. 3.

се тезата, че признакът при непряката дискриминация работи като едно „разширение на забраненото основание за дискриминация“. Например, когато работодател изисква от кандидатите за работа да имат свидетелство за управление на моторно превозно средство, това има за резултат неблагоприятно въздействие спрямо хората с увредено зрение.²⁷ От този ъгъл тя се определя като *дискриминация чрез различно третиране по подозрителен признак, което има непряка връзка със забранено основание за дискриминация*.²⁸ Другият подход, който може да бъде извлечен от съдебната практика, разглежда непряката дискриминация като различното въздействие само по себе си – резултат от неутрално проявление на факт, обективизиращ определен признак и неравносвойно положение.²⁹

Обстоятелството, че концепцията за оправдаване е вградена в дефиницията за непряка дискриминация, не означава, че по принцип непряката дискриминация е оправдана, а при пряката оправдаване не е допустимо. Оправдаването на определено третиране/засягане е въпрос не толкова до форма на дискриминацията или на определен признак, а на съразмерност в контекста на ограничаването на определено право. Това е преди всичко въпрос на конкретен казус. На ниво право на ЕС дефиницията за дискриминация не включва засягане на права, а използване на автономни критерии за оправдаване, което най-често дублира критериите за съразмерност на правата. Вярно е обаче, че бидейки изрично вградено в дефиницията за непряка дискриминация, оправдаването е отправна точка за непряка дискриминация, още преди да възникне евентуална ситуация на дискриминация. Така например работодателят е обвързан, че непълното работно време може да бъде обосновано от икономическа или производствена необходимост; интервютата и тестовете за работа с изискванията, които поставя самата работа. Това не означава, че работодателите имат свободата да упражнят по собствена преценка дали да дискриминират позитивно работниците, в името на някаква цел, включително противодействие на съществуваща дискриминация. От една страна днес може уверено да се твърди, че спазването на чистата забрана за неравно третиране не предотвратява дискриминацията. От друга страна, непрекъснатото усложняване на разновидностите на непряка дискриминация създава редица парадокси. Оказва се, че сигурният факт,

²⁷ Malmberg, J., 2005. *Bevisfrågor i den nya diskrimineringsrätten: Diskussionsinlägg*. Paper submitted to the 37. Nordiske Juristmøte (37th Nordic Congress of Lawyers), Reykjavik, p. 240.

²⁸ Strand, M., 2006. *The Formal Concept of Discrimination*. Field of Study: Philosophy of Law and European Law Spring 2006, p. 41, <http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A454814&dswid=8111>.

²⁹ Case Seymour-Smith, C-167/97.

който би изключил отговорността за тези форми е именно осъществяването на пряка дискриминация. Оправдаването на непряка дискриминация може да се случи или посредством позитивни мерки или в хода на вече предявена претенция за непряка дискриминация. Така последната се конфронтира със самото ѝ основание, в смисъл или илюзорно да адаптира поведението на дискриминиращия, за да избегне отговорността; или дори по-лошо – да дава власт на дискриминиращия позитивно да дискриминира по справедливост. Това възражение е и вярно, и невярно, но особено показателно, че понякога лошата юридическа употреба на свободата и равенството би могла да доведе до едновременно заличаване на двете ценности.

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Равенство и неравенство, основани на раса, пол или... класа

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В статията се анализират понятията „съсловие“ и „класа“ в контекста на социалното неравенство. Направен е кратък преглед на практиката на конституционната юрисдикция в България относно равенството. На основата на конституционния принцип на равенството се предлага извеждането на „класата“ като социален признак за установяване на дискриминация.

Ключови думи: равенство, неравенство, конституционен принцип на равенство, класа, класова дискриминация



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Equality and Inequality Based on Race, Sex or ... Class

Natalia Kiselova

The article analyzes the concepts of „estate“ and „class“ in the context of social inequality. A brief overview of the practice of the constitutional jurisdiction in Bulgaria regarding equality was made. On the basis of the constitutional principle of equality, it is proposed to introduce „class“ as a social sign for establishing discrimination.

Keywords: *equality, inequality, constitutional principle of equality, class, class discrimination*



Социалната диференциация е обособяване в обществото на групи от хора, заемащи различни социални позиции. Това разделение се извършва според много и различни характеристики (произход, пол, възраст, семейно положение, притежавана собственост и т.н.). Социалната диференциация обаче поражда неравенство между хората в обществото, което се изразява в неравен достъп на индивидите до различни ресурси и блага.

Неравенството между хората е фундаментална реалност за съвременността, така както и за всяка известна ни историческа система¹. В Античността (Гърция² и Рим³) и в Средновековието принадлежността към определена социална група⁴ (с изключение на робите^{5, 6}) по правило се наследява, а по

¹ Валлерстайн, И., 2016. *Мир – система Модерна*. Том IV. Триумф центристското либерализма 1789 – 1914. М.: Русский фонд содействия образованию и науке, с. 169.

² Омировата социална организация се състои от три елемента: водач, съвет на старейшините и народно събрание, (Туманс, Х., 2002, *Рождение Афины. Афинский путь к демократии: от Гомера до Перикла (VIII–V вв. до н. э.)*. СПб.: ИЦ „Гуманитарная Академия“, с. 65). Платон в Книга VIII на „Държавата“ разделя населението на управляващи, воини и полагащи труд.

³ В Древния Рим първоначално делението в обществото е на римски граждани и лица, които не са римски граждани. Към римските граждани принадлежат аристокрацията (патриции) и плебеите (плебс – земеделци, занаятчии). Правена е разлика и между градските (има се предвид само град Рим) (plebs urbana) и селските (plebs rustica) плебеи. Впоследствие в началото на III в. пр. н. е. патрицианският и богатият плебейски елит се сливат в една група – благородници (нотабилитет), а през 287 г. пр. н. е. е приет закон (lex Hortensia), според който решенията на Народното събрание на плебеите стават задължителни за всички граждани, независимо от техния произход. От този момент нататък патрициите и плебеите престават да бъдат различни социални групи. Богатите римски граждани са сенатори и конници, а всички бедни съставляват плебса, който включва свободни занаятчии, селяни и дребни търговци.

⁴ Класови структури са съществували в опростена форма още в земеделските общества, но са еволюирали в по-сложна и установена структура след установяването на постоянни цивилизации, базирани на селското стопанство с излишък от храна.

⁵ Робството е система от обществени отношения, при които едно лице (роб) е собственост на друго лице (господар, робовладелец, собственик) или на държавата. Първоначално пленници, престъпници и длъжници са превръщани в роби, а по-късно и цивилни, които са принудени да работят за своя господар.

Първите източници, в които има данни за робство, са открити при завладяването на Шумер от семитските племена. Тук се сблъскваме със завладяването на пленените хора и тяхното подчинение на господаря. Най-старите сведения за съществуването на робовладелски държави в Месопотамия датират от началото на третото хилядолетие пр. н. е. В библейските източници робството е описано след потопа (Бит. 9:25). Древните патриарси са имали много роби (Бит. 12:5, 14:14). В сборника на Юстиниан (Corpus iuris civilis) робството се дефинира като „установяване на правото на народите, по силата на което човек е подложен на господството на другите противно на природата“ (Digest. 1.5.4.1).

⁶ През Средновековието търговията с роби в Англия е забранена (през 1102 г.). В края на Средновековието и в началото на Новото време (през 1698 г.) английският парламент отново разрешава на частни лица да се занимават с търговия с роби. Въпреки това, след аферата Съмърсет в Англия (1772 г.), Френската революция и избухването на

изключение се придобива. Членовете на всяка социална група се отличават по своя правен статус, привилегии и задължения.

В средновековна Европа обособените социални групи в обществото се наричат съсловия. При т. нар. „стар режим“ във Франция⁷ (т.е. преди революцията от 1789 г.) обществото е разделено на три съсловия: първо (тези, които се молят; духовенство)⁸, второ (тези, които воюват; поземлена и градска аристокрация)⁹ и трето съсловие¹⁰ (тези, които работят; всички останали¹¹).

Наполеоновата война, през 1807 г., британският парламент се възползва от възможността да забрани на английските кораби да превозват роби до френските колонии (Акт за забрана на търговията с роби (Abolition of the Slave Trade Act)). Тогава аболуционистите Уилям Уилбърфорс и Гранвил Шарп постигат разширяване на тази забрана и в други страни, а през същата година (1807) Кралският флот започна да се бори с търговията с роби по бреговете на Западна Африка, което спира доставките на живи хора като стока през океана. Британският закон за премахване на робството е приет през 1833 г. (Act to Free Slaves in the British empire) и не се прилага за Индия, където робството е признато за част от „националната култура“.

⁷ Вж. Токвил, А. дьо, 1992. *Бившият режим и революцията*. (С.: Избор, 448 с.) или „*Старият режим и революцията*“ (на фр.: „L'Ancien Régime et la Révolution“ (1856)) е книга, която дава анализ на френското общество преди Френската революция, на т. нар. „стар ред“, и изследва причините и влиянията, които довеждат до Революцията. Това е една от първите исторически творби за Френската революция.

⁸ Задълженията на първото съсловие са да регистрират бракове, раждания и смърт; събиране на данъка „десятък“; упражняване на духовна цензура върху книгите; изпълнение на задължения като морална полиция; подпомагане на бедните. Духовенството притежава 10–15% от земите във Франция, но към 1789 г. не са били облагани с данъци. Общият брой на хората в първото съсловие към 1789 г. се оценява на 100 хиляди души, от които около 10% принадлежат към висшето духовенство. Системата за наследяване на най-големия син, която е съществувала във Франция, има за последица, че по-младите синове често стават духовници (свещеници).

⁹ Включва всички аристократи – от рицари до членове на кралското семейство, с изключение на самия монарх. Благородниците са разделени на „аристократи на наметалото/мантията“, осъществяващи правосъдието и държавната служба, и „аристократи на меча“. Аристократите са около 1% от населението. Те са освободени от труд за строителство на пътища, както и от редица данъци, по-специално от „габел“ (данък сол) и традиционния данък „талия“. Специалните привилегии на аристократите включват правото да носят меч и правото на фамилен герб. Аристократите също така събират данъци от третото съсловие, разчитайки на традиционната феодална система.

¹⁰ Третото съсловие са тези хора, които работят сами – селяни, работници, занаятчии, буржоазия. Представителите на това съсловие са задължени да плащат данъци и през 1789 г. те съставляват около 96% от населението.

„Що е това третото съсловие?“ (на фр. Qu'est-ce que le tiers-état?) е политически памфлет на френския общественик абат Еманюел-Жозеф Сийес, публикуван през май 1789 г. (на български: Сийес, Еманюел-Жозеф, 2004. *Що е това третото съсловие?* С.: Сиела, 121 с.). Памфлетът започва с три основополагащи въпроса и техните отговори:

„Какво е третото съсловие? Всичко.

След революциите¹² в Западна Европа и Северна Америка¹³ (XVII–XVIII в.) социалната диференциация вече не се основава на съсловия, а на класи¹⁴

Какво бе то досега в политическия ред? Нищо.

Какво иска то? Да бъде нещо.“.

- ¹¹ Памфлетът „Що е това третото съсловие?“ съдържа искания за промяна в представителността (формиране на политическо представителство), сред които са: удвояване на броя на представителите от третото съсловие в свиканите Генерални щати в 1789 г., истинско политическо представителство на населението в Генералните щати на Франция и гласуване от всеки представител индивидуално, а не колективно като съсловие.

Традиционният съсловно-представителен орган във Франция е трикамарните Генерални щати, създадени за първи път от Филип IV през 1302 г. Постепенното нарастване на икономическото влияние на третото съсловие води до факта, че през 1789 г. властта преминава към еднокамарното Национално събрание (17 юни), след това към Националното конституционно събрание (9 юли). Представителите на третото съсловие в Генералните щати се провъзгласяват за Национално събрание, което според тях е представителство не на съсловието, а на целия народ.

- ¹² Триадата на Великата френска революция от 1789 г. гласи: „Свобода, равенство, братство“. В „Декларацията за правата на човека и гражданина“ има конкретни записи, относими към равенството. Напр. чл. 1 „I. Хората се раждат и остават свободни и равни по права. Общественият различия могат да служат само на общата полза.“, чл. 6 „VI. Законът е израз на общата воля. Всички граждани имат правото да участват лично или чрез свои представители при неговото създаването. Той трябва да бъде еднакъв за всички било когато защитава, било когато наказва. Всички граждани, тъй като са равни пред закона, имат еднакъв достъп до всички обществени длъжности и служби, съобразено с техните способности и без друга разлика освен тази, която произтича от техните добродетели и дарби.“ и чл. 13 „XIII. За поддържането на обществената сила и за разходите на администрацията е необходим общ данък; той трябва да бъде равномерно разпределен между всички граждани съобразно техните възможности“.

- ¹³ По време на своята президентска кампания през 1988 г. Дж. Буш казва, че класата е „европейско нещо“. САЩ са разглеждани през доминиращата култура като безкласово общество, основано на индивидуалната меритокрация („американска мечта“). „Малката мръсна тайна на Америка“ доведе до осакатяване на публичен дискурс за класата и класовостта (Barone, C., 2006. *Cultural capital, ambition and the explanation of inequalities in learning outcomes: A comparative analysis*. Sociology, 40 (6), 1039 – 1058; Barone, C., 2001. The Foundations of Class and Classism. <<https://justice-spirit.pbworks.com/f/ClassFoundations.pdf>> [26.05.2024].

- ¹⁴ Още в Древен Рим при центуриатната реформа на Сервий Тулий римските цензори използват думата „classis“, за да разделят населението на шест сложни групи данъкоплатци – от *assidui* (уседнали платежоспособни граждани с имущество на стойност над 100 000 аса) до *proletarii* (чиято единствена стойност за държавата се изразявала в създаване на потомство – бъдещи граждани Рим).

По-късно, от XVI в., понятието „клас“ продължава да се използва в смисъла на градация, категоризация. Терминът „класа“ е използван от Адам Фъргюсън и Джон Милър за определяне на социалните слоеве по ранг и собственост. В този смисъл (като взаимнозамеянем синоним на понятието „социална класа“) в началото на

/ социални класи^{15, 16}. Понятието „класа“¹⁷ в произведенията на Маркс се

XVIII в. се среща във всички европейски езици, включително в класическата политическа икономия и английската социална философия.

Понятието „класа“ придобива специфичния си смисъл, използван и понастоящем, едва след отпадането на средновековната феодална система и с възникването на капиталистическото индустриално общество. В политическата икономия въвеждането на отделен научен термин е улеснено от Дейвид Рикардо, който започна основната си работа (*On the Principles of Political Economy and Taxation*/1817) с определението, че в обществото има три големи класи (земевладелци, капиталисти, работници), които споделят общественото богатство чрез различни източници на доходи (поземлена рента, съответно печалба и работна заплата).

¹⁵ Концепцията за „социална класа“ започва да се развива от учени в Англия и Франция през XVII–XIX в. Социалните класи са разглеждани като антагонистични социални групи (богати – бедни, капиталисти – работници, собственици – неособственици). Френските историци Ф. Гизо и О. Тиери показват противопоставянето на интересите на класите и неизбежността на техния сблъсък, изразен в класовата борба. Английските и френските политически икономисти А. Смит и Д. Рикардо разкриват вътрешната структура на класите. Разделението на антагонистични (непримиримо бореци се помежду си) социални класи е описано за първи път най-пълно и изчерпателно от Карл Маркс. В социално-класовата структура на обществото има основни класи (съществуването, на които пряко произтича от икономическите отношения, преобладаващи в дадена общественно-икономическа формация) и неосновни класи (остатъци от предишни класи в новата формация или възникващи класи). Теорията за класовата борба заема едно от централните места в марксисткото материалистическо разбиране на историята, което Фридрих Енгелс нарича исторически материализъм. Възникването на класи става възможно, само когато нарастването на производителността на труда води до появата на принадлеен продукт и общата собственост върху средствата за производство се заменя с частна собственост; с появата на частната собственост става факт и имущественото неравенство. Ключово за разделението на класи обаче е общественото разделение на труда – умствен и физически, управленски и изпълнителски, квалифициран и неквалифициран. Енгелс отбелязва, че процесите на производство и потребление са в центъра на класовата борба, но тя не може да бъде сведена само до икономическата сфера.

¹⁶ Критерии за разграничаване на класите са:

- Йерархична позиция. Социалната класа е ранг или прослойка, дефинирана от признати и ефективни различия в престижа, богатството или властта. Напр. лордовете, търговците и крепостните се разглеждат като публични актьори, а не като правни категории. Това предполага вертикални разделения, пресичащи големи популации и почиващи на широко разпространено съгласие, колкото и неохотно да е, и насърчава социалната история на промяна на ранговете, тяхното обществено представяне и техните последици за стила на живот.
- Пазарни връзки. Социалната класа е сегмент от населението, дефиниран от отличителна връзка със земята, труда и стоковите пазари. Напр. благородниците, фермерите, търговците, занаятчиите и наемателите се разглеждат като собственици, производители и особено като потребители. Това предполага обширни, но диференцирани пазари със значително въздействие върху благосъстоянието на техните участници и насърчава социалната история на материалната култура, собствеността и потреблението.

използва в по-общ социален¹⁸ и в икономически¹⁹ смисъл в условията на капитализма.

Същностна разлика в социалната диференциация между Античността и Средновековието, от една страна, и Новото време, от друга, е вертикалната социална мобилност²⁰, която е възможна в условия-

- Съзнание и култура. Социалната класа е набор от хора, които се считат един за друг за социални равни или споделят отличителна група от разбирания, представления и практики. Напр. аристокрацията контрастира с буржоазията като общност и стил на живот. Това предполага добре дефинирани граници, широки връзки и взаимно признаване в границите и насърчава социалната история на променящите се разбирания, представления и практики.
- Местоположение в производството. Социалната класа обозначава обитателите на голяма, но отличителна позиция в системата на материалното производство. Напр. капиталистите срещу пролетариите се определят от контрола върху капитала срещу зависимостта от продажбата на работна сила. Това предполага широки категорийни разделения в цели производствени системи и значителното въздействие на производствената позиция върху общото благосъстояние. Това насърчава социалната история, свързвайки политиката и социалния живот с променящата се организация на производството и изследвайки промените във формите и степените на неравенството. See Tilly, C. (2018) *Social class*. // *Sociology: General Terms and Concepts*. 14 May 2018, <<https://www.encyclopedia.com/social-sciences-and-law/sociology-and-social-reform/sociology-general-terms-and-concepts/social-class>> [26.05.2024].

¹⁷ Въпреки решаващото значение на понятието „класа“ в концепциите на Карл Маркс и Фридрих Енгелс за развитието на класовата теория в социалните науки, самите основатели на марксизма не са извършили систематично представяне на класовата си теория на обществото на нито едно място и разбирането им е разпръснато из произведенията им. Третият том на *Капитала* завършва с глава 52 „Класи“, която остава nedovършена. В тази глава Маркс успява да отбележи следното: „Само собствениците на работна сила, собствениците на капитал и собствениците на земя, чиито съответни източници на доходи са заплатите, печалбите и поземлената рента, следователно наемните работници, капиталистите и собствениците на земя, образуват трите големи класи на съвременното общество, почиващи на капиталистическия начин на производство“.

¹⁸ В свои ранни произведения („Класова борба във Франция от 1848 до 1850 г.“ и „Осемнадесетият брюмер на Луи Бонапарт“) Маркс описва специфични класи в определени общества като анализира резултатите от революцията от 1848 г., нейните последици и причини. Тук Маркс определя класата не чисто икономически, а назовава общите условия на съществуване в нейната цялост (напр. начин на живот, интереси, образование и политическа организация), които отделят една класа от друга.

¹⁹ В своите по-късни произведения (напр. в „Капитала“) Маркс абстрактно описва различните класи като резултат от производствените отношения на капитализма. Той се стреми не само да опише емпирично съответните групи от населението, но и да обясни системния произход на тези разделения. За да направи това, той прибегва до трудовата теория за стойността и теорията за класовата борба.

²⁰ Социалната мобилност е промяна от индивид или от група хора на мястото, което заема(т) в социалната структура (социална позиция), преминаване от една социална

та на пазарната икономика чрез лични качества (умения, талант) или по силата на т. нар. социален асансьор (лифт) в сравнително-исторически аспект²¹ – армията²², религията²³, придобито образование²⁴,

прослойка (класа, група) в друга (вертикална мобилност) или в рамките на същата социална прослойка (хоризонтална мобилност).

²¹ Питирим Сорокин извежда различни асансьори (лифтове) на вертикалната мобилност, по които хората се движат нагоре или надолу по стъпалата на социалната стълбица в хода на живота и личната си кариера. Вж. повече при Сорокин, П. А., 1992. *Человек. Цивилизация. Общество*. Общ. ред., сост. и предисл. А. Ю. Союмонов: Пер. с англ. С. А. Сидоренко. М.: Политиздат, 392–404.

²² Армията дава възможност за промяна на социалния статус в различни исторически периоди. Така напр. 36 римски императори (Юлий Цезар, Октавиан Август и др.) от 92 са постигнали своята позиция чрез военна служба, 12 византийски императори от 65 са постигнали статута си по същата причина.

²³ Религиозни организации са имали по-съществено значение в миналото. Значението на този асансьор достига своя зенит през Средновековието. Папа Григорий VII през 1077 г. сваля, унижава и отлъчва императора на Свещената римска империя Хенри IV. От 144 папи 28 са от прост произход, 27 са от средната класа. Институцията на безбрачието забранява на католическите свещеници да се женят и да имат деца, така че след смъртта им освободените позиции се заемат от нови хора, което предвратява формирането на наследствена олигархия и ускорява процеса на вертикална мобилност. Пророкът Мохамед първо е бил обикновен търговец, а след това е станал владетел на Арабия.

²⁴ Придобитото образование в училищни и научни организации е най-значимият асансьор. В древен Китай училището е било основният асансьор в обществото. Въз основа на препоръките на Конфуций е изградена система за образователен подбор (селекция). Училищата са били отворени за всички класове, най-добрите ученици са прехвърлени в гимназиите и след това в университетите, оттам най-добрите ученици влизат в правителството и на най-високите държавни и военни постове. Нямамо е наследствена аристокрация. Правителството на мандарините в Китай бе правителство на интелектуалци, които знаеха как да пишат литературни произведения, но не разбират от бизнес и не знаят как да себият, така че Китай повече от веднъж е ставал лесна плячка за номади (монголи и манджури) и европейски колонизатори. Училищният асансьор е от голямо значение и в Османската империя при Сюлейман Великолепни (1522–1566), когато талантиливи деца от цялата страна са изпращани в специални училища, след това в еничарския корпус, а след това в гвардията и в държавния апарат. В древна Индия по-ниските касти нямат право на образование, тоест училищният асансьор се движи само по горните етажи. От 829 британски гении 71 са синове на неквалифицирани работници. 4% от руските академици произхождат от селски произход, например М. Ломоносов. Днес в Съединените щати не може да се заеме публична длъжност без университетска диплома.

Наличието на поне един човек в семейството с висше образование намалява риска от бедност 2,3 пъти. Доходите на семействата, в които всички възрастни са с висше образование, са с 20% по-високи от средните. Ако в семейството няма хора с висше образование, благосъстоянието му е с една четвърт по-ниско. Вярно е, че дипломата

политическата дейност²⁵, изкуството²⁶, медиите²⁷, икономическата (стопанска) дейност²⁸, семейството и брака²⁹.

Отличително и особено свойство на капитализма като негова цел (както и нейно постигане) бе провъзгласено равенството – равенство пред закона и съда, фундаментално социално равенство на всички хора, надарени с равни права, пазарно равенство, равни условия за стопанска дейност. Големият политически въпрос на модерния свят, големият културен въпрос е как да се примири теоретичната представа за равенството с продължаващата и все

за висше образование не гарантира защита на семейството от бедност, както когато нейните притежатели са заети в публичния сектор, така и в частната сфера.

²⁵ Политически асансьор или участие в дейността на политическа партия, избор в представителен орган или дейност в правителствени учреждения (организации).

²⁶ Изкуството е също възможност за социална мобилност. Сред най-известните литературни фигури на Франция 13% са от работническата класа.

²⁷ Класическите (преса, радио, телевизия) и новите медии (интернет-издания, социални мрежи) могат да осигурят както популярност (промоция), така и излагане.

²⁸ Натрупването на богатство е най-надеждният път към върха в условията на спазване на върховенството на правото. Но в условията на социални катаклизми богатството лесно може да бъде отнето (конфискувано, отнето в полза на държавата). Бедният аристократ не е в състояние да поддържа социален престиж, въпреки че ще остане собственик на титлата; бедният новобогаташ губи абсолютно всичко. В древен Рим богати предприемчиви роби като Трималхион, Паладий и Нарцис са се радвали на огромно влияние. Крал Югурта от Нумидия чрез подкупване на римски служители търси подкрепата на Рим в борбата си за трона в края на II век. пр. н. е. В крайна сметка, когато е изгонен от Рим, нарича „вечния“ град „корумпиран“: „Всички можете да бъдете купени, ако имаше купувач“.

Р. Гретън пише за възхода на английската буржоазия: „Докато аристокрацията и поземлените благородници през XV в. се унищожават и съсипват взаимно, средната класа тръгнала нагоре, трупайки богатство. В резултат на това един ден нацията се събуди с нови господари. Средната класа купи всички желани титли и привилегии с пари.“ (Gretton, R. H., 1917. *The English Middle Class*. London: G. Bell And Sons Ltd., 63–65, 202–209).

²⁹ Семейството и брака са използван социален асансьор както в миналото, така и днес. Според древните римски закони, ако свободна жена се омъжи за роб, тогава нейните деца стават роби, а синът на робиня и свободен мъж става роб. Днес има „привличане“ между богатите булки и бедните аристократи, когато в случай на брак и двамата партньори получават взаимни ползи: булката получава титла, а младоженецът получава богатство.

Членовете на кралското семейство във Великобритания трябва да получат разрешение от монарха, за да сключат брак. Според Закона за кралските бракове от 1772 г. висшите членове на кралското семейство не могат да се оженят/омъжат за някой, който е разведен или е католик. Това обаче се променя със Закона за наследяването на короната през 2013 г., според който първите шестима по ред за трона се нуждаят от разрешението на монарха да се оженят/омъжат. В наши дни членовете на кралската британска фамилия могат да се женят за всеки, включително и за обикновени хора (от простолудиято), но за да се случи това, те се нуждаят от разрешение.

по-остра поляризация на възможностите на реалния живот и удоволствията, произтичащи от тези възможности.

Дълго време – цели три века, от XVI до XVIII в. – този въпрос почти не е обсъждан. Неравенството (социално, а не индивидуално)³⁰ се е смятало за нещо естествено, всъщност предпоставено от Бога. Но след като революционният подем от края на XVIII в. превръща езика на равенството в (общочовешка/правна) ценност и културна икона, след като предизвикателствата към властта стават повсеместни, несъответствието между теория и практика вече не може да бъде игнорирано.

След Втората световна война по време на Студената война виждаме два основни модела за преодоляване на неравенството в икономическия смисъл на думата – при либералната пазарна икономика (социална държава) и при регулираната планова икономика. След падането на Берлинската стена и налагането на пазарната икономика като единствен модел за развитие на националните икономики в страните от Източния блок и като доминиращ модел в условията на глобализация, неравенството в икономическия смисъл на думата и равенството между хората в условията на правовата държава повдигат класически въпроси, на които трябва да се търсят адекватни на съвременното развитие на правото отговори.

В условията на пазарна икономика, изпълнявайки качествено различни условия на труд и задоволявайки в различна степен социални потребности, хората понякога се оказват ангажирани с икономически разнороден труд, тъй като тези видове труд имат различна оценка на социалната си полезност. Основни механизми на социално неравенство в обществото са отношенията на собственост и преразпределение на собствеността в условията на преход, властта (господство и подчинение), социално (т. е. социално определено и йерархизирано) разделение на труда, както и неконтролирана, спонтанна социална диференциация. Тези механизми са свързани преди всичко с характеристиките на пазарната икономика, с неизбежна конкуренция (включително на пазара на труда) и с безработицата. В съвременните държави с доминираща неолиберална икономика се провеждат нарочни мерки (социална политика), които да смекчат социалното неравенство. Такива са: провеждане на политика за социално осигуряване, установяване на минимална заплата за работниците; развитие на образованието, здравеопазването и околната среда предимно за сметка на държавата; провеждане на активна политика, насочена към осигуряване на квалификация и преквалификация на работниците и служителите; подпомагане на най-бедните семейства; отпускане на помощи при безработица; защита на стандарта на живот (чрез въвеждане на различни форми на компенсация за увеличение на цените и индексация).

³⁰ Относно социалната стратификация вж. при Дарендорф, Р., 2002. *Тропы из утопии*. М.: Праксис, 459–480.

Равенството е общочовешка ценност, конституционен принцип и основно право на човека и гражданина в съвременния демократичен конституционализъм, към който принадлежи Конституцията на Република България от 1991 г.³¹. В Преамбюла на Конституцията равенството е прокламирано като общочовешка ценност³² наред със свободата³³, мира, хуманизма, справедливостта и търпимостта.

Равенството на всички граждани пред закона е основен принцип на всяко демократично общество. В чл. 6, ал. 2 от Конституцията равенството на гражданите пред закона е формулирано като конституционен принцип³⁴, който стои в основата на гражданското общество и правовата държава.

³¹ Вж. мотиви към Тълкувателно решение № 14 от 1992 г. на Конституционния съд по к. д. № 14/1992 г.

³² „Политическата свобода и политическото равенство са базисни ценности и основополагащи принципи на демокрацията. Те са прогласени в основните закони на съвременните конституционни демокрации, каквато е и действащата българска Конституция, и на тях се основава Конституционният съд в своята практика...

Между свободата и равенството съществува вътрешно напрежение, което е присъщ проблем на всяка политическа (както и морална) система, изградена върху повече от една ценност. Макар и нерядко те да се представят като несъвместими, повече от развитите демократични общества успяват да съчетават по-малка или по-голяма степен на лична свобода с мерки, водещи до ограничаване ефекта на неравенството по отношение на различните категории права, включително и на политическите. В една демократична общност свободата не е над равенството – йерархична по естеството си връзка между тях означава налагане върху една група индивиди на волята на друга, но също така равенството не е пред свободата, тъй като това създава опасност от прекомерна интервенция в автономията на индивида и авторитарност. Свободата не е просто една от ценностите, тя е ценност – предпоставка за други ценности, включително и за равенството, обсъждано като основно право принципно. Това виждане е възприето и от българския конституционен законодател, което се потвърждава от поставянето на свободата като общочовешка ценност и принцип на демократичния ред, както в Преамбюла, така и в нормативната част (чл. 6, конкретизирано в чл. 19, ал. 2, чл. 121, ал. 1 и др.) на Конституцията от 1991 г., на един ред, но пред равенството, прокламирано като равенство по достойнство и права на всички (ал. 1, чл. 6 от Основния закон възпроизвежда буквално текста на чл. 1, изр. първо от Всеобщата декларация за правата на човека).“ (из мотиви към Решение № 9 от 2023 г. по к. д. № 4/2023 г.).

³³ „Свободата, както и равенството, не са абсолютни и те могат да бъдат ограничавани. При намеса в свободата въпросът не е дали се намаляват възможностите, измежду които можем да избираме според собствената си воля, а в това, дали интервенирането в обхвата на свободата е рационално обосновано и е в съответствие с едно общо правно правило, на което правило всички сме еднакво подчинени (т.е. дали конкретната намеса генерира състояние на подчиняване каквото прави произволната намеса в свободата). На свой ред, произволните неравенства и дискриминация могат да генерират състояние на господство и в такъв случай те противостоят и на равенството и на свободата, а непосилната цена на свободата също я ограничава така както и прякото налагане на една воля над друга.“ (из мотиви към Решение № 9 от 2023 г. по к. д. № 4/2023 г.).

³⁴ Вж. мотиви към Решение № 5 от 2022 г. по к. д. № 13/2021 г.

Този принцип е общ за цялата правна система на Република България. Той е основа за тълкуване и прилагане на Конституцията и за нормотворческата дейност. Равенството пред закона³⁵ означава равнопоставеност на всички граждани пред закона и задължение за еднаквото им третиране от държавната власт. Равенството пред закона се изразява в две основни форми³⁶ – задължение за равно третиране и забрана за произволно неравно третиране³⁷. Конституционният съд последователно се придържа към утвърденото в съвременната конституционноправна доктрина и практика схващане за равенството пред закона като относителна, а не абсолютна равнопоставеност³⁸. Водеща следва да бъде обективната преценка дали правните субекти се намират в една и съща или сходна ситуация³⁹, или не⁴⁰. Наличието на съществени разлики не само позволява, но и изисква от законодателя да диференцира правната уредба⁴¹.

³⁵ Вж. мотиви към Решение № 6 от 2010 г. по к. д. № 16/2009 г.

³⁶ Вж. мотиви към Решение № 1 от 2005 г. по к. д. № 8/2004 г. и Решение № 4 от 2021 г. по к. д. № 1/2021 г.

³⁷ „Забраната за произвол е елемент на правовата държава в материален смисъл и е насочена към държавните органи, включително и към законодателя. В правовата държава повелата за равно третиране задължава нормотвореца да урежда подобните случаи по еднакъв начин, а различните – по различен, респ. задължение на публичната власт е да третира „еднаквите еднакво“ (Решение № 4 от 2021 г. по к. д. № 1/2021 г. и Решение № 11 от 2010 г. по к. д. № 13/2010 г.). Само така може да се гарантира равенството пред закона и да се осигури справедливост в обществото.“ Вж. мотиви към Решение № 10 от 2022 г. по к. д. № 21 от 2021 г.

³⁸ Вж. мотиви към Решение № 5 от 2017 г. по к. д. 12/2016 г. и Решение № 4 от 2024 г. по к. д. № 16/2023 г.

³⁹ „Еднакви са ситуацияите, между съществените характеристики на които няма разлика. Сходни са ситуацияите, които не са еднакви, но са съпоставими в съществените си характеристики и между които няма съществени разлики, което изключва случаите на привидна съпоставимост или близост без реална връзка. Преценката за еднаквост или сходство в съществените характеристики или за наличие на съществени разлики не може да бъде направена абстрактно – тя зависи от обективните особености на конкретната материя и се прави за всеки отделен случай с оглед характеристиките му.“ (Вж. мотиви към Решение № 5 от 2022 г. по к. д. № 13/2021 г.)

⁴⁰ „И обратно: наличието на съществени разлики не само позволява, но и изисква от законодателя да диференцира правната уредба (Решение № 3 от 2013 г. по к. д. № 7/2013 г.). Ако за едно и също право или задължение законът предвижда диференциация, това само по себе си не означава автоматично нарушаване на конституционния принцип на равенство пред закона. Без диференциация не биха могли да се отчетат обективните или субективните различия, изискващи нееднаква правна уредба, за да се постигне равенство пред закона. Уредбата на правата и задълженията на гражданите в Конституцията и тяхната детайлна уредба в другите нормативни актове се изграждат на основата на диференцираност, за да се постигне необходимата справедливост чрез равно третиране (Решение № 6 от 2010 г. по к. д. № 16/2009 г.).“ (Вж. мотиви към Решение № 5 от 2022 г. по к. д. № 13/2021 г.)

⁴¹ Вж. мотиви към Решение № 3 от 2013 г. по к. д. № 7/2013 г. и Решение № 4 от 2024 г.

За да гарантира прогласения принцип за равенство на всички граждани пред закона, чл. 6, ал. 2 от Конституцията посочва определени социални признаци, които не могат да бъдат основание за неравно третиране. Социалните признаци могат да бъдат класифицирани най-общо в две основни групи⁴². Първата група признаци (раса, народност, етническа принадлежност, пол и произход) произтичат от чл. 1 на Всеобщата декларация за правата на човека, обявил, че всички хора се раждат свободни и равни по достойнство и права. Този текст е дословно възпроизведен в чл. 6, ал. 1 на Конституцията. Недопускането на никакви ограничения на правата или привилегии, основани на тези признаци, е гаранция за общочовешките права, които Конституцията на Република България признава и защитава. Останалите признаци (религия, образование, убеждения, политическа принадлежност, лично и обществено положение или имуществено състояние) фактически се придобиват или изменят в процеса на социалната реализация на гражданите в обществото в резултат на упражняване на определени права⁴³. Всеки от тези признаци във втората група представлява за отделния гражданин равна възможност, предвидена и гарантирана в Конституцията, която не може съгласно чл. 6, ал. 2 да бъде основание за привилегировано отношение към него или за ограничаване на правата в качеството му на гражданин.

В чл. 6, ал. 2 равенството пред закона е формулирано още и като основно право на гражданите⁴⁴. В редица конституционни разпоредби то е конкретизирано, като е отнесено към определени основни права и лични свободи на човека и гражданина (чл. 19, ал. 2, чл. 46, ал. 2, чл. 47, ал. 3, чл. 119, ал. 3, чл. 121, ал. 1 и др.)⁴⁵.

по к. д. № 16/2023 г.

⁴² Вж. мотиви към Тълкувателно решение № 14 от 1992 г. по к. д. № 14/1992 г.

⁴³ За произхода на неравенството между хората вж. при Дарендорф, Р., 2002. *Тропы из утопии*. М.: Праксис, 481 – 518.

⁴⁴ Вж. мотиви към Тълкувателно решение № 14 от 1992 г. по к. д. № 14/1992 г. и Решение № 4 от 2021 г. по к. д. № 1/2021 г.

⁴⁵ „...[В]ъзприетият модел на принципа на равенство в действащия Основен закон, който е в основата на конституционната конструкция на равното [избирателно] право, е модел на юридическо равенство, чиито смисъл, представен най-общо, се изразява в изискване за равнопоставеност пред закона: еднакво третиране от държавата на еднаквите случаи и различно третиране на неравностойните; равенството не изключва по абсолютен начин различното третиране – разбиране, последователно поддържано в практиката на Съда (Решение № 6 от 2010 г.; Решение № 4 от 2014 г.; Решение № 10 от 2016 г.; Решение № 9 от 2021 г.; Решение № 10 от 2022 г. и др.). Конституционният императив обхваща забрана за дискриминация както и недопускане на привилегии на основание изчерпателно изброените в чл. 6, ал. 2 от Основния закон признаци (Решение № 14 от 1992 г.)...

Конституционният съд привлича вниманието към модела на равенство в Конституцията, за да подчертае, че той е определящ за релевантната правна аргументация на неравенството, а не друг модел какъвто е този на равенство на възможностите, като достъп до ресурс (изначален) или на равенство по отношение на резултатите. Въпреки че равенството на възможностите може да бъде съществена концепция в

Представената накратко конституционна уредба и практиката на конституционната юрисдикция не засягат изрично възможността за неравно третиране на личността на основание социален признак „класа“ – класова (социална) дискриминация (англ. *classism*)⁴⁶. Свенливо в Закона за защита от дискриминация социалният признак „класа“ е споменат в § 1, т. 15 от ДР във връзка с чл. 39, ал. 2⁴⁷ от Закона. Законодателят е посочил в легалната дефиниция на „специфични обстоятелства“ (по § 1, т. 15 ДР), че това са „обстоятелства, свързани със социален, здравословен и семеен статус, възраст и други подобни, които не водят до дискриминация на основата на пол“⁴⁸. Смятам, че социалният признак „класа“ следва да е самостоятелен признак по смисъла на чл. 4, ал. 1 от Закона⁴⁹.

Класовата дискриминация (класовост)⁵⁰ е дискриминация, основана на принадлежност към социална класа или на (социално-класови)⁵¹ предразсъ-

области като социална политика, заетост или образование, тя не е непременно водеща за правните доводи по отношение на равенството пред закона. Модел на равенството, основан на такава концепция, изисква засилено внимание към неговия потенциал за преместване на тежестта в ангажиментите на държавата, при разширяване на равенството, което изисква по-мощна и интервенция в свободата“. (из мотиви към Решение № 9 от 2023 г. по к. д. № 4/2023 г.).

⁴⁶ Проучванията показват взаимовръзка между класовата дискриминация и расизма и сексизма.

⁴⁷ „При наличие на специфични обстоятелства по отношение на равностойния кандидат от по-силно представения пол извън изискванията за длъжността той се назначава, ако това не представлява дискриминация спрямо кандидата от по-слабо представения пол“.

⁴⁸ Член 39, ал. 1 от ЗЗДискр. гласи „Ако кандидатите за заемане на длъжност в администрацията на държавните и местните органи са равностойни по отношение на изискванията за съответната длъжност, назначава се кандидатът от по-слабо представения пол“. Алинеи 1 и 2 се прилагат и при определянето на участниците или членовете в съвети, експертни работни групи, управителни, съвещателни или други органи, освен когато тези участници се определят чрез избор и конкурс (чл. 39, ал. 3 ЗЗДискр.).

⁴⁹ Психологът Томас Фулър-Роуел заявява: „Преживяването на [класова] дискриминация често е по-скоро фино, отколкото крещящо, и точната причина за несправедливото отношение често не е ясна за жертвата.“. Fuller-Rowell, T., 2012. *Social-Class Discrimination Contributes to Poorer Health*. Association of Psychological Science. 18 June 2012. <<https://www.psychologicalscience.org/news/releases/social-class-discrimination-contributes-to-poorer-health.html>> [26.05.2024].

⁵⁰ See Langhout, R. D., F. Rosselli, J. Feinstein, 2007. *Assessing Classism in Academic Settings*. The Review of Higher Education 30 (2), Winter, 2007, 145–184.

⁵¹ На възраст между три и пет години хората започват да категоризират личните си преживявания, включително информация за хората, които срещат и за които научават. Напр., някои от първите категории хора, които децата научават в САЩ, включват цвят на кожата и пол. Скоро може да се развият предразсъдъци, насочени към тези категории хора въз основа на това, което децата научават от родители, приятели и други, с които влизат в контакт чрез посещавани места като училище, църква и дневни грижи. Едва по-късно в развитието на детето то започва да разграничава другите хора според тяхното лично богатство и социално положение в общността. Въпреки това, както е описано от Гордън У. Олпорт в неговата книга „Природата на предразсъдъците“,

дъци срещу членове на определена класа. Тя включва всяко отношение, индивидуални нагласи, поведение или системи от политики и институционална практика, които са създадени да облагодетелстват една (висша) класа за сметка на друга (по-ниска) класа въз основа на доходи, богатство, професия, образование и/или тяхното икономическо състояние и социални връзки. Терминът се използва за обозначаване както за лична/всекидневна, така и за институционализирана дискриминация⁵² на основата на социална стратификация.

Класовата дискриминация може да бъде идентифицирана на няколко публични нива⁵³. На макро ниво става дума за систематична експлоатация и потисничество на една класа от друга, както и за дискриминация срещу работниците. На средно ниво се говори за наличието на предразсъдъци или пристрастни нагласи към членове на дискриминирани класи в общественото мнение (напр. идеята, че хората с ниски доходи са по своята същност глупави или мързеливи). Медиите и социалните мрежи също играят важна роля на това ниво⁵⁴. На микро ниво се определя като ежедневна дискриминация при нахърняване на интересите на хора на междуличностно ниво „човек към човек“, дискриминация срещу бедни хора.

вероятно е предразсъдъците, основани на тези социални категории, да бъдат важна част от вярванията и поведението на човека до края на живота му.

Както при отделните социални класи, разликата в социалния статус между хората определя как се държат един към друг и предразсъдъците, които вероятно имат един към друг. Хората с по-висок статус обикновено не се смесват с хора с по-нисък статус и често са в състояние да контролират дейностите на другите хора, като влияят върху законите и социалните стандарти. <<https://www.encyclopedia.com/social-sciences/news-wires-white-papers-and-books/social-class-prejudice>> [26.05.2024].

⁵² Терминът „класизъм“ (класовост) може да се отнася както до лични предразсъдъци срещу по-ниските класи, както и до институционален класизъм, точно както терминът „расизъм“ може да се отнася или строго до лични предразсъдъци, или до институционален расизъм. Институционалният класизъм е определян като начини, по които съзнателният или несъзнателен класизъм се проявява в различните институции на нашето общество.

Класизмът понякога се разделя на повече от две категории, както в „личен, институционален и културен“ класизъм. В социолингвистиката е общоизвестно, че мета-социалният език изобилства от по-ниски регистри, жаргон за различни класи. Adams, M., L. A. Bell, P. Griffin, (eds.), 2007. *Teaching for Diversity and Social Justice*. 2nd ed. New York: Routledge, p. 317.

⁵³ Barone, C., 2007. *Classism*. In: *Class in America*. An Encyclopedia. Robert E. Weir (Hrsg.): Greenwood Press, p. 139 et seq.

⁵⁴ Медиите и социалните мрежи оказват голямо влияние върху света днес, като класизмът може да се представи в различни парадигми. Медиите играят важна роля в начина, по който се възприемат определени групи от хора, което може да засили някои пристрастия. Възможно е хора с по-ниски доходи да се представят в медиите като мръсни, без образование и обноски, бездомни. Хората могат да използват медиите, за да научат повече за различни социални класи или да използват медиите, за да повлияят на другите относно това, в което вярват.

Социалният признак „класа“ не е изведен изрично нито на конституционно, нито на законово ниво сред признаците, които могат да доведат до по-неблагоприятно третиране на лице, и са фактически придобити или изменени в процеса на социалната реализация на гражданите в обществото в резултат на упражняване на определени права. В заключение може да се каже, че макар „класата“ да не е изрично посочена сред социалните признаци, то е възможно да бъде изведена като признак от чл. 14 от ЕКЗПЧ – „или друг някакъв признак“. По този начин се преодолява ранно разбиране на Конституционния съд от 1992 г., че „социалните признаци за недопускане ограничения на правата или предоставяне на привилегии са посочени в чл. 6, ал. 2 от Конституцията изчерпателно“ (диспозитив на Тълкувателно решение № 14 от 1992 г. по к. д. № 14/1992 г.). Изброяването на социалните признаци е примерно и поради това законодателят в чл. 4, ал. 1 от ЗЗДискр., изрично посочва, че се забранява дискриминация „на всякакви други признаци, установени в закон или в международен договор, по който Република България е страна“.

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Забраната за двойно гражданство при заемане на висши длъжности, установена в Конституцията на Република България – дискриминация или необходимост?

Зорница Йорданова*

С последните изменения и допълнения в Конституцията на Република България отпадна забраната народните представители и членовете на Министерския съвет да имат двойно гражданство. Същата остана в сила за държавния глава – президента на Републиката. В доклада се анализират историческите, философските и юридическите основания за тази забрана, прави се критичен и сравнителен конституционноправен анализ и се представя авторовата позиция по темата.

***Ключови думи:** Конституция на Република България, двойно гражданство, висши длъжностни лица*



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**The prohibition of dual citizenship for
high state positions, established in
the Constitution of the Republic of Bulgaria –
discrimination or necessity?**

Zornitsa Yordanova

With the latest amendments of the Constitution of the Republic of Bulgaria, the ban on holding dual citizenship has been abolished for the National representatives and the members of the Council of ministers. The same restriction remained in force for the Head of state – the President of the Republic. The report analyzes the historical, philosophical and legal grounds for this prohibition, provides a critical and comparative constitutional analysis and presents the author's position on the matter.

Keywords: *Constitution of the Republic of Bulgaria, dual citizenship, high state officials*



Увод

В края на 2023 г. беше приет шестият по ред Закон за изменение и допълнение на Конституцията на Република България (приет на 20.12.2023 г., обн. ДВ, бр. 102 от 22.12.2023 г.). Това изменение и допълнение е едно от най-мащабните и засяга шест от десетте глави на Конституцията. Макар най-съществена да е ревизията по отношение на съдебната власт, една от най-дискутираните промени е отпадането на забраната за двойно гражданство, приложима до 2023 г. за народните представители и членовете на правителството. Единствената висша длъжност, за която Конституцията на Република България (КРБ) продължава и след промяната да изисква единствено местно гражданство, е тази на президента (и вицепрезидента) на Републиката (макар първоначалният проект да предвиждаше възможност и последните да бъдат с двойно гражданство). В доклада се анализират мотивите и параметрите на измененията през призмата на практиката на Конституционния съд и съвременните изисквания на демократичната и правова държава.

Изложение

Конституцията на Република България от 1991 г. е четвъртият по ред основен закон на страната. Тя отразява съвременните демократични постижения и утвърждава принципа за равенство на всички граждани пред закона. Член 6, ал. 2 забранява всякаква дискриминация по изброените в текста признаци – раса, народност, етническа принадлежност, пол, произход, религия, образование, убеждения, политическа принадлежност, лично и обществено положение или имуществено състояние. Т.е. признакът „гражданство“ не фигурира сред конституционно недопустимите основания за различно законово третиране.

Въз основа на конституционната разпоредба е приет Законът за защита от дискриминация (33Дискр., обн. ДВ, бр. 86 от 2003 г., посл. изм. ДВ, бр. 84 от 2023 г.). Член 4, ал. 1 33Дискр. разширява конституционните признаци за недопускане на дискриминация, като забранява всяка пряка или непряка дискриминация, основана на пол, раса, народност, етническа принадлежност, *човешки геном, гражданство*, произход, религия *или вяра*, образование, убеждения, политическа принадлежност, лично или обществено положение, *увреждане, възраст, сексуална ориентация, семейно положение*, имуществено състояние или *на всякакви други признаци, установени в закон или в международен договор, по който Република България е страна*. Законът добавя още 7 качества, непредвидени в Конституцията, за да обезпечи пълноценната защита на лицата срещу всяка проява на неравно третиране, при това изброяването е неизчерпателно. Тези допълнителни критерии обаче не

се прилагат за конституционно уредените длъжности, доколкото не може законът да се приложи по аналогия за попълване на евентуални непълноти в Конституцията.

Още преди приемането на Закона за защита срещу дискриминацията, едва година след приемането на КРБ, въпросът за конституционната допустимост на въвеждането на привилегии и на ограничения в правата е дискутиран от новоучредения Конституционен съд (КС) на РБ. В диспозитива на Решение № 14 от 10.11.1992 г. по к. д. № 14/1992 г. КС постановява, че *равенството на всички граждани пред закона по смисъла на чл. 6, ал. 2 от Конституцията означава равенство пред всички нормативни актове. Социалните признаци за недопускане ограничения на правата или предоставяне на привилегии са посочени в чл. 6, ал. 2 от Конституцията изчерпателно. Привилегии, основани на посочените в чл. 6, ал. 2 от Конституцията социални признаци, са нарушения на принципа за равенство на всички граждани пред закона.* В мотивите си КС утвърждава равенството на всички граждани пред закона като основен принцип на всяко демократично общество. То е прокламирано като общочовешка ценност още в Преамбюла на КРБ, а в чл. 6, ал. 2 – като конституционен принцип, основен за гражданското общество и държавата, и като основно право на гражданите, детайлизирано впоследствие и в редица други конституционни разпоредби. *Равенството пред закона означава равнопоставеност на всички граждани пред закона и задължение за еднаквото им третиране от държавната власт.* Изискването за равенство на гражданите пред закона логически изисква равенство пред всички нормативни актове (в т. ч. и подзаконови), а не само пред закона в собствения му смисъл. За да гарантира равноправието, чл. 6, ал. 2 посочва определени социални признаци, които не могат да бъдат основание за неравно третиране. Това са раса, народност, етническа принадлежност, пол, произход, религия, образование, убеждения, политическа принадлежност, лично и обществено положение или имуществено състояние. Тези социални признаци, които са конституционно недопустими като основания за ограничаване на правата или за създаване на привилегии, са класифицирани от КС в две основни групи. Първите пет – раса, народност, етническа принадлежност, пол и произход, произтичат от чл. 1 ВДПЧ, според който всички хора се раждат свободни и равни по достойнство и права (чл. 6, ал. 1 КРБ). Останалите признаци – религия, образование, убеждения, политическа принадлежност, лично и обществено положение или имуществено състояние, фактически се придобиват или изменят в процеса на социалната реализация на гражданите. Ограничаване на правата и предоставяне на конкретни привилегии на база други социални признаци Конституцията не изключва, въпреки че извън широкото изброяване в чл. 6, ал. 2 остават малко и редки случаи. Ограничаване на правата по признака „гражданство“

например е изрично предвидено в Конституцията¹, а други ограничения се предвиждат за изтърпяващите наказание лишаване от свобода, за поставените под запрещение и т. н. Аналогично е положението и с предоставяне на определени социално оправдани привилегии на граждани, обособени на основата на други признаци. Съдът посочва имунитета, установен в Конституцията за народните представители, президента, вицепрезидента, магистрати, който им е предоставен поради особеностите и важността на правата и задълженията им. Децата, останали без грижата на близките си, се намират под особена закрила на държавата и обществото (чл. 47, ал. 4). За лицата с физически и психически увреждания държавата създава условия за осъществяване правото на труд, докато за другите граждани държавата се грижи за създаване условия за осъществяване на това право (чл. 48). Следователно ограничаване на правата и предоставяне на привилегии на определени социални групи е допустимо според Конституцията. Във всички случаи обаче според КС се отнася за „обществено необходими ограничения на правата или предоставяне на привилегии на определени групи граждани при запазване приоритета на принципа за равенство на всички граждани пред закона. Точното и изчерпателно посочване на социалните признаци, които са основание за недопускане ограничения на правата и за предоставяне на привилегии, е гаранция срещу необосновано разширяване на основанията“. Поначало привилегиите са нарушения на принципа на равноправието и в една правова държава те трябва да се смятат предварително изключени. КС обаче приема, че в две групи хипотези привилегиите, които Конституцията допуска, са обществено необходими и социално оправдани. В една група случаи те се създават за *преодоляване на съществуващо неравенство с цел да се стигне до желаното постулирано равенство*. Член 47, ал. 4 и чл. 51, ал. 3 например предвиждат особена закрила на държавата и обществото за децата, останали без грижата на близките си, за старите хора, които нямат близки и не могат да се издържат от своето имущество, както и за лицата с физически и психически увреждания. Привилегиите, които се предоставят на тези граждани, са *компенсаторни блага с оглед неизгодното социално положение, в което са изпаднали*. В другата група случаи *поради особеностите и важността на правата и задълженията*, които имат някои граждани (народни представители, президент, вицепрезидент, министър-председател, министри, съдии, прокурори и следователи), те имат привилегировано правно положение спрямо останалите граждани относно наказателната отговорност и личната неприкосновеност. За да изпълняват

¹ КС сочи чл. 26, ал. 2 (правата на чужденците, които пребивават в РБ); чл. 65, ал. 1 (изискванията за избираемост на депутатите); чл. 93, ал. 2 (изискванията за избираемост на президента и вицепрезидента); чужденците не могат да придобиват право на собственост върху земя освен при условията на чл. 22.

високоотговорните си задължения, *Конституцията предоставя на тези граждани съвкупност от права, чрез които им обезпечава по-голяма свобода и самостоятелност, сигурност и независимост спрямо органите на изпълнителната и съдебната власт, отколкото на другите граждани.* В чл. 6, ал. 2 КРБ са посочени изчерпателно социалните признаци за недопускане ограничения на правата или предоставяне на привилегии. Допускането на привилегии по някой от тези признаци е нарушение на принципа за равенство на гражданите пред закона.

В контекста на настоящия доклад, с решението си КС приема, че е допустимо предоставяне на допълнителни права на титулярите на висши конституционни длъжности, за да им се обезпечи по-голяма самостоятелност, лична сигурност и независимост спрямо органите на другите власти в изпълнение на принципа за разделение на властите. *Това обаче не означава привилегии от всякакъв вид, а в съответствие с обоснована легитимна цел и само ако и доколкото привилегиите гарантират висша конституционна ценност.*

В КРБ доскоро забрана за двойно гражданство съществуваше за депутатите, членовете на Министерския съвет и президента/вицепрезидента. До момента Конституционният съд има по едно произнасяне относно народен представител и министър с двойно гражданство.

- С Решение № 2 от 13.04.1995 г. по к. д. № 1/1995 г. КС прекратява предсрочно пълномощията на народния представител Жорж Ганчев поради неизбираемост предвид наличието на американско освен българското гражданство. КС приема, че за да може български гражданин да бъде избран за народен представител в Народното събрание на Република България, той трябва да отговаря на условията, посочени в чл. 65, ал. 1 КРБ, които имат абсолютен характер и липсата на което и да е от тях го прави неизбираем. Едно от тези условия е кандидатът за народен представител да няма друго гражданство. Ако въпреки това той бъде избран за народен представител, двойното гражданство е основание за прекратяване на пълномощията му на основание чл. 72, ал. 1, т. 3 КРБ. Съдът приема, че загубването на другото гражданство не може да настъпи автоматично, а се постановява с акт на овластения за това държавен орган на съответната държава при спазване на определената процедура. Поради публичноправния характер на института за гражданството, свързан със значими правни последици, без правно значение е субективната преценка на лицето по въпроса за придобиване и загубване на чуждото гражданство. Не е достатъчно да са налице материалноправните предпоставки за освобождаване от гражданство. Необходимо е да е осъществена

предвидената със закон процедура, която завършва с издаване на съответен държавен акт. Разпоредбата на чл. 65, ал. 1 от Конституцията изисква кандидатите за народни представители да нямат друго гражданство още към момента на кандидатирането си².

- С Решение № 16 от 28.10.2021 г. по к. д. № 16/2021 г. КС обявява за частично противоконституционен указ на президента на Републиката в частта за назначаване на Кирил Петков за служебен министър на икономиката, като и тук причината е двойно гражданство. В мотивите на решението си КС сочи, че правното положение на министрите съдържа редица специфики, като една от тях е избираемостта или условията, на които следва да отговаря едно лице, за да заеме длъжността. Член 110 КРБ предвижда, че министърът следва да отговаря на всички изисквания за избираемост, които са установени за народен представител (чл. 65, ал. 1), които имат абсолютен характер. Конституцията (в тогавашната си редакция) поставя на първо място в чл. 110 изискването лицето да е „само български гражданин“, а в чл. 65, ал. 1 се сочи „който няма друго гражданство“. Връзката между изискванията, на които следва да отговаря кандидатът за министър, и тези за народен представител, произтича от парламентарната форма на управление на държавата. КС изтъква, че гражданството на съответната държава е сред най-често предявяваните в конституционните демокрации изисквания за избираемост на публична длъжност. Липсата на чуждо гражданство следва да бъде декларирана при кандидатирането за народен представител, президент или вицепрезидент, както и към момента на избора (назначаването) на едно лице за министър. Гражданството представлява трайна политическа и правна връзка на съпринадлежност между физическото лице и държавата, от която възникват права и задължения за двете страни. То е определящо за правния статус на индивида, свързано е с неговата ин-

² В случая според КС Жорж Ганчев е трябвало да бъде освободен от американското гражданство, преди да подаде документите си за регистрация като кандидат, което не е сторено, и затова към датата, на която се е кандидатира за народен представител, е бил с двойно гражданство. Твърдението му, че е загубил американското си гражданство и на основание на Договора за натурализация между България и САЩ от 1923 г. (ратифициран, обн. ДВ, бр. 3 от 1924 г.) според КС е неоснователно. Договорът предвижда възможност за лице от български произход да загуби придобитото чрез натурализация американско гражданство, когато се завърне в родината си и заживее в нея без намерение да се завръща в САЩ. Удостоверяването на тези факти трябва да стане от съответните длъжностни лица на САЩ. Загубването на гражданството не може да настъпи автоматично по право. Двустранният договор урежда единствено основанията за придобиване и загубване на съответното гражданство, а процедурата и актовете се уреждат от националните законодателства на страните.

дивидуализация и поради това подлежи на сравнително сложен и изискващ време процес най-вече за промяната му или за неговото придобиване чрез способности извън тези по рождение. Приложимо е класическото правило, че само лицата, трайно свързани с държавата чрез своето гражданство могат да заемат висши държавни длъжности. Освен политическо и правно измерение гражданството съдържа и *морални императиви, доколкото лоялността на индивида към държавата е ценност, чието отсъствие може да лиши от съдържание целия институт*. Правната уредба на гражданството е концентриран израз на историческите и държавни традиции и е свързана с личното и общественото самосъзнание на българската общност и на всеки отделен българин и мисията на държавата да се самосъхрани срещу влиянието на вътрешни и външни сили, които противостоят на нейните интереси и единство. Омаловажаването на тази връзка между гражданина и държавата обезценява миналото и обезсмисля бъдещето на общността. „Според КРБ само български граждани могат да участват в управлението на страната на национално ниво, като за заемането на някои висши държавни длъжности наличието на друго освен българско гражданство е изключено и неспазването на този конституционен императив представлява непреодолимо в последващ момент препятствие“. Според КС това изискване произтича от мисията на съвременната национална държава да се запази единството на народа. КРБ установява завишени изисквания по отношение гражданството на лицата, заемащи конституционно установени държавни длъжности, които са израз на *стремежа към устойчивост на правните изисквания и защита на националните интереси*. Макар след присъединяването на България към Европейския съюз да се поставя въпросът за отпадане на забраната за двойно гражданство, установена за президента, народните представители и членовете на МС, неговото решаване не може да заобиколи изискването за изменение на Конституцията в тази част, поради своята деликатност – *необходимост от премерена и обоснована защита на националните интереси*.

КС допълва, че България е изразила резерва по отношение прилагането на чл. 17, т. 1 от Европейската конвенция за гражданството (от 1997 г., в сила за РБ от 01.06.2006 г.), изискваща „гражданите на държава – страна по конвенцията, притежаващи друго гражданство, да имат на територията на тази държава – страна по конвенцията, в която пребивават, същите права и задължения като останалите граждани на тази държава – страна по конвенцията“, със следното съдържание на резервата: „Република България няма да прилага по отношение на гражданите на Република България,

притежаващи друго гражданство и които пребивават на нейна територия, правата и задълженията, за които Конституцията и законите изискват само българско гражданство“.

В своята практика КС е приемал, че „упражняването на властта във всяка държава е елемент от държавния суверенитет“, и че е „съмнително доколко упражняването на властта от лица с чуждо гражданство гарантира нейната независимост“. Защото наличието на чуждо гражданство означава публичноправна връзка между лицето и друга държава наред с тази с българската държава. Тази връзка с друга държава съдържа права и задължения, които могат да се окажат в конфликт с тези към българската държава. Според КС „подобна хипотеза при упражняването на изпълнителната власт за вземането и изпълняването на управленски решения крие риск за националните интереси и сигурност“, затова държавата следва да решава кой и при какви условия е годен да упражнява властнически правомощия, така че да се осигури осъществяването на управленски функции от персонален състав, способен във всичките си актове и действия да се ръководи от публичния интерес за общите дела в държавата и да съдейства за постигане на общото благо. КС поддържа позицията си, че не е достатъчно да са налице материалноправните предпоставки за освобождаване от чуждо гражданство, а трябва да е осъществена цялата предвидена със закон процедура, приключваща с издаване на съответен държавен акт – ако не беше така, това би било изрично и ясно посочено. Не е достатъчно и лицето да е предприело стъпки за отказ от чуждото си гражданство³. От официалния документ, издаден от компетентния орган на Канада, е видно, че освобождаването на К. Петков от гражданство на Канада е настъпило едва на 20.08.2021 г., т.е. след назначаването му за служебен министър. Към момента, в който е бил назначен за служебен министър с указ на президента на РБ, Кирил Петков е притежавал не само българско, но и канадско гражданство и по тази причина не е отговарял на изискванията, предвидени в чл. 110, във вр. с чл. 65, ал. 1 КРБ, поради което е била налице недекларирана от него непреодолима конституционна пречка да бъде назначен за министър.

³ Съдът счита за ирелевантни произнасянията на Европейския съд по правата на човека по дела срещу държави, поставящи непреодолими пречки за ефективен отказ от гражданство, тъй като в законодателството на Канада не са предвидени такива. Може да бъде счетено за наличие на непреодолима пречка за отказ от гражданство, когато процедурата надхвърля в значителна степен разумната продължителност на сходни административни процедури. В случая такава не е налице, тъй като срокът, предвиден за обработване на исканията в Канада, е сходен с този в България – 6 месеца, а конкретната процедура е приключила в рамките на 4 месеца. Заявената от Петков воля да бъде освободен от канадско гражданство и обстоятелството, че е отговарял на материалноправните предпоставки, не са били достатъчни той да престане да бъде гражданин на Канада.

Освен тези решения, КС на два пъти се е произнасял по повод искания за обявяване противоконституционност на разпоредби, ограничаващи двойното гражданство на кандидатите за кметове и общински съветници. Първият такъв случай е Решение № 15 от 13.09.1995 г. по к. д. № 21/1995 г. Една от атакуваните разпоредби по делото е тази на чл. 4 от Закона за местните избори, с която се въвежда допълнително условие за избор на съветник или кмет, непосочено в Конституцията – българският гражданин да няма друго гражданство. Според вносителите изчерпателно в КРБ са изброени всички хипотези на недопустимост на двойното гражданство за упражняване на пасивно изборително право. Според КС общият конституционен критерий за въвеждане на ограничително изискване за българско гражданство следва да се търси в *характера на отношенията, в които съответните органи участват, и този общ критерий е наличието на определени властнически правомощия и упражняването на власт*. Тук Съдът аргументира, че „по своя характер упражняването на властта във всяка държава е елемент от държавния суверенитет. Суверенитетът е основа на конституционното устройство и се изразява като върховенство и независимост при упражняването на властта. Съмнително е доколко упражняването на властта от лица с чуждо гражданство гарантира нейната независимост. Наличието на чуждо гражданство означава публичноправна връзка между лицето и чужда държава. Тази връзка се изразява в права и задължения, които могат да бъдат в конфликт със задълженията към българската държава. Такъв конфликт на задължения може да възникне при упражняване на законодателната власт, например при гласуването на закон; на изпълнителната власт – при вземането и изпълняването на управленски решения; на съдебната власт – при осъществяването на нейните функции. Това важи и за особените властнически компетенции, които Конституцията предоставя на президента, както и за компетенциите на други органи, например КС. Ето защо единствено българската държава е компетентна да прецени доколко и кога е допустимо упражняването на държавни властнически компетенции от лице, което има друго, освен българското гражданство“. Съдът достига до извода, че текстовете в Конституцията, ограничаващи двойното гражданство, не означават забрана българската държава чрез закон да предвиди други случаи, в които чуждото гражданство е пречка за предоставянето на пасивно изборително право. Изчерпателното изброяване в Конституцията на всички хипотези не е необходимо. Решаващо е строгото съобразяване с конституционния критерий – публичноправния, властнически характер на регулираните отношения. КС счита, че разпоредбата на чл. 4 ЗМИ не нарушава баланса между независимото, суверенно упражняване на властническите правомощия и упражняването на пасивното изборително право на българските граждани. Поначало наличието на чуждо освен българското гражданство на едно пълнолетно, дееспособно лице е въпрос на собствен избор. Чуждото гражданство не е

външно, натрапено качество на българския гражданин. Когато този гражданин желае да участва в упражняването на властта в Република България, достатъчно е да се освободи от чуждото си гражданство и да запази само българското. Ето защо чл. 4 ЗМИ по същество не ограничава изборителното право на българските граждани, а пасивното изборително право на чужди граждани, които се кандидатираат за участие в местната власт на територията на РБ. В Решение № 4 от 4.05.2011 г. по к. д. № 4/2011 г. КС се произнася по повод оспорени текстове на тогава новоприетия първи Изборен кодекс. Част от оспорените разпоредби съдържат изискване към кандидатите за членове на Европейския парламент от РБ и за общински съветници и кметове да нямат гражданство на държава, която не е член на ЕС. По тези текстове КС не постига мнозинство от 7 гласа, съдийските гласове са 6:6, поради което искането в тази му част е отхвърлено. Шестима от съдиите считат, че искането е основателно. Според тях пасивното изборително право се урежда в Конституцията като условия за избираемост, на които кандидатите за съответните изборни длъжности трябва да отговарят. Макар то да не е уредено в глава втора, това не променя качеството му на основно политическо право на българските граждани. Конституцията изрично определя условията за избиране на народните представители, президента и вицепрезидента. За избирането на други конституционно предвидени длъжности – общински съветници, кметове, представители на РБ в Европейския парламент КРБ не поставя изрични изисквания, условията се определят от законодателя, но при спазване принципа на общото изборително право. Законодателят не е свободен в преценката си какви изисквания да въвежда за упражняване на пасивното изборително право, доколкото той не може да ерозира или ограничава конституционния принцип на общото изборително право. Членството на България в Европейския съюз и приемането на новата ал. 3 на чл. 42 от Конституцията през 2005 г. според тази група съдии практически обезсмислят горесцитираното Решение № 15 от 1995 г., тъй като в България вече се допуска упражняване на пасивно изборително право в изборите за Европейски парламент, както и в местните избори, от лица, които са граждани на държава член на ЕС, дори и да нямат българско гражданство. В същото време в оспорваните разпоредби на Изборния кодекс се въвеждат друг вид ограничения на пасивното изборително право. Законодателят, като допуска двойно гражданство на кандидатите за представители на РБ в ЕП, общински съветници и кметове, поставя ограничение относно другото гражданство на кандидатите – принципно възприема двойното гражданство, но определя гражданството на държава член на Европейския съюз за допустимо, а гражданството на държава извън ЕС – за недопустимо. Това ограничение според съдиите е дискриминационно и противоречи на конституционния принцип за равенство пред закона. Текстът дава възможност публична власт у нас да бъде упражнявана и от лица, които са граждани на държава член на

ЕС, дори когато не са български граждани, докато български граждани се лишават от пасивно изборително право в случаите, когато освен българското имат и гражданство на държава извън Европейския съюз. Налице е различно третиране и ограничаване на пасивното изборително право на гражданите в зависимост от тяхното второ гражданство. Този законодателен подход е конституционно нетърпим, тъй като самата Конституция изрично допуска възможността за двойно гражданство и третира като равни българските граждани, независимо от факта, че някои от тях могат да имат и друго, освен българското си гражданство. Текстовете относно липсата на гражданство в държава извън ЕС въвеждат дискриминация по чл. 6, ал. 2 на основание произхода на лицата. Освен това е недопустимо РБ да участва в изграждането и развитието на Европейския съюз като предоставя в изборния процес повече права на гражданите на държави членки на ЕС, които не са български граждани, отколкото на български граждани, които на основание произход имат и гражданство на държава, която не е член на ЕС.

Останалите шестима съдии считат, че оспорването е неоснователно. Пасивното изборително право няма самостоятелна конституционна уредба в главата „Основни права и задължения на гражданите“, каквато има активното изборително право (чл. 42, ал. 1); уредено е в Конституцията като изисквания за избираемост, на които кандидатите и избраните титуляри на висши длъжности в държавата, избираеми на национално ниво пряко и непряко, трябва да отговарят – пряко избраните народни представители (чл. 65, ал. 1), президент и вицепрезидент (чл. 93, ал. 2 и чл. 94 КРБ), както и министър-председателят и другите членове на Министерския съвет (чл. 110 от Конституцията). За заемането на други конституционно предвидени длъжности чрез избори – членове на ЕП от Република България, общински съветници и кметове, Конституцията не поставя изрични изисквания; оставя ги на законодателя при спазване на принципа за всеобщо изборително право – всички, които отговарят на поставените изисквания, имат право да се кандидатира. Поради това аргументът, че оспореното законово изискване дописва Конституцията, няма опора в самата нея, тъй като тя регламентира избираемостта като конкретни изисквания за заемането на отделните висши длъжности, а за други предоставя тяхното определяне на законодателя при спазването на чл. 10 КРБ. За конституционните длъжности, заемани чрез национални избори, Конституцията изрично поставя негативното изискване кандидатите, респ. титулярите им да нямат друго освен българско гражданство, като впоследствие същото изискване е въведено и за общински съветници и кметове със Закона за местните избори. Конституцията не изключва правото на българската държава чрез закон да предвиди други случаи, в които гражданството на друга държава да е пречка за упражняването на пасивното изборително право, защото публична власт се упражнява не само на национално, но и на местно, и на регионално равнище. Изчер-

пателно изброяване в Конституцията на всички такива възможни хипотези не е необходимо; решаващо е строгото съобразяване с конституционния критерий – публичноправния, властническият характер на регулираните отношения. Съдиите повтарят довода от 1995 г., че гражданството на друга държава не е натрапено качество. Когато лицето желае да се кандидатира за изборен пост с властнически правомощия, достатъчно е да се освободи от другото гражданство. Ето защо такова негативно изискване по същество не ограничава пасивното избиращо право и не е противоконституционно. Съдиите отбелязват, че през 1995 г. при оспорването на текстовете на ЗМИ Република България не е член на ЕС и поради това второто гражданство на която и да е друга държава води до двойно гражданство. Към 2011 г. обаче Република България е страна членка на ЕС и Изборният кодекс не третира гражданството на държава членка на ЕС като недопустимо „друго гражданство“; гражданин на държава членка на ЕС може да се кандидатира за член на ЕП от Република България, както и за общински съветник, без да е необходимо едновременно да е гражданин на РБ и на неговата държава – и той, и българският гражданин имат гражданство на ЕС, което обаче не измества националното, а го допълва. Изискванията за гражданство в Изборния кодекс са синхронизирани с членството на Република България в ЕС и с изискванията на чл. 42, ал. 3 КРБ. Според тази група съдии атакуваните разпоредби в частта „няма гражданство в държава извън Европейския съюз“ са в съответствие с чл. 4, ал. 3 КРБ – „Република България участва в изграждането и развитието на Европейския съюз“, и не са в противоречие с други текстове на Конституцията, нито с общопризнати норми на международното право и с международни договори, по които Република България е страна. Като допълнителен аргумент, във Всеобщата декларация за правата на човека и в МПГПП държавите се задължават да зачитат и гарантират признатите права на всички лица, без разлика на раса, цвят на кожата и много други признаци; но „гражданство“ не е сред тях.

Следователно Конституционният съд трайно поддържа в своята практика, че забраната за двойно гражданство за определени висши длъжности не представлява дискриминация. Тя е обусловена от особената важност на служебните правомощия на съответните конституционни органи. Същевременно с последните промени в КРБ без пълноценни мотиви тази забрана отпадна за народните представители и за министрите и (след промени в първоначалната редакция) остана само за президента. Освен че не е обоснована с юридически аргументи, тази мярка е неадекватна и с оглед развитието и на съвременния свят, и конкретно на българската държава. Макар вносителите да изтъкват обстоятелството, че множество българи (точното число дори не е известно) живеят извън страната и биха могли да допринесат със своите знания, опит и качества за развитието на българската държава, това не е достатъчно основание за отпадане на конституционното ограничение. Из-

искването лицето да е единствено български гражданин създава презумпция (действително оборима), че лицето ще бъде лоялно към българската държава и ще зачита само нейния интерес. В допълнение, и народните представители, и министрите при встъпване в длъжност полагат в името на РБ клетва да спазват Конституцията и законите на страната (България) и във всичките си действия да се ръководят от интересите на народа (българския!). Противоречи на елементарната житейска, а не само на правната логика да се смята, че когато едно лице е обвързано с два правопорядъка, то може да бъде винаги лоялно само към едната държава. Особено сложна би била ситуацията, ако двете държави, на които лицето е гражданин, са в конфликт. Ограничаване на двойното гражданство обаче само до гражданството на определени държави би било дискриминационно (макар съдиите в КС да не са успели да постигнат мнозинство по въпроса през 2011 г.). Достатъчно е да се посочи, че в действащия Изборен кодекс от 2014 г. тези спорни текстове вече не съществуват. Макар да има твърдения, че с приетите конституционни промени се визират основно българските граждани с гражданство и на друга държава от ЕС, то въвеждането на изрично изискване в този смисъл в Конституцията би било дискриминационно. Понастоящем пред КС е висящо к. д. № 1 от 2024 г., по което е атакуван ЗИДКРБ, приет през 2023 г. По това дело КС би могъл да се позове на досегашната си практика и да обяви отпадането на забраната за двойно гражданство на депутати и министри за противоконституционно, или обратно – да приеме, че тази промяна е обоснована от промените в международните и национални условия.

Въпреки че в цялата си научна продукция съм поддържала забраната за двойно гражданство, предвид развитието на съвременния свят и право, както и установената липса на идентични разпоредби в повечето национални конституции на държавите от ЕС, съм склонна да възприема едно по-нюансирано разрешение. Макар Народното събрание да решава глобалните въпроси на управлението, ако измежду 240 депутати има и такива с двойно гражданство (същите не биха били мнозинство или особено значителен брой, ако се спазва ограничението за уседналост от 18 месеца в страната), то другото им гражданство не би било определящо при вземане на важните за страната политически решения. Същото обаче не може да се твърди за министрите. Отпадането на забраната министрите да имат двойно гражданство за мен е *par excellence* противоконституционно разрешение. Членовете на правителството са висши еднолични държавни органи, които в общия случай ръководят определен ресор на държавното управление. Поради това за тях следва да е напълно недопустимо двойното гражданство. При това напълно лишено от аргументи е неприлагането към същите на изискването за уседналост от 18 месеца. Всъщност редакцията на разпоредбата на чл. 110 КРБ след последните изменения е не само немотивирана, но и неясна и непрецизна, и поради съществено противоречие с принципа на правовата държава съм на

мнение, че следва да бъде обявена за противоконституционна. Дори КС да приеме, че е допустимо както за депутати, така и за министри да е разрешено двойното гражданство, то за министрите изискването за уседналост следва да е завишено спрямо това за народните представители. В противен случай бихме могли да станем свидетели на „завръщането“ в България на лица, които през целия си съзнателен живот са пребивавали в друга държава и се появяват у нас само защото са номинирани за министри. Не считам, че би било в интерес на България да бъдат излъчени за министри граждани, които не са реално запознати с общественно-икономическите условия у нас (дори и да нямат друго гражданство). Мисля, че при евентуално възприемане от КС на принципна допустимост министрите да имат двойно гражданство, за тях следва да се въведе (отново с промени в Конституцията) изискване за уседналост, по-близко до това за президента (последните 5 години да е живял в страната), отколкото до това за депутатите. При това може би е време КС да коригира практиката си от 2001 г. относно преценката за спазването на този срок, както и да се въведе критерий, който да отчита реалния принос на лицето за българската държава и общество.

Ако Конституционният съд приеме, че измененията в Конституцията относно допустимостта на двойно гражданство при заемане на висши представителни длъжности не са противоконституционни, а попадат в полето на свободна преценка на парламента при спазване на Глава IX КРБ, бих предложила да се приемат нови промени и изискванията към министрите да се завишат, вместо да са по-леки от тези за депутатите. Уместно би било да се следва следната логика – докато при колективните, особено по-многочислени държавни органи наличието на ограничен брой лица с двойно гражданство по-трудно би могло да постави в опасност интересите на българските държава и народ, при едноличните органи тази опасност е реална. В последните години, след глобалната пандемия и близките до границите на РБ военни конфликти, се забелязва определен стремеж към затваряне на държавите. Всяка страна следва да закриля на първо място собствените си граждани (дори тези, пребиваващи в чужбина), поради което се отправят призови за напускане на територии, застрашени от терористични нападения, от вътрешни и международни конфликти. Що се отнася до изискването за уседналост възниква и въпросът защо е въведен срок точно от 18 месеца, който да „компенсира“ наличието на двойно гражданство, а не примерно срок в години (1, 2, 3 или 5 като при президента). Появява се и въпросът как ще бъдат отчитани тези 18 месеца. При липсата на мотиви това число изглежда избрано напълно произволно.

Следва да се има предвид, че от 2025 г. вече би следвало да се обособи и 32-ят изборен район „извън страната“. В тази връзка възниква и проблемът как ще се определи броят на депутатите от този район и дали към тях няма да е логично изискванията да са по-различни, защото за тях вероятността

да са с двойно гражданство ще е по-висока. Отново обаче следва да се подходи с изключителна прецизност и внимание, за да не се прекрачи тънката граница между родолюбието, защитата на държавата, и дискриминацията.

Заслужава обмисляне и още една идея, която съм лансирала в предходни свои публикации – уседналост не само в рамките на страната, но и в конкретния изборен район. Така например във Федералната конституция на САЩ има изискване кандидатите за депутати и за сенатори да са жители на щата, от който се избират. Независимо че у нас народните представители са изразители на волята на целия български народ и не представляват само избирателния си район, смятам, че лицата следва да се кандидатираат само на място, с което са житейски свързани.

Заклучение

Промените в Конституцията от края на 2023 г. поставят повече въпроси, отколкото решават. Те са от естество не само да затруднят протичането на обществените отношения у нас съобразно националните ни интереси, но и да доведат потенциално до правен хаос при избора на висши държавни длъжности. Затова следва да се осмисли доколко отпадането на забраната за двойно гражданство е обосновано и адекватно на настоящия етап на развитие на държавата ни и на международните отношения. Смятам, че ограничението за определени висши длъжности да се изисква само българско гражданство не е дискриминационно само по себе си, но при въвеждане на изборен район „извън страната“ следва да се обмислят параметрите на изискванията към кандидатите от този изборен район. Във всички случаи трябва да се търси баланс и оптимална защита на българския народ и държава, а промени по отношение основни политически права да се приемат само след задълбочено обмисляне и пълноценно обществено обсъждане, за да не бъдат гражданите дискриминирани от самия конституционен законодател.

Кворум и мнозинство на комисията за защита от дискриминация като колективен орган (актуални въпроси)

Дарина Зиновиева*

Предмет на изследването са практически хипотези, които възникват по повод прилагането на правните норми от нормативните актове, които регламентират процесуални въпроси на Комисията за защита от дискриминация. Разгледани са въпроси, свързани с кворума на този орган при изтекли мандати на част от членовете му. Анализирана е релевантна съдебна практика. Проблеми съществуват и по отношение на отводи на членове на заседателни състави и обективна невъзможност да се сформира петчленен състав с оглед общия числен брой на членовете на комисията. Направен е анализ на съдебната практика. Обосновани са изводи за оптимизиране на нормативната уредба с оглед и на Директива на ЕС и текущия срок за нейното транспониране.

Ключови думи: *комисия, кворум, мнозинство, директива*



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Quorum and Majority of the Commission for Protection Against Discrimination as a Collective Body (Current Issues)

Darina Zinovieva

The subject of the research are practical hypotheses that arise on the occasion of the application of the legal norms of the normative acts that regulate procedural issues of the Commission for Protection against Discrimination. Questions related to the quorum of this body were considered, when the mandates of some of its members expired. Relevant case law is analyzed. Problems also exist with regard to the appeals of the members of the sitting panels and the objective impossibility of forming a five-member panel, in view of the total number of members of the commission. An analysis of the judicial practice was made. Conclusions for the optimization of the regulatory framework are substantiated in view of the EU Directive and the current deadline for its transposition.

Keywords: *committee, quorum, majority, directive*



Основните нормативни актове, уреждащи статута и компетентността на Комисията за защита от дискриминация (КЗД) са Закон за защита от дискриминация (ЗЗДискр.), Правилник за устройството и дейността на КЗД (Правилника) и Правила за производство пред КЗД (Правилата).

Статутът на КЗД от години се дискутира в правната доктрина и в съдебната практика, вкл. и в тази на ЕСПЧ. Дискусията е фокусирана върху правната същност на този орган – административен орган или квазисъдебна институция.

Налице са разнопосочни мнения, базирани на отделни елементи от устройството, компетентността, производството по издаване на актовете, оспорването им.

Целта на това изследване обаче не е изясняване на статута, а фокусът ни е насочен върху конкретни актуални практически проблеми, свързани с формиране на законосъобразни заседателни състави в КЗД.

1. Принципът за постоянно действащ орган в държавата

Според ЗЗДискр. КЗД е постоянно действащ колегиален орган, който се състои от 9 души, от които поне четирима юристи. Специфика на този орган е, че законът го регламентира като мандатен орган, обаче мандатът е конкретизиран за неговите членове, а не в цялостност за КЗД. Тази специфика се обвързва и с изисквания на закона относно балансирано участие на жени и мъже, участие на лица, принадлежащи към етнически малцинства и лица, отговарящи на други посочени критерии, с цел постигане на най-целесъобразно решение, което да защити от дискриминация гражданите по различните признаци.

Именно затова в Решение № 10497 от 10.07.2013 г. по адм. д. № 13347/2012 г., 5 чл. с-в на ВАС, съдът счита за неоснователен довода в жалбата на министъра на труда и социалната политика, че решението на КЗД е нищожно, тъй като е постановено от членове на Комисията, чиито индивидуален мандат е изтекъл. ВАС обосновава тезата, че по време на мандата си членовете на КЗД могат да бъдат освободени предсрочно на основания, които са установени в закона (чл. 44 от ЗЗДискр.), но освобождаването на някой от членовете не води до прекратяване съществуването на целия орган и спиране на неговата дейност.

„КЗД е колективен административен орган и като такъв прекратяването на мандата ѝ не зависи автоматично от изтичането на срока на персоналният мандат на нейните членове. В случая от съществено значение са съображенията за съдържателното естество на правомощията, възложени на КЗД, като единствен специализиран административен орган за защита срещу всички форми на дискриминация, които имат приоритет пред времевите граници,

в които тези пълномощия са дадени. КЗД е колективен административен орган, учреден в изпълнение на задълженията на страната като държава член на Европейския съюз. Нормата на чл. 41, ал. 2 ЗЗДискр. предвижда срок на мандата на членовете на Комисията пет години, а не мандат на колективния орган КЗД. В същото време КЗД функционира като колективен административен орган, който заседава в тричленни или петчленни състави по възложените ѝ от ЗЗДискр. производства. Правомощията на КЗД по цитирания закон за защита на лица, пострадали от дискриминация, са ѝ възложени именно в качеството ѝ на колективен орган.“

Както законът, така и чл. 5 от Правилника регламентират императивно, че този орган е постоянно действащ.

В Директива на ЕС¹ (наричана по-долу Директива за стандартите на органите за защита от дискриминация) също изисква държавите членки на ЕС да имат постоянно действащ орган, който да гарантира защитата от дискриминация. В някои държави защитата от дискриминация е възложена не на колективен орган със специална компетентност като КЗД, а например на омбудсмана² (Хърватия, Австрия, Гърция). Следователно основно изискване на националното законодателство, както и на европейското право е държавата да има конституиран централен орган с постоянно действаща времева компетентност с цел – защита на гражданите от дискриминация, без значение дали е колективен орган със специална структура или друг орган, който има законово регламентирана компетентност за защита на гражданите от дискриминация (такова е и изискването в Директивата, цитирана по-горе – да са налице равни правни средства за защита от дискриминация в държавите членки на ЕС).

Съгласно чл. 25 ЗЗДискр. заседанията на комисията се считат за редовни, ако на тях присъстват не по-малко от 5 членове на комисията. Заседанията на комисията започват с установяване на необходимия кворум за вземане на решения. Комисията взема решенията си с явно гласуване и мнозинство от пет гласа, като не могат да се делегират правата на отсъстващ член на друг. Решенията на комисията се подписват от всички членове, участвали в гласуването. Решенията се считат за приети, след като са подписани от присъстващите членове. Член на комисията, който не е съгласен с решени-

¹ Директива на Съвета относно стандартите за органите по въпросите на равенството в областта на равното третиране на лицата, независимо от тяхната раса или етнически произход, равното третиране на лицата в областта на заетостта и професиите, независимо от тяхната религия или убеждения, увреждане, възраст или сексуална ориентация, равното третиране на жените и мъжете по въпросите на социалното осигуряване и достъпа и предоставянето на стоки и услуги и за заличаване на член 13 от Директива 2000/43/ЕО и член 12 от Директива 2004/113/ЕО.

² За омбудсмана и сравнение със сродни правни фигури в българското право вж. Славова, М., 2014. *Българският омбудсман*. С.: УИ „Св. Климент Охридски“, 48–49.

ята по чл. 64, ал. 2 от ЗЗДискр., е длъжен писмено да мотивира особено си мнение още същия ден, което се прилага към решението. Въведена е и презумпцията, според която ако липсва приложено писмено особено мнение в този срок, се счита, че няма изразено такова.

Видно от законовите изисквания за състава на комисията, независимо дали член на състава не е съгласен с диспозитива на решението, той следва да подпише решението, като изрази писмено своето особено мнение. Този принцип е заложен и в съдебните решения на съдилищата там, където съставите се състоят от повече от един съдия. Законодателната цел е да се гарантира законосъобразно решение, като едновременно да се даде възможност на участниците в състава да изразят своята воля, правно тълкуване и безпристрастност.

Особеност е налице при формирането на заседателните състави на КЗД. Принципно те са тричленни, като се дава и възможност за сформирание на петчленен състав, когато КЗД трябва да се произнесе по казус, сочещ за „множествена дискриминация“ по см. т. 11 от ДР на закона, тоест когато нарушението на ЗЗД обхваща повече от един признак за дискриминация (чл. 12 от Правилата).

Актуален проблем възниква, когато е поискан от заинтересована страна отвод на всички членове на състава. В тази хипотеза е налице невъзможност да се произнесе органът, като опасенията му, а и евентуалните твърдения на страната, поискала отводи, е, че решението би се оспорило като незаконосъобразно поради безпристрастност на състава.³ По такъв случай е налице произнасяне на ВКС по дело, което ще анализираме по-долу.

Принципно терминът „отвод“ на членовете на КЗД не е използван в ЗЗДискр., нито в Правилника, нито в Правилата. В чл. 61, ал. 3 от ЗЗДискр., както и в чл. 28 от Правилата се използва терминът „отстраняване“, като относно основанията и реда се препраща към чл. 22 – 24 от ГПК. Видно от контекста на специалните норми и на общите в АПК и в ГПК, двата термина се използват в тъждествен смисъл. С оглед субсидиарното прилагане на АПК, предвидено в чл. 70, ал. 1 от ЗЗДискр., и субсидиарното прилагане на ГПК, предвидено **само в частта** относно основанията и реда за отводи на членовете на заседателните състави, следва да се приложат разпоредбите на ГПК. Принципно разпоредбите на чл. 33, ал. 1 от АПК във връзка с чл. 10 от АПК уреждат основанията за отвод при издаване на индивидуални административни актове по следния начин. Не може да участва в производството лице, когато е „заинтересовано от изхода му или има с някои от заинтересованите лица отношения, пораждащи основателни съмнения в неговото

³ Член 6 от Европейската конвенция за защита правата на човека и основните свободи изисква условието „безпристрастност“ да е част от принципа за справедлив процес.

безпристрастие“. За разлика от уредбата в ГПК, тук основанията за отвод не са изброени подробно, а са посочени по-общо, бланкетно.

Докато основанията за отвод, уредени в ГПК, са детайлно посочени така, в ГПК се предвижда следното: „чл. 22 (1) Не може да участва като съдия по делото лице:

1. което е страна по делото или заедно с някоя от страните по делото е субект на спорното или свързано с него правоотношение;
2. което е съпруг или роднина по права линия без ограничение, по съребрена линия до четвърта степен или по сватовство до трета степен на някоя от страните или на неин представител;
3. което живее във фактическо съпружеско съжителство със страна по делото или с неин представител;
4. което е било представител, съответно пълномощник, на страна по делото;
5. което е взело участие при решаване на делото в друга инстанция или е било свидетел или вещо лице по делото;
6. относно което съществуват други обстоятелства, които пораждат основателно съмнение в неговото безпристрастие.

(2) Съдията е длъжен сам да се отстрани в случаите по ал. 1, т. 1–5, а когато не приеме отвода по ал. 1, т. 6, да обяви обстоятелствата“.

По повод мотивите за обосноваване на отвод следва да се посочи, че в Тълкувателно Решение № 1 от 2023 г. на ВКС, с което е отклонено тълкуване на някои от посочените условия за отвод, се казва, че фактите и обстоятелства са от най-различно естество и са достатъчно разнородни, за да не може да се даде общо тълкуване в кои и в какви случаи се реализират тези условия. Именно по мотивите може да се разбере има ли причинно-следствена връзка с фактите и основанията, водят ли те до безпристрастност и пр.

В производството на КЗД считам, че при наличието на хипотеза с искане на отвод или волеизявление за самоотвод на участник в заседателен състав следва да се посочат фактите и причинно-следствената връзка с основанията за безпристрастност. Част от мотивите на издаденото решение на заседателния състав (респ. на КЗД) трябва да съдържат подробно, ясно и логично аргументиране на отвода/самоотвода или отказа за такъв. С тези мотиви се обосновава не само процесуалната законосъобразност на издадения акт, но и законосъобразността на сформирания компетентен орган.

В решение № 631 от 2024 г. на ВКС правилно се посочва, че когато липсват мотиви за отводите на членовете на състава в КЗД, то искането за отвод от страната не следва да бъде уважено от състава. Мотивите трябва да са ясни, точни и безспорни, като бъдат изложени писмено. В решението на ВКС се уточнява, че доказателства за такива мотиви на исканите отводи

липсват. По тази причина исканията за отводи са неправомерни, както на материалноправно основание, така и на процесуалноправно основание. При наличие на решението на ВКС, с което преписката се връща на Комисията с указание да продължи производството, следва да се разгледат основанията за исканите отводи и да се изложат съдържателно и логично фактите и причинно-следствената връзка между тях, за да се обоснове основанието за безпристрастност. Решението на КЗД ще е законосъобразно, ако продължи производството в същия състав само, ако са извършени описаните процесуални действия и от тях се установява, че мотивите на заинтересованата страна за поисканите отводи са неоснователни.

Мотивираният отказ на член на състава да се отведе от процесуалните действия на състава и продължаването на производството в конкретния случай няма да е основание за отмяна на решението като незаконосъобразен административен акт, тъй като процесуалните действия са в изпълнение на влязло в сила съдебно решение. Обаче тази хипотеза е коректна, ако липсват обосновани мотиви за отводи. В случай, че действително са налице такива аргументи и членовете на комисията имат правни основания за отводи, е налице правен казус за невъзможност да се конституира 5-членен заседателен състав.

Така например в коментираното съдебно решение се пояснява, че ако мотивите за отвод са обосновани и основателни, то председателят на КЗД би могъл да назначи нов състав. Мнението ми е, че в тази част съдебното решение има невъзможен предмет. Това е така, защото комисията се състои от 9 члена, а заседателният състав е 5-членен. Липсата на възможност за конституиране на нов 5-членен състав от общия 9-членен брой на органа, води до невъзможен предмет на съдебното решение. То ще е обективно неизпълнимо, поради което и не може да се реализира дори основанието за изпълнение на съдебно решение, предвидено в чл. 304 АПК. Отново в мотивите на коментираното решение се сочи и за евентуално конституиране на заседателен състав с членове „ad hoc“, което също е обективно неизпълнимо поради императивния характер на нормата на чл. 41 ЗЗДискр. за конституиране на членския състав на КЗД (част се избират от Народното събрание, а друга част се назначават от президента). Друг е въпросът, че жалбоподателят може да ползва искивия път за защита, предвиден в чл. 71 и сл. от ЗЗДискр., ако КЗД няма обективна възможност да конституира законосъобразен годин състав.

Недоумение будят мотивите на определение № 41030 от 2023 г. на РС, гр. София, в което се коментира, че задължението на КЗД да осигури защита от дискриминация следва да се тълкува в смисъл, че КЗД трябва да сезира друг компетентен административен орган или съд, които да определят друг орган с компетентност да реши възникналия спор. Не може никакъв

административен орган да изझे законово регламентираната компетентност на КЗД да се произнесе по жалба за дискриминация.⁴ Това е така поради изричната норма на чл. 40, ал. 1, определяща КЗД като „независим специализиран държавен орган за предотвратяване на дискриминация, защита от дискриминация и осигуряване равенство на възможностите“.⁵ Законът не дава и възможност за делегиране на компетентността на КЗД на друг орган, което произхожда и от целта, заложена в него – независим, специализиран, централен орган на държавна власт. Директивата, макар и приета след коментираното определение на съда, също потвърждава нашето тълкуване като сочи в детайлност условията за гарантиране на независимост и ги обособява в самостоятелна разпоредба (чл. 3) със същото наименование.

Независимо от алтернативната правна възможност за защита от дискриминация по исков път, мнението ми е, че трябва да се предвидят правни норми, с които да се елиминират подобни ситуации. Проблемът е, че тези норми са от естество, изискващо основно изменение в закона.

При действащия в момента Закон за защита от дискриминация частични въпроси могат да се уредят в Правилника и в Правилата, но те обхващат малък кръг от проблеми, имащи нужда от решение чрез нормативна оптимизация.

С оглед изпълнението на чл. 20 от Директивата, България трябва да спази 18 месечния срок за изпълнението ѝ, което е основание за оптимизиране на Закона за защита от дискриминация, с което да се елиминират вече възникнали актуални проблеми при прилагане на закона.

Библиография:

1. Зиновиева, Д., 2020. *Компетентност на административните органи*. С.: Сиела.
2. Славова, М. 2014. *Българският омбудсман*. С.: УИ „Св. Климент Охридски“.

⁴ Вж. Зиновиева, Д., 2020. *Компетентност на административните органи*. С.: Сиела, 125–126.

⁵ Също така следва да визираме и чл. 3 от Директивата относно независимостта на органите за защита от дискриминация в държавите членки на ЕС, макар и приета след постановяване на анализираното Определение на съда.

Нарушаване на забраната за дискриминация от страна на българските власти в реакцията им срещу домашното насилие

Петър Топуров*

Докладът ще разгледа хипотезите на нарушаване на забраната за дискриминация от страна на българските власти в нейния отговор в борбата срещу домашното насилие. Той ще очертае слабостите в този отговор, които биха могли да доведат до нарушаване на забраната, както и какво би могло да се подобри в българското законодателство, така че да се обезпечи ефективността на тази реакция.

Ключови думи: забрана за дискриминация; домашно насилие; защита срещу домашното насилие; реакция на българските власти



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Violation of the prohibition of discrimination by the Bulgarian authorities in their response to the domestic violence cases

Petar Topurov

The report will examine the hypotheses of violation of the prohibition of discrimination by the Bulgarian authorities in its response to cases of domestic violence. It will outline the weaknesses in this response that could lead to a breach of the prohibition, and what could be improved in the Bulgarian legal framework to ensure the effectiveness of this response.

Keywords: *Prohibition of discrimination; Domestic violence; Protection against domestic violence; reaction of the Bulgarian authorities*



I. Увод

1. Европейската конвенция за защита правата на човека и основните свободи съдържа забрана за дискриминация в чл. 14. Текстът на разпоредбата прогласява, че упражняването на правата и свободите, изложени в Конвенцията, следва да бъде осигурено без всякаква дискриминация, основана на пол, раса, цвят на кожата, език, религия, политически и други убеждения, национален или социален произход, принадлежност към национално малцинство, имущество, рождение или друг някакъв признак. Принципът на недискриминация се възприема от практиката на ЕСПЧ като основополагащ за Конвенцията редом с върховенството на закона и ценностите на толерантността и социалния мир. Член 14 има допълваща функция към другите материалноправни разпоредби на ЕКПЧ, като съдът винаги разглежда чл. 14 във връзка с друга разпоредба на Конвенцията, като това не означава, че приложимостта на разпоредбата зависи от наличие на нарушение на друга такава¹. Чл. 14 има не само вертикален, но и хоризонтален ефект, т. е. принципът за дискриминация се прилага както в отношенията между отделните човешки личности и държавата, така и в чисто частни отношения².

2. Още през 1992 г. в т. 6 на препоръка № 19 на Комитета за премахване на всички форми на дискриминация по отношение на жените (CEDAW) е предвидено, че когато акт на насилие е насочен срещу жена поради самия факт, че тя е жена, както и когато дадена форма на насилие засяга жените в по-голяма степен, е налице дискриминация³. Неуспехът на държавата, дори и неумишлен, да защити жените срещу домашно насилие нарушава правото им на равна защита от закона⁴. Утвърдена практика, която вместо ефективно разследване по подадени сигнали, изпълнява функции на посредник, който убеждава жертвите да оттеглят жалбите си и да се върнат в уязвима за нови актове на домашно насилие семейна среда, както и съдебни решения, които не налагат санкции, възпиращи от нови актове, е възприета от съда като дискриминираща правораздавателна пасивност, основана на пола, която съз-

¹ Ръководство по чл. 14 от Европейската конвенция за правата на човека и по член 1 от Протокол № 12 към Конвенцията. Забрана за дискриминация. Български хелзинкски комитет и Съвет на Европа. 2020, с. 6.

² Пак там, с. 9.

³ След одобрението от Общото събрание на ООН препоръките стават част от Конвенцията. Това важи и за препоръка № 19. Държавата отговаря за посегателства от страна на частни лица, доколкото нейните органи не са положили дължимата грижа, за да предотвратят нарушенията на правата, или за да разследват и наказват такива актове на насилие, или за да предвидят възможности за обезщетяване на жертвата. Виж в този смисъл Тишева, Г. *Домашното насилие като нарушение на правата на човека*. – Права на човека, 1998, № 1, 27–28.

⁴ *Opuz v. Turkey (жалба № 33401/02); Eremia and Others v. Moldova (жалба № 3564/11)*.

дава благоприятен климат за разцъфтяване на домашното насилие⁵. Дискриминацията в този случай не се основава на законодателството, а на общото отношение на местните власти⁶. Но наличие на подобен климат може да е свързан с липсата на подходящи изменения на правната рамка. Домашното насилие се възприема като една от най-тежките форми на дискриминация по отношение на жените и изразяващо дълбоко вкоренени предразсъдъци, модели на поведение в обществото, намерили проявление в семейството, домакинството, в отношенията между интимни партньори, други членове на семейството, включително между родители и деца⁷.

3. За да се произнесе по въпроса дали е налице нарушаване на забраната за дискриминация, съдът извършва обширна оценка, която може да бъде основана както на представените от жалбоподателя доказателства, така и на вътрешни или международни доклади (например на Комитета на ООН за премахване на всички форми на дискриминация срещу жените) за правните гаранции за равните права на членовете на обществото, отношението към актовете на насилие към определени групи от него и тяхното толериране от страна на националните власти⁸.

4. Настоящата публикация ще направи кратък анализ на нарушаването на забраната за дискриминация през призмата на съдебните производства пред Европейския съд по правата на човека по жалби срещу Република България, ще открие пропуските на националните власти в реакцията им срещу актовете на домашно насилие и ще проследи тенденциите за усъвършенстване на защитата от домашно насилие с оглед даването на препоръки за усъвършенстване на българското законодателство.

II. Нарушаването на принципа за недискриминация в контекста на практиката на ЕСПЧ срещу Република България

⁵ *Opuz v. Turkey* (жалба № 33401/02); *Eremia and Others v. Moldova* (жалба № 3564/11); *M. G. v. Turkey* (жалба № 646/10); *Halime Kilic v. Turkey* (жалба № 63034/11); *Talpis v. Italy* (жалба № 41237/14); *Bâlşan v. Romania* (жалба no. 49645/09); *Tkheldize v. Georgia* (жалба № 33056/17); *A and B v. Georgia* (жалба № 73975/16).

⁶ Ръководство по чл. 14..., с. 13.

⁷ Илиева, И. Някои общи проблеми на борбата срещу домашното насилие в Европа. – В: Реформата на защитата от домашно насилие. Сборник с доклади от научна конференция. С.: ИДП при БАН, 2024, 6–18. Идеята на въвеждането на понятието „социален пол“ в Истанбулската конвенция е именно поставянето на акцент върху факта, че неравенствата, стереотипите и насилието не произтича от биологични различия, а от увреждащи предразсъдъци за ролите и качествата на жените. В този смисъл Марчева, Д. Преосмисляне на домашното насилие в правото. – В: Реформата на защитата от домашно насилие. Сборник с доклади от научна конференция. С.: ИДП при БАН, 2024, 65–85.

⁸ *Volodina v. Russia* (жалба № 41261/17).

1.1. С решение от 3.05.2016 г. по делото *N. P. and N. I. v. Bulgaria* ЕСПЧ е разгледал оплакване за нарушение на чл. 14 ЕКПЧ при твърдение от жалбоподателката, че е била жертва на дискриминиращо отношение при упражняването на правата ѝ, гарантирани от членове 3 и 13 от Конвенцията. В рамките на своето произнасяне съдът припомня, че според съдебната практика за приложението на чл. 14 във връзка с чл. 3 от Конвенцията дори неволното изпълнение на една държава на задължението ѝ да защитава жените от домашно насилие е нарушение на правото им на равна защита от закона. Той констатира, че жалбоподателката и синът ѝ са били жертви на домашно насилие и че отношението към жалбоподателите е било с достатъчен интензитет, за да попадне в приложното поле на чл. 3 от Конвенцията. Оплакванията, направени във връзка с членове 3, 13 и 14 от Конвенцията, се обобщават в твърдението, че държавните власти не са изпълнили положителното си задължение да защитят жалбоподателката от проявите на насилие на техния фактически партньор/баща.

1.2. С решението по делото съдът приема, че не е налице нарушение на чл. 14 ЕКПЧ. На първо място той е посочил, че в българския правен ред съществува правна уредба, която позволява получаването на защита от домашно насилие и жалбоподателите са получили трикратно такава (с налагане на мерки за защита в рамките на първото производство от деня, следващ подаване на искането им). Същевременно жалбоподателката е получила многократно съдействие от кризисни центрове, оторизирани от социалните служби. За недоказани са приети оплакванията, че полицията и прокуратурата не са успели да разследват адекватно насилствените действия, тъй като са били налице образувани две наказателни производства, от които едно висящо, които са били образувани именно въз основа на оплакванията на жалбоподателката. Съдът е констатирал, че самата жалбоподателка не се е възползвала напълно от съществуващите национални средства за защита, подавайки жалби в полицията и прокуратурата за извършени от партньора ѝ престъпления. Прието е, че полицейските органи са реагирали адекватно на съществуващата ситуация, включително чрез съдействието им относно напускането на жилището от страна на майката и детето.

1.3. В заключение Съдът приема, че не е налице нарушение на позитивните задължения на държавата, произтичащи от членове 3, 13 и 14 от Конвенцията, като нито националните съдилища, нито социалните служби, полиция и прокуратура са пренебрегнали опасността от насилствено поведение. Точно обратното – взели са няколко вида мерки с оглед развитието на ситуацията, така че да бъде защитена физическата неприкосновеност на лицата.

2.1. Липсата на нарушение на чл. 14 ЕКПЧ от страна на Република България е установено и в решение от 22.03.2022 г. по делото *Y. and others*

v. *Bulgaria* (макар и в същото дело да е установено нарушение на правото на живот).

По отношение на твърдението на жалбоподателите за нарушение и на чл. 14 ЕКПЧ във връзка с чл. 2 ЕКПЧ последните твърдят, че неспособността на българските власти да предприемат ефективни мерки с оглед предотвратяване на риска за живота на г-жа В. не е просто изолиран случай, който може да се обясни с фактори, специфични за нейния казус, а се дължи на факта, че тя е жена и на толериране по принцип от страна на властите на насилието срещу жени.

2.2. За да се произнесе по същество, съдът извежда следните принципи положения:

- Разликата в третирането на лица в аналогични или относително сходни ситуации е дискриминираща, ако няма обективно и разумно обяснение;
- Обща политика, която оказва непропорционално вредно въздействие върху дадена група, може да бъде дискриминираща дори ако не е конкретно насочена към тази група и няма дискриминиращо намерение. Дискриминацията може да е резултат и от фактическа ситуация;
- Насилието срещу жени, включително домашното насилие, е форма на дискриминация срещу жените. Незащитаването им от такова насилие от страна на държавата нарушава правото им на равна защита от закона;
- Разликата в третирането, насочена към осигуряване на материално равенство между половете, може да бъде оправдана и дори необходима;
- След като жалбоподателят е обосновал разлика в третирането, държавата ответник трябва да докаже, че тази разлика е била оправдана. Ако се установи, че домашното насилие засяга жените непропорционално, тежестта се прехвърля върху държавата, която трябва да аргументира какви коригиращи мерки е предприела, за да компенсира това неблагоприятното положение;
- *Prima facie* доказателства, които в такива случаи могат да прехвърлят тежестта на доказване върху държавата ответник, не са предварително определени по вид и могат да варират. Такива доказателства биха могли да бъдат доклади на неправителствени организации или международни наблюдатели като CEDAW или статистически данни от властите или академичните институции, които показват, че (i) домашното насилие засяга предимно жени, и че (ii) общото отношение на властите – проявяващо се например

в начина, по който жените биват третирани в полицейските управления, когато съобщават за домашно насилие, или в съдебната пасивност при предоставянето на ефективна защита на жените, които са жертви на такова – създава климат, благоприятстващ такова насилие;

– Ако се установи, че съществува широкомащабно структурно предубеждение, не е необходимо жалбоподателят да доказва, че жертвата също е била обект на индивидуално такова. Ако обаче няма достатъчно доказателства за дискриминиращ характер на законодателството или официалните практики, или за техните дискриминиращи ефекти, следва да се докаже предубеждение от страна на длъжностните лица по случая на жертвата, за да установи дискриминация. При липса на доказателства фактът, че не са приложени всички санкции или мерки, постановени или препоръчани в индивидуалния казус на жертвата, сам по себе си не разкрива дискриминиращо намерение въз основа на пола.

2.3. Във връзка с конкретната преценка на тези принципни положения към казуса ЕСПЧ излага съображение, че е установено, че домашното насилие в Република България засяга предимно жени, подобно на други държави членки на Съвета на Европа. Същевременно по делото липсват доказателства, че българските власти имат практика да разубеждават жертвите да търсят защита на правата си, да омаловажават сигналите им, да са пасивни при получаването на сигнали от тяхна страна, включително забавяне на издаването на заповеди за защита от страна на българските съдилища. Като сериозен пропуск е посочена липсата на събиране на статистически данни за начина, по който правоприлагащите органи разглеждат случаи на домашно насилие. В решението съдът отхвърля твърдението, че българското законодателство се е провалило генерално в опита си да противодейства на домашното насилие или че създава неоправдани пречки пред неговите жертви за защита на правата им. Съдът отказва да анализира последните изменения в Наказателния кодекс, доколкото неговите правомощия в производства, образувани по индивидуална жалба, е да установи дали начинът, по който националното право е било приложено спрямо жалбоподателя, е довел до нарушение на Конвенцията, а не да прави абстрактни оценки по отношение на неговата годност да защити всяка жертва на домашно насилие. ЕСПЧ отхвърля и аргумента, че нератифицирането на Истанбулската конвенция е индигия за дискриминационното отношение на българските власти към жертвите на домашно насилие. Напротив – посочва, че то се основава на съображения, които са несвързани с нежеланието им да се осигури правна защита на жените срещу домашно насилие. В заключение съдът приема, че не е доказана обща и дискриминационна пасивност от страна на българските власти по отношение на домашното насилие спрямо жени.

По отношение наличието на предубеждение на държавните служители, които са се занимавали конкретно със случая на г-жа В. ЕСПЧ констатира, че няма данни за разубеждаващи действия от страна на някои от длъжностните лица, участвали в разглеждането на жалбите ѝ, нито за опит те да се омаловажат, било вината за конфликтната ситуация да бъде прехвърлена върху пострадалата. Въпреки наличието на сериозна пасивност от страна на полицейските служители, тази пасивност е приета за укорима с оглед наличие на нарушение на чл. 2 ЕКПЧ, но не и на чл. 14 ЕКПЧ. Съдът отхвърля аргумента за наличие на снизходително отношение от страна на съдебната система по отношение на убийството на г-жа В. Наказателното производство по делото срещу г-н В. е приключило сравнително бързо в рамките на 1 г. и 4 м. и с ефективна присъда от 13 г. и 4 месеца лишаване от свобода. Фактът, че полицията е извършила вътрешно разследване след смъртта на г-жа В. и са предприети дисциплинарни действия спрямо служители, за които е установено, че не са изпълнили задълженията си в нейния случай също сочи, че българските власти не са гледали на въпроса с безразличие.

3.1. Оплакване за нарушаване на забраната за дискриминация има и по делото *A. E. v Bulgaria* (жалба № 53891/20).

Жалбоподателката твърди, че, въпреки че съответното законодателство е формулирано по неутрален по отношение на пола начин, така че да защитава еднакво всяко лице, на практика домашното насилие засяга повече жените, отколкото мъжете. Поради това бездействието на властите при преследването и наказването му засяга непропорционално жените.

3.2. С оглед на оплакванията съдът потвърждава вече изразените в по-старата си практика принципи, че следва да бъде признато, че насилието срещу жени, включително домашното насилие, е форма на дискриминация срещу жените и че неспособността на държавата да защити жените от него нарушава правото им на равна защита от закона. След като даден жалбоподател е доказал разлика в третирането, държавата трябва да докаже, че тази разлика е била оправдана.

3.3. Основното оплакване на жалбоподателката е, че неуспехът на властите да ѝ осигурят защита, произтича от институционалната толерантност към домашното насилие. В тази връзка ЕСПЧ отбелязва, че това е третото дело по отношение на Република България, в което се установява нарушение на Конвенцията, произтичащо от реакцията на властите на актове на домашно насилие срещу жени. Той приема за установено, че домашното насилие в България засяга предимно жени и че е най-високо в рамките на Европейския съюз. В конкретния случай разликата в третирането е приета за доказана. От своя страна правителството на Република България не е релевирало какви конкретни политики са насочени към защита на жертвите на домашно насилие и наказване на нарушителите, които са преследвани

и какъв е ефектът от тях. Въпреки че българският закон е формулиран в неутрални термини и предоставя еднаква защита срещу домашно насилие на всички, съдът констатира, че съответните законови разпоредби, касаещи конкретната жалба, не са в състояние да отговорят адекватно на домашното насилие, по-голямата част от жертвите на което са жени. И по-точно – начинът, по който законовите разпоредби са били формулирани и тълкувани от съответните органи, е довел до лишаване на редица жени, жертви на домашно насилие, от възможност да започне наказателно преследване по инициатива на прокуратурата, както и от ефективна защита. Съдът отправя критика и към липсата на официална статистика за случаите на домашно насилие, което не може да се обясни като пропуск от тяхна страна с оглед нивото на проблема в България.

Въпреки че в решението по делото *Y. and others v. Bulgaria* ЕСПЧ отхвърля аргумента, че нератифицирането на Истанбулската конвенция е индигнация за дискриминиращо отношение на българските власти към жертвите на домашно насилие, по делото *A. E. v Bulgaria* приема отказа на българските власти да ратифицират Истанбулската конвенция като показателен за нивото на техния ангажимент за ефективна борба с домашното насилие.

3.4. В заключение ЕСПЧ приема, че националните власти не са опровергали наличието на обща институционална пасивност по въпроси, свързани с домашното насилие в Република България. Въз основа на представените от жалбоподателката статистически данни, е направена констатацията, че продължителен период от време жените са непропорционално засегнати от домашно насилие и властите не са показали, че са се ангажирали адекватно с проблема. С оглед на гореизложеното, Съдът стига до заключение, че е налице нарушение на член 14 от Конвенцията, разглеждан във връзка с член 3.

III. Неизбежни стъпки към преодоляване на евентуални нарушения на забраната за дискриминация

1. Направеният обзор на практиката на ЕСПЧ откроява следните слабости в реакцията на българските национални власти спрямо актовете на домашно насилие в няколко направления:

- Своевременното реализиране на конкретни политики, насочени към защита на жертвите на домашно насилие и наказване на нарушителите, които са преследвани и проследявани на техния ефект във времето с оглед тяхното усъвършенстване;
- Въвеждане на засилено служебно начало във всички производства, свързани с извършения акт на насилие и освобождаване на жертвата на насилие от процесуалната тежест да инициира съответните производства;

- Изготвяне на национална официална статистика за случаите на домашно насилие и нейния периодичен анализ с оглед усъвършенстване на правната уредба и правоприлагането;
- Възприемане чрез национална правна уредба на стандартите за защита, установени в Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие;

В тази връзка следва да се посочи, че е наложително и преодоляването на дискриминационна пасивност от страна на българския законодател, който следва да създаде адекватна правна рамка за получаване еднаква защита на лицата от един и същи пол, намиращи се или намиращи се в отношения, идентични по своето фактическо съдържание на отношенията по чл. 3 ЗЗДН.

2.1. Видно от направения преглед, нератифицирането на Истанбулската конвенция е възприето в по-новата практика на ЕСПЧ като показателно обстоятелство за ниското ниво на ангажимент на българските власти за провеждането на ефективна борба с домашното насилие. С решение № 13/27.07.2018 г. обаче Конституционният съд на Република България прие, че Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие не съответства на Конституцията на Република България. Основните мотиви за това становище бяха свързани с дефинирането от страна на Конвенцията на понятието „пол“ в нейния чл. 3, б. в), спрямо който не се допускат резерви. Поради това Истанбулската конвенция остана нератифицирана, съответно стандартите за защита, която тя предвижда за жертвите на насилие, останаха неприложени. Настоящият текст няма за цел да подлага на критичен анализ цитирания акт на Конституционния съд. Следва обаче да се посочи, че неговото наличие не бе и не е пречка пред българския законодател за установяването на подобни стандарти в защита на всички лица, без значение от техния пол, които се намират в идентично положение, дори и без преосмисляне на решението от страна на Конституционния съд. Това произтича от обстоятелството, че изводите в него са основани не на отричането на стандартите за защита, които цитираната конвенция предлага, а на конкретно понятие, което тя използва.

2.2. Такава необходимост е наложителна и към настоящия момент, а тяхното възприемане неизбежно. Това произтича на първо място от обстоятелството, че на 1.06.2023 г. бяха взети Решение (ЕС) 2023/1075 на Съвета за сключване от името на Европейския съюз на Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие по отношение на институциите и публичната администрация на Съюза и Решение (ЕС) 2023/1076 на Съвета за сключването на Конвенцията от името на Европейския съюз по отношение на частите, свързани със съдебното сътрудничество по наказателноправни въпроси, и по отношение на правото на убежище и забраната за връщане. Съгласно първото цитирано решение

Конвенцията се одобрява от името на Съюза, доколкото се прилага по отношение на неговите институции и публична администрация. Според второто – Конвенцията, се одобрява от името на Съюза по отношение на частите, свързани със съдебното сътрудничество по наказателноправни въпроси, и по отношение на правото на убежище и забраната за връщане, доколкото те попадат в изключителната компетентност на Съюза. И в двете решения е посочено изрично, че присъединяването на ЕС към Конвенцията не засяга компетентността на държавите членки по отношение на ратифицирането на Конвенцията по въпроси, попадащи в тяхната национална компетентност.

2.3. Неизбежността на възприемането на стандартите произтича и от обстоятелството, че на 13.06.2024 г. предстои да влезе в сила Директива (ЕС) 2024/1385 на Европейския парламент и на Съвета от 14 май 2024 година относно борбата с насилието над жени и домашното насилие. Именно установените в т. нар. „Истанбулска“ конвенция стандарти са отправна точка за предложената директива⁹. Директивата разглежда насилието над жени в неговия „дискриминационен контекст“ и това е изрично посочено в нейните съображения: равенството между жените и мъжете и недискриминацията са основни ценности на Съюза, а насилието над жени и домашното насилие засяга правото на недискриминация¹⁰ и представлява трайна проява на структурна дискриминация срещу жените, произтичаща от исторически неравностойните властови отношения между жените и мъжете¹¹.

В общ план транспонирането ѝ ще е свързано със:

- криминализиране на някои форми на насилие, които засягат предимно жените като гениталното осакатяване и кибернасилието;
- гарантиране на достъпа до правосъдие и подкрепата на жертвите, отчитайки техните специфични особености и нужди;
- предприемане на конкретни мерки относно генералната превенция срещу бъдещи актове на насилие;
- обучаване на специалистите, които в рамките на своята професионална дейност влизат в контакт с жертвите или извършителите на насилие;
- засилване на координацията и сътрудничеството на национално равнище и на равнище Европейския съюз.

Сред целите на директивата е именно предоставянето на по-сериозна защита на правото на недискриминация и равенството между жените и мъжете. Срокът за транспониране на директивата е до 14 юни 2027 г., но

⁹ Обяснителен меморандум към предложението за директива.

¹⁰ Съображение 2, изр. 1 и 3, изр. 1.

¹¹ Съображение 10, изр. 1.

обществената значимост на борбата с домашното насилие предполага по-бързи действия от страна на националните власти.

2.4. В заключение следва да бъде посочено още веднъж, че българският законодател следва в резултат на широка обществена дискусия да създаде адекватна правна рамка, която да предостави възможност за получаване на ефективна и своевременна защита от домашно насилие на всички лица, намиращи се в едно и също положение, без значение от техния пол¹².

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¹² Относно дискусията по тези въпроси вж. Русчев, И. *Истанбулската конвенция и проблемът за половата идентичност*. – В: Реформата на защитата от домашно насилие. Сборник с доклади от научна конференция. С.: ИДП при БАН, 2024, 19–36; Марчева, Д. *Преосмисляне на домашното насилие в правото*. – В: Реформата на защитата от домашно насилие. Сборник с доклади от научна конференция. С.: ИДП при БАН, 2024, 65–85; Самуилов, Ф. *Домашно насилие при еднополовите двойки*. – В: Реформата на защитата от домашно насилие. Сборник с доклади от научна конференция. С.: ИДП при БАН, 2024, 231–245.

Дискриминационни разпоредби в българското антидискриминационно законодателство

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Статията разглежда случаи на антидискриминационно законодателство, съдържащо разпоредби, които създават предпоставки за дискриминация или се опитват да постигнат равенство, което е природно нелогично и практически нефункционално. В тази връзка се разглеждат разпоредбите от Закона за защита от дискриминация, установяващи особен режим относно малцинствата, както и разпоредбите от същия закон, целящи да постигнат пълна равнопоставеност между жените и мъжете. Посочват се причини за протиеоеететвената същност на въпросните разпоредби, както и причини за тяхната практическа липса на функционалност.

Ключови думи: *дискриминация в закона; дискриминация и малцинства; неравенство между жените и мъжете; мяра и дискриминация*



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Discrimination Provisions in the Bulgarian Anti-Discrimination Legislation

Georgi Mihaylov

The article examines cases of anti-discrimination legislation containing provisions that create conditions for discrimination or attempt to achieve equality that is inherently illogical and practically dysfunctional. In this regard, the provisions of the Anti-Discrimination Act, establishing a special regime regarding minorities, as well as the provisions of the same Act aimed at achieving full equality between women and men, are considered. Reasons are given for the unnatural nature of the provisions in question, as well as reasons for their practical lack of functionality.

Keywords: *discrimination in law; discrimination and minorities; inequality between women and men; measure and discrimination*



Дискриминация (от лат. *discriminatio* – „правене на разлика“) представлява различно третиране, което закон, институция или отделен субект проявява спрямо друг субект или група правни субекти поради признак, който е посочен в чл. 4, ал. 1 от Закона за защита от дискриминация или на друг закон или международен нормативен акт, по който Република България е страна. Различното третиране трябва не само да бъде основано на някой от признаците като пол, раса, етнос, религия, сексуална ориентация и др., посочени в чл. 4, ал. 1 от 33Дискр., но също така трябва да бъде и логически необосновано от обективни съображения и поради това увреждащо нечия чест, достойнство, субективно право и правен интерес. Следователно не всяко неравенство, не всяко различно третиране представлява дискриминация, а само това, което е обективно необосновано, нецелесъобразно от хуманна и конституционна гледна точка и поради това предполага увреждане на нематериални и/или материални блага и правата, които ги обезпечават. Разпоредбите на чл. 7, ал. 1 от 33Дискр. изрично посочват в двадесет точки случаи, които не представляват дискриминация. Повечето от тях описват различия, които са обективно и логически обосновани и поради тази причина не представляват дискриминация. Не могат да бъдат дискриминационни изискванията за определянето на минимална възраст, професионален опит или стаж при наемане на работа или при предоставяне на определени привилегии, свързани с работата, при условие че това е обективно оправдано за постигане на законна цел и средствата за постигането ѝ не надвишават необходимото (т. 5, ал. 1, чл. 7 33Дискр.); не е дискриминация специалната закрила за бременни жени, жени в напреднал етап на лечение ин-витро и майки, установена със закон, освен ако те не желаят да се ползват от тази закрила и са уведомили писмено за това работодателя (т. 7, ал. 1, чл. 7 33Дискр.); не е дискриминация също и посочването на възраст и определен от закона трудов или служебен стаж за целите на пенсионното осигуряване (т. 8, ал. 1, чл. 7 33Дискр.). Посочените случаи в горните законови разпоредби не могат да се разглеждат като дискриминационни, защото законовата целесъобразност, житейска логика и справедливост обосновават различното третиране. Нито субектите, които са обект на различно третиране, нито останалите членове на обществото могат да бъдат дискриминирани, когато логиката, обоснована от обективни закономерности, оправдава различията.

Абсолютното равенство в обективната действителност също е невъзможно, то е химера. Естеството на човешките взаимодействия и закономер-

ностите на природата не го предполагат, поради което и правото не може, а и не трябва да се стреми да го търси, защото ще възпроизведе несправедливост. Неравенството в третирането при създаването на нормативната уредба или при разпределянето на субективните права и юридическите задължения невинаги е дискриминационно. В този смисъл кратко и ясно проф. Бойчев формулира принципа: Равна мяра при равни величини и неравна мяра при неравни величини¹. Когато се тълкуват обществени отношения с цел разработване на законопроект, трябва да се анализират обективните условия и предпоставки за създаването на нормативна уредба, която да поддържа равновесие при реализирането на институционализираните обществени взаимодействия². За тази цел познавателната функция на тълкуването трябва да оцени природните, обществените и субективни особености, въз основа на които различията в законодателното третиране са напълно обосновани. От тази гледна точка бременните, майките с деца, хората с увреждания са субекти, чиито законови права могат да бъдат разширени спрямо тези на останалите субекти въз основа на обективни основания³. Хората, достигнали до определена възраст, която науката и житейската практика определят като пенсионна по обективни причини, е напълно основателно да бъдат различно третирани от законодателя. През призмата на своето познавателно тълкуване законодателят оценява различната величина (съответната пенсионна възраст, например), за да възпроизведе мисловно тълкуване, определящо различните права и задължения. Природните и обществени закономерности при примера с пенсионната възраст служат като основание (различна величина) за определяне на особен правен статут на притежаващите ги субекти (различна мяра). Логическата оценка на различията при тълкуването от страна на законодателя трябва да бъде така формулирана от него, че да бъде ясно и обосновано възпроизведена в нормативния акт и неговите разпоредби. В случай, че оценката е неадекватна или тълкуването лошо обосновано, ще се създадат правни разпоредби с дискриминационно

¹ Вж. Бойчев, Г., 2006. *Въведение в правото. Философия на правото*. С.: УИ „Св. Климент Охридски“, 10–13.

² Относно дискриминацията в българското трудово законодателство вж. Lazarova, N., 2016. *Discrimination against temporary workers and employees under the Bulgarian labour law*. Revista inclusiones, Volumen 3 – número 4 – octubre/diciembre Chili, 140–146, <https://revistainclusiones.org/index.php/inclu/article/view/496>.

³ Lazarova, N., 2017. *Integrated work environment for people with disabilities within the context of Bulgarian and European legislation, Economic, social and administration to the Knowledge – based organization*, “Nicolae Balcescu” Land Forces Academy, Sibiu, 181–186 <https://doi.org/10.1515/kbo-2017-0110>.

съдържание, които предполагат практики или съмнения и спорове относно наличието на дискриминация.

Законът за защита от дискриминация съдържа и разпоредби, които създават предпоставки за дискриминация или се опитват да постигнат равенство, което е природно нелогично и практически нефункционално. Разпоредбите на чл. 7, ал. 1 от същия закон, установяващи особен режим относно малцинствата, представляват дискриминация. А разпоредбите към същата норма, целящи да постигнат пълна равнопоставеност между жените и мъжете, са противоестествени и практически неработещи. Те също създават предпоставки за дискриминация.

Проблемът с дискриминацията при малцинствата

Парадоксалното при малцинствата е, че различното нормативно и институционално третиране всъщност насърчава, а не преодолява дискриминацията. Когато се предвиждат привилегии, облагодетелстващи чрез предоставянето на субективни права специално за малцинствата, се създава непряка дискриминация по отношение на останалите членове на обществото. Така например, по смисъла на чл. 7, ал. 1, т. 17 от ЗЗДискр., който повелява, че „мерките в областта на образованието и обучението за осигуряване на участието на лица, принадлежащи към етнически малцинства, доколкото и докато тези мерки са необходими“, министърът на образованието Меглена Кунева оправда разработването на проект, който предвижда стипендии за деца от ромски етнос при по-нисък успех спрямо всички останали деца в училищата. Тази практика обаче беше прекратена от Върховния административен съд, който я обяви за дискриминационна със свое решение от 13 януари 2020 г.⁴ Разпоредбите, предполагащи особен статут за малцинствата спрямо останалите граждани, не само създават дискриминация, но и предполагат трайно нейното налагане в обществе-

⁴ ВАС в свое Решение от 13 януари 2020 г. потвърди Решение 7471/10.12.2018 г. на Административен съд София град, което мотивирано отменя решението на Комисията за защита от дискриминация, която в петчленен състав преди това не е видяла нищо дискриминационно в това Министерството на образованието да разработи и приложи проект за отпускане на стипендии на деца според етнически признак при по-нисък успех, отколкото стипендиите, отпуснати за всички останали деца в българските училища. И двете инстанции на българския съд – Административен съд – София-град и Върховният административен съд приемат в мотивите си, че практиката на Министерството на образованието е дискриминационна спрямо останалите деца в българските училища.

ния живот. Разделението, противопоставянето и дискриминацията в едно общество не се преодоляват, а се насърчават и засилват, когато в него се обособяват малцинствени групи на етнически, религиозен, расов или друг признак на различие. Парадоксалното е, че проблемът с малцинствата не се решава, а се подхранва нормативно и институционално. Познанието на историята разкрива, че всяко малцинство трябва да живее според порядъка, който е създаден от мнозинството. Колкото и крайно да се оценява като твърдение, трябва да се подчертае истината, че по този начин са асимилирани цели народи и държави. Обратното – именно създаването на привилегии за малцинствата, е равнозначно на разпад на мнозинството, което ще бъде дискриминирано, недоволно и все по-враждебно към малцинството.

Анализирайки проблема с малцинствения статут през призмата на историята и съвременната реалност следва да заключим, че здравото общество, което се уповава на своите обичаи и исторически корени, не трябва да допуска никаква дискриминация (пряка или непряка) спрямо отделните субекти и групи, от които е изградено. Привилегиите, както и ощетяването на малцинствените групи, различаващи се по определени белези от мнозинството в една държава, водят до дискриминация и конфликти. Равнопоставеността между всички граждани и групи в обществото, без значение от техните различия, гарантира сплотяването на народността под върховенството на закона.

Съвременното социално-политическо развитие на западните общества ясно показва наличните проблеми, които открито привилегироваха вече десетилетия различните малцинства в своите държави. Неминуемо това води до обществено напрежение, породено от дискриминация на изконното им население. Пораждат се конфликти⁵, които са все по-ясно обозрими и пораждат въпроси дори за бъдещата стабилност в тези държави. Трябва да бъде отбелязано, че българското общество и държава са добър пример за разбирателство и единство между неговите граждани. За разлика от Западна Европа, където разделителните линии са много дълбоки и водят до явни конфликти, в България се наблюдава обща нравствена нормативна система, която не е повлияна от различията по отношение на религия, етнос и други

⁵ По време на Световното първенство по футбол в Катар през 2022 г. имигрантите от Африка изразяваха емоциите си, създавайки безредици във Франция, Белгия и други страни: <https://www.dailymail.co.uk/news/article-11539321/Riot-cops-Paris-Brussels-brace-clashes-Morocco-CRASHES-World-Cup.html>. В новогодишната нощ на 2022–23 г. в много градове в Германия т. нар. малцинствени групи създаваха безредици и нападаха дори органите на полицията.

белези на различие. Тази особеност говори за народна общност, която не бива да се разрушава изкуствено чрез дискриминационни норми от законодателя или дискриминационни практики от институциите. Поради тази причина следва да се обоснове предложение *de lege ferenda* за премахване на нормите и разпоредбите, обособяващи малцинства в българското законодателство. Всички са равни пред закона в демократичната и правова Република България. Независимо колко различни са обичаите, вярванията и начинът на живот на отделните групи, общата нравственост, общите възприятия за добро и зло, редно и нередно – сплотяват обществото, предполагат наличието на стабилен правов ред, стабилна и силна държава.

Самите малцинствени групи нямат интерес да бъдат третираны различно от закона и институциите. Въпреки че в повечето случаи различното третиране е на пръв поглед от полза за малцинството, всъщност „привилегироването“ работи и срещу самите малцинства в дългосрочен план. Задълбочават се разделителните линии в обществото, защото неравноправието провокира недоволство сред останалите членове. В същото време малцинствените групи придобиват усещане за изключителност спрямо обществото и необходимост да се изолират. В крайна сметка това води не само до дискриминация, но и до противопоставяне, конфликти и постоянно социално напрежение. Равното третиране, без оглед на различия като етнос, религия, пол и други признаци, е в състояние да преодолее всички вреди от обективните и субективни различия. Законодателят и правоприлагащите органи трябва да създават и тълкуват нормативните правила така, че да предполагат обществено единство⁶. Различните обичаи, вероизповедания, етноси и раси в държавната общност не трябва да бъдат нито привилегирвани със специални права, нито ощетявани спрямо общообществените. Човешкото начало предполага културно-исторически различия, но също така предполага и равнопоставеност въпреки различията, когато правото организира справедлив и стабилен държавен порядък.

Никак не е случайно, че теориите за глобализма, които се стремят да обезличат националните държави и да създадат световен център на управление, толкова напористо насърчават малцинствата. Създадена по този начин дискриминацията не облагодетелства нито самите малцинства, нито широката общественост. Ефектът от малцинствените привилегии е създаването на разделителна линия, противопоставяне, което руши държавния ред

⁶ Вж. Иванов, Ат., М. Станин, 2013. *Защитимост на правото на недискриминация*. – Норма, 2013, № 10, 1–2 <http://www.norma.bg/bg/article/170/>.

и заплашва стабилността на държавните устои. Точно това се случва пред очите ни в съвременните западни държави, където все по-често се наблюдават проблеми с малцинствените групи от арабски и африкански произход.

Колкото повече държавната власт оценява различията между отделните групи в обществото като ги институционализира с различни субективни права, толкова повече дискриминацията подкопава стабилността на обществения ред и държавното устройство.

Функционална равнопоставеност между жените и мъжете в правния мир

Друг недостатък на Закона за защита от дискриминация се съдържа в разпоредбите на чл. 7, ал. 1, т. 19 и т. 20, където в стремежа си да постигне абсолютно равенство между половете законодателят създава противоестествени и практически неприложими правни разпоредби. Проблемът се състои в това, че законодателят се стреми да постигне абсолютно равенство между двата пола. Тази непостижима и вредна цел е заложена и в излишния, дори вреден, Закон за равнопоставеност между жените и мъжете, който е обнародван през април 2016 година. Целта на законодателя и при двата нормативни акта е да постигне равнопоставеност между жените и мъжете, като чрез законодателни и институционални средства се създадат условия за равнопоставеност. В тази насока е и препращането от страна на 3ЗДискр. към Закона за равенството между жените и мъжете (вж. чл. 7, ал. 1, т. 20 от 3ЗДискр.).

Равенството между двата пола всъщност е невъзможно. Оценката на биологичните особености и природните закономерности води до заключение, което не предполага абсолютно равенство, постижимо чрез правни средства. Биологията предполага, че възможност да зачене плод и да роди потомство съществува само при женския пол. Без медицински интервенции това е невъзможно за мъжкия пол. Естеството на женската и мъжката природа предполага различно предназначение на двата пола, което не може да се замества по естествени, природни съображения. Нито един от двата пола в природата не може да възпроизведе репродуктивните функции на другия. Разбира се, трябва да се подчертае, че естествените функции на всеки един от двата пола, свързани с възпроизвеждането на потомство, не могат да действат без помощта на другия пол. Тези природни закономерности трябва да бъдат съблюдавани от законодателя и институционалните

представители при тълкуването, създаването и прилагането на правото. Обстоятелството, че развитието на медицината позволява извършването на интервенции, които естеството на природата не познава, не предполагат тяхната правна институционализация. Поради обстоятелството, че от медицинска гледна точка е възможно да се смени биологичният пол, да се заменят половите органи и роденият като мъж да се превърне в жена, която да може да забременее и роди, не бива да се изменя логиката на предназначението на правния ред.

Правото трябва да следва природните и биологични закономерности, които са присъщи за природата и човека, като част от нея. Тези закономерности предполагат различни функции на женските и мъжките същества при хората и при животните. Обстоятелството, че жената е способна да зачене и да стане майка, съвсем логично и нормално създава необходимост за специфичен за нея, по-различен правен статут. Обстоятелството, че биологичните и обществени функции на мъжкия пол са различни, съвсем логично предполагат необходимостта от различен негов правен статут.

Жените и мъжете не са еднакви и не могат да имат еднакъв правен статут. Естествените биологични различия обосновават особености на правната институционализация, свързани с майчинството и военното дело, например. Следвайки тази логика се възлагат различни права и задължения на жената – майка и мъжа – войник. Тези различия в третирането не могат да бъдат тълкувани и определяни като дискриминационни, защото се диктуват от естествена биологична предразположеност и необходимост. Обстоятелството, че на жената се възлагат привилегии, свързани с нейното майчинство, не могат да засегнат честта или достойнството на субект от противоположния пол, защото различието е обективно обосновано, естествено предразположено. Различното третиране и по отношение на мъжкия пол също не поражда дискриминация, когато е обективно обосновано. Например, задълженията на мъжкия пол към военната служба също са биологично, природно и социално обосновани, съответно не са дискриминационни.

Равенството между двата съществуващи пола⁷ трябва да се основава върху субективната чест и достойнство. Те не могат да бъдат накърнени, когато правото се тълкува през призмата на естествените биологични законо-

⁷ Според българската Конституция понятието „пол“ следва да се разбира само в неговия биологичен смисъл – решение на Конституционния съд на Република България. Според Тълкувателно решение № 2/2020 г. на Върховния касационен съд на Република България юридическата промяна на пола е невъзможна.

мерности. Не бива да се създават противоестествени привилегии или ограничения, които да се опитват да създават абсолютна равнопоставеност. Такава равнопоставеност, каквато например се опитва да предположи законодателят чрез насърчителни мерки в областта на предприемачеството или други професионални сфери, също е противоестествена, съответно и безполезна. Такава равнопоставеност още може да бъде и дискриминационна, защото се създават права, които са изкуствено преувеличени и несвойствени за биологичната природа. Това не означава, че в случай на интерес и желание да се реализира в сфера, която е нетипична за съответния пол, субектът трябва да бъде ограничаван. Напротив, всеки трябва да реализира субективните си права и задължения при равни условия с останалите субекти, полът в такъв случай не трябва да е фактор за разграничение. Жената, която има интерес от кариера във военното дело или мъжът, който има интерес от професионално развитие в областта на детските грижи, трябва да се развиват при еднакви нормативно предположени условия с всички останали субекти на правото. Но естеството на женската и мъжката природа винаги ще предполагат повече женско присъствие на женския пол в някои области на живота и повече мъжко присъствие в други. Противоестествените насърчителни мерки целят да създадат изкуствена равнопоставеност, която няма да има общественополезно въздействие. За сметка на това изкуственото равенство създава предпоставки за дискриминация.

Заклучение

Съществуват области от обществения живот, в които присъствието, действията и ролята на един от двата пола е по-значима от тази на другия. Опитите на законодателя да създаде равнопоставеност в такива области са противоестествени и несвойствени за природната обусловеност на различие между двата пола. Търсейки подобна противоестествена равнопоставеност под предлог от избягване на дискриминация, всъщност законодателят създава една неработеща правна регулация. Каквито и цели да си поставя юристът – законодател или правораздаващ магистрат, те не могат да бъдат полезни, съответно и работещи в дългосрочен план поради яркото противоречие между налаганото абсолютно равенство и нормативната сила на фактическото положение.

Правото, неговото тълкуване в процеса на правотворчество и правоприлагане трябва да отчита биологичните различия и не бива да допуска дискриминация, която да засяга негативно нечия чест или достойнство. От друга

страна дискриминацията може да се създаде при опит да се изравни напълно правното положение на субектите въпреки фундаменталните им биологични различия. Двата подхода на крайност са еднакво вредни от функционална гледна точка. Необходимо е да се намери балансираното съотношение между обективните предпоставки и разпределението на правата и задълженията на правните субекти. В този смисъл, прилагайки правилото „Равна мяра спрямо равни величини и неравна мяра спрямо неравни величини“ различното третиране на субектите на правото от страна на законодателя е обосновано винаги, когато има обективни предпоставки за това – при неравни величини. В тези случаи не може да бъде засегната честта или достойнството на субектите, участващи в регулираните от правото обществени отношения, следователно и дискриминацията е изключена. Тя ще бъде налична, когато законодателят оценява със своето тълкуване различни величини с еднаква правна мяра, както и еднакви величини с различна правна мяра. В разгледаните правни разпоредби и примери различното третиране на субектите според етнически признак, както и еднаквото третиране въпреки естественоправните различия на пола всъщност предполагат дискриминация. Законодателят прилага различна мяра, когато това не е необходимо и всички трябва да бъдат еднакво третирани въпреки наличните етническите различия. Неправилно е също законодателят да прилага равна мяра в случая на биологичното и естественоправно неравенство между половете. Подобен подход предполага несправедливо разпределение на правните позиции⁸ – субективните права и юридически задължения, което ще засегне негативно честта и достойнството на някои от субектите, участващи в правоотношенията, което по същество представлява заложена в законодателството дискриминация.

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Дискриминация, основана на сексуална ориентация и джендър идентичност в България

Филип Самуилов*

Докладът се фокусира върху противопоставянето на практиката Комисията за защита от дискриминация и националните съдилища (отчасти), като се сравняват с практиката на Европейския съд по правата на човека, с изключително внимание насочено към защита на „сексуална ориентация“. В България се наблюдава засилваща се тревожна тенденция за непризнаването на правата на ЛГБТИК+** хората, което ги поставя в условията на неравно третиране. Сравнението между практиката на националните институции и тези на ЕСПЧ подчертава различията в подхода и прилагането на адекватната защита от дискриминация на уязвимите групи.

Ключови думи: дискриминация, джендър идентичност, ЕСПЧ, КЗД, сексуална ориентация



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** Със съкращението „ЛГБТИК+“ на български език се обозначава: „лесбийки, гейове, бисексуални, транс, интерсексуални, куйър и др.“.

Discrimination based on sexual orientation and gender identity in Bulgaria

Filip Samuilov

The report focuses on contrasting the jurisprudence of the Commission for Protection against Discrimination and national courts (in part) by comparing it with the jurisprudence of the European Court of Human Rights, with a particular focus on protection of „sexual orientation“. In Bulgaria, there is a growing and worrying trend of non-recognition of the rights of LGBTIQ+ people, which puts them in conditions of unequal treatment. A comparison between the practice of national institutions and those of the ECtHR highlights the differences in approach and implementation of adequate protection from discrimination for vulnerable groups.

Keywords: *Commission against discrimination, discrimination, gender identity, ECtHR, sexual orientation*



Целта на това изследване е да стимулира обширна научна дискусия сред юристите относно невидимата дискриминация, базирана на сексуална ориентация и джендър¹ идентичност в България. Анализът ще включва преглед на практиката на Комисията за защита от дискриминация (КЗД), българските съдилища и Европейския съд по правата на човека (ЕСПЧ), както и ще изтъкне основните проблеми, с които се сблъсква ЛГБТИК+ общността в България при опитите си за получаване на защита от дискриминация с цел постигане на желаните равнопоставеност и включване.

В настоящия доклад ще използвам концепции и понятия, признати в широкоизвестните Джогякарта принципи². Съществен е вторият принцип от този документ, обхващащ „Правото на равенство и недискриминация“³ гласи: „Всеки има право да се ползва от всички права на човека без дискриминация въз основа на сексуална ориентация или джендър идентичност. Всяко лице има право на равенство пред закона и на равна защита от закона без каквато и да е дискриминация (...)“⁴. Макар и да нямат статут

¹ Речникът на Кеймбридж (*Cambridge Dictionary*) обозначава термина джендър (*gender*) като: 1) група от хора в дадено общество, които споделят определени качества или начини на поведение, които това общество свързва с мъжка, женска или друга идентичност; или 2) състоянието да си член на група хора в дадено общество, които споделят определени качества или начини на поведение, които това общество свързва с това да си мъж, жена или лице с друга идентичност. В българския правен език понятията *джендър идентичност* и *полова идентичност* са взаимозаменяеми.

² Принципите от Джогякарта (*Yogyakarta Principles*) са набор от принципи за прилагане на международното право в областта на правата на човека по отношение на сексуалната ориентация и половата/джендър идентичност.

³ https://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf (достъп на 25.05.2024 г.).

⁴ Продължението му гласи: „Дискриминацията на основата на сексуална ориентация или джендър идентичност включва всяко различие, изключване, ограничение или предпочитание, основано на сексуална ориентация или джендър идентичност, което има за цел или резултат да унищожи или накърни равенството пред закона или равната защита от закона, или признаването, ползването или упражняването на равна основа на всички права на човека и основни свободи. Дискриминацията, основана на сексуална ориентация или джендър идентичност, може да бъде, и обикновено е, утежнена от дискриминация на други основания, включително пол, раса, възраст, религия, увреждане, здравословно и икономическо състояние.

Държавите трябва:

А. Да включат принципите на равенство и недискриминация въз основа на сексуална ориентация и джендър идентичност в своите национални конституции или в друго подходящо законодателство, ако все още не са включени в тях, включително чрез изменение и тълкуване, и осигуряват ефективното прилагане на тези принципи;

Б. Да отменят наказателни и други правни разпоредби, които забраняват или на

на международен договор и да не са обвързващи, те дават ценни насоки за отстраняването на дискриминацията срещу ЛГБТИК+ общността в националните законодателства като: *включване на принципите на равенство и недискриминация; отмяна на закони, които забраняват доброволните сексуални отношения между лица от един и същи пол; приемане на действия за отстраняване на предразсъдъците и дискриминационните нагласи и др.*

Не може да бъде отречено и положителното развитие през 2023 г. в българското наказателно право с включването на „сексуалната ориентация“ като квалифицирани състави в убийството (чл. 116, ал. 1, т. 11 НК), телесната повреда (чл. 131, ал. 1, т. 12 НК), отвлечане и противозаконно лишаване от свобода (чл. 142, ал. 2, т. 9 и чл. 142а, ал. 3, т. 3 НК), престъпленията против равенството на гражданите (чл. 162, ал. 1 и 2 и чл. 163 НК), престъпленията против трудовите права на гражданите (чл. 172, ал. 1 НК), противозаконно унищожаване и повреждане на чужди вещи (чл. 216, ал. 5, т. 4 НК) и явното подбуждане към престъпление (чл. 320, ал. 3 НК)⁵. Въпреки тези положителни изменения, общественото отношение в България към ЛГБТИК+ хората остава предимно хомофобско, трансфобско и бифобско. Докладът на Иво Инджов от юни 2023 г.⁶ потвърждава това, показвайки, че около 40% от медийното съдържание има отрицателно отношение към ЛГБТИК+ общ-

практика се използват за забрана на сексуална активност по взаимно съгласие между лица от един и същи пол, които са навършили пълнолетие, и да гарантират, че еднаква възраст на съгласие се прилага както за сексуална активност между лица от един и същи пол, така и за лица от различен пол;

- В. Приемане на подходящи законодателни и други мерки за забрана и премахване на дискриминацията в публичната и частната сфера въз основа на сексуалната ориентация и джендър идентичност;
- Г. Да предприемат подходящи мерки за осигуряване на подходящ напредък на лицата с различна сексуална ориентация и джендър идентичност, както може да е необходимо, за да се гарантира на тези групи или лица равностойно ползване или упражняване на правата на човека. Такива мерки не могат да се считат за дискриминационни;
- Д. При всички свои действия в отговор на дискриминация, основана на сексуална ориентация или джендър идентичност, да отчитат начина, по който тази дискриминация може да се пресича с други форми на дискриминация;
- Е. Да предприеме всички подходящи действия, включително програми за образование и обучение, с оглед да се постигне премахване на предразсъдъците или дискриминационните нагласи или поведение, които са свързани с идеята за малолетеност или превъзходство на която и да е сексуална ориентация или джендър идентичност или изразяването на пола.“

⁵ Обн., изм. и доп. ДВ. бр. 67 от 4 август 2023 г.

⁶ <https://www.bghelsinki.org/web/files/reports/173/files/2023-indjov--the-image-of-minority-groups-in-the-media.pdf> (достъп на 25.05.2024 г.).

ността, включително и реч на омразата. Само 8,99% от съдържанието е с положителното отношение. Многобройните статии с негативно отношение често стигматизират, дехуманизират и демонизират ЛГБТИК+ общността, представяйки я като проблем и „заплаха за устоите на страната“⁷.

В момента Агенцията на Европейския съюз за основните права (FRA) извършва трето изследване на дискриминацията и престъпленията от омраза срещу ЛГБТИК+ хората като резултатите от него ще бъдат публикувани до края на 2024 г. Според предишното изследване на FRA от 2020 г., 54% от куиър хората⁸ в България рядко или никога не споделят своята сексуална ориентация и/или джендър идентичност⁹, само 24% отговарят, че го правят рядко.¹⁰ Тези данни показват, че 78% от куиър хората в България се страхуват от разкриване или от негативни последици като дискриминация, обиди или престъпления от омраза.

Това подчертава предизвикателствата, които ЛГБТИК+ общността в България продължава да среща въпреки усилията за промяна. Негативните отношения и дискриминацията, които се наблюдават в медиите и обществото, са в съответствие със страховете и опасенията, които куиър хората изпитват при споделянето на своята сексуална ориентация и/или джендър идентичност. Това подчертава необходимостта от продължаващи усилия за промяна на отношенията и защитата на правата на ЛГБТИК+.

Като „резултат“ същевременно през периода от 2006 до 2023 г., Петият специализиран състав¹¹ на Комисията за защита от Дискриминация (КЗД) постановява общо решения по 19 преписки, образувани въз основа на защитен признак „сексуална ориентация“¹². Въпреки това, КЗД и съдилищата обработват само малък брой случаи, свързани с „чувствителни“ основи като етнически или расов произход и сексуална ориентация.

⁷ Инджов, И. Цит. съч., с. 23.

⁸ Речникът на Кеймбридж (*Cambridge Dictionary*) обозначава термина куиър (*queer*) като: лице, чиято джендър идентичност или сексуалност не отговарят на традиционните представи на обществото за джендър или сексуалност.

⁹ Fundamental Rights Agency, 2020. *A long way to go for LGBTI equality*, Publications Office, p. 25. <https://data.europa.eu/doi/10.2811/348583> (достъп на 25.05.2024).

¹⁰ Fundamental Rights Agency. Op. cit., p. 24.

¹¹ Петият специализиран състав на КЗД разглежда дела със защитени признаци „увреждане“, „възраст“, „сексуална ориентация“ и „семеино положение“.

¹² <https://kzd-nondiscrimination.com/layout/index.php/component/content/article/29/1554-2020-09-16-13-44-15> (достъп на 31.05.2024 г.).

Не се наблюдават специфични усилия от страна на КЗД за справяне с проблемите на дискриминацията, които са базирани на въпросния признак, въпреки че тя [Комисията] има задължението да осъществява „контрол по прилагането и спазването на този закон или други закони, уреждащи равенство в третирането“ (чл. 40, ал. 2 ЗЗДискр.) и да установява „нарушения на този или други закони, уреждащи равенство в третирането, извършителя на нарушението и засегнатото лице“ (чл. 47, т. 1 ЗЗДискр.). Потенциална причина за това би била голямото натоварване в КЗД и ограниченият капацитет, с който разполага, ако не бяха преобладаващите ѝ отрицателни решения във връзка със сексуалната ориентация и не съществуваше докладът на FRA за нарастващата хомофобия в българското общество.

Подобряването на ефективността на КЗД и борбата с утвърдените стереотипи трябва да са обект на отделно изследване. Сегашното няма претенция за изчерпателност и само отбелязва смущаващи обстоятелства въз основа на данни от КЗД и нейните решения. Не може да се игнорира фактът, че антидискриминационният орган не реагира адекватно на честите прояви на агресия срещу общностни ЛГБТИ+ събития, което е отбелязано и в годишния доклад на Европейската комисия срещу расизма и нетолерантността (ЕКРН)¹³. Сред примерните ситуации са постоянните нападения над прожекции София прайд филм фест през годините¹⁴, нападението над общностния център „Rainbow Hub“¹⁶ – с присъда на Апелативен съд – София¹⁷ и други. Към май 2024 г., препоръката на ЕКРН за *създаване официални системи за данни за ЛГБТИ общността и за наблюдение и противодействие на расистки и анти-ЛГБТИ инциденти* все още не е приложена. Без такава информация не може да има устойчива основа за разработването и изпълнението на политики за борба с нетолерантността и дискриминацията срещу ЛГБТИ¹⁸. Бездействието на държавните органи за създаване

¹³ Съвет на Европа. (2022) *Доклад на ЕКРН за България (Шести мониторингов цикъл)*.

¹⁴ София Прайд Филм Фест е филмов фестивал, който се организира от 2012 г., прожектирал през годините повече от сто пълнометражни и късометражни филма – <https://www.sofiapridefilmfest.org/> (достъп на 29.05.2024 г.).

¹⁵ Най-стряскащи са случаите по време на предизборни кампании. През 2021 г. ПП ВМРО-БНО попречат на провеждането на прожекция на филма „Змия“, а през 2023 г. ПП „Възраждане“ – на филма „Близо“.

¹⁶ Нападението е извършено от Боян Расате – кандидат за президент към датата на изпълнение на изпълнителното деяние; <https://www.svobodnaevropa.bg/a/31537397.html> (достъп на 29.05.2024 г.).

¹⁷ Присъда № 21 от 10.07.2023 г. по в.н.о.х. № 936/2022 г. на Апелативен съд – София.

¹⁸ Съвет на Европа. Цит. съч., с. 9.

на централизиран регистър за престъпленията от омраза води до това, че организациите от гражданското общество (правозащитни сдружения) са принудени да събират данни самостоятелно и да поддържат платформа за подаване на сигнали за дискриминация, реч на омразата и престъпления от омраза¹⁹.

Предизвикателствата основани на дискриминация въз основата на сексуална ориентация и джендър идентичност са свързани не само със събирането на данни, но и с това как се тълкуват и прилагат антидискриминационните разпоредби. В този контекст се наблюдават и различни подходи между отделни състави на самия Върховен административен съд (ВАС) и състави на Върховния касационен съд (ВКС) по отношение на доказателствената тежест в случаите на дискриминация, които са особено значими.

За разлика от част от практиката на ВАС, който постанови, че за да бъде установена дискриминация на основание сексуална ориентация, лицето, което я твърди, трябва да докаже с пълни и убедителни доказателства, че е налице дискриминация²⁰ – *обратно*, ВКС постанови, че „според [съдебната практика на този съд] съгласно член 9 от 33Дискр в антидискриминационно производство ищецът е длъжен да докаже фактите, въз основа на които може разумно да се предположи, че той/тя е жертва на дискриминация, и когато той/тя го е направил, законът възлага на ответника доказателствена тежест за установяване на противното, а именно, че не е нарушено правото на равно третиране на жалбоподателя в конкретния случай. [...] След като ищецът разполага с доказани факти, от които може да се заключи, че е налице дискриминация [...], ответникът трябва да докаже основно и пълно, че правото на равно третиране не е нарушено“²¹. В друго дело ВАС посочва че: „Правилото на член 9 от 33Дискр обръща тежестта на доказване при наличие на данни, въз основа на които може да се приеме, че е налице дискриминация“²².

Във връзка с Решение № 10036 по дело № 2747/2022 г. ВАС потвърди становището на КЗД, че коментарът, направен в телевизионно предаване от ръководител на НПО относно билборд, изобразяващ двама мъже, които

¹⁹ <https://www.equal.bg/> (достъп на 29.05.2024 г.).

²⁰ Решение № 10036 от 9.11.2022 г. по адм. д. № 2747/2022 г. на ВАС.

²¹ Определение № 557 от 16.06.2022 г. по дело № 178/2022 г. по описа на ВКС; виж също Решение № 74 от 25 май 2022 г. по дело № 4046/2021 г. по описа на ВКС.

²² Решение № 2983 от 30 март 2022 г. по дело № 12073/2021 г. на ВАС.

се прегръщат, не представлява тормоз, основан на сексуална ориентация. Коментарът гласи: „Тези билбордове са в нарушение на Наказателния кодекс и по-точно чл. 149 – 155, според които е забранено подбуждането към разврат и блудствени действия“.

ВАС приема, че коментарът е предимно израз на лично мнение в съответствие с правото на свобода на изразяване и авторът на коментара изразява своите опасания, че „нормите на поведение и възпитание, които са противно на традиционните семейни ценности се налагат в българските семейства и психиката на децата“.

Това е пореден случай, в който се наблюдава конфликт между правото на свободно изразяване на мнение, закрепено в чл. 39, ал. 1 от КРБ, в член 11, пар. 1 от ХОПЕС и член 10 от ЕКПЧ, и правото на недискриминация. ВАС определя „традиционните ценности“ и правото на свободно изразяване с приоритет пред недискриминацията, въпреки съществуващата санкция на член 39, ал. 2 от КРБ, вр. с чл. 6, ал. 2 от КРБ и чл. 4, ал. 1 от ЗЗДискр. Поради това, че свободното мнение не е незакономерно действие, доколкото не нарушава принципите на недискриминация – член 21 от ХОПЕС и вр. с чл. 4 от ЗЗДискр., то не може да бъде установено нарушение в рамките на производството за защита от дискриминация пред КЗД, твърди ВАС. Член 10, параграф 2 от ЕКПЧ налага допълнителни критерии за пропорционалност и целесъобразност на упражняването на правото на свободно изразяване на мнение.

За разлика от ВАС Административен съд – София-град (АССГ) правилно в мотивите си по делото подчертава, че „Дискриминацията засяга не само конкретните жертви, тя е опасна и вредна за съвременното общество като цяло, тъй като е в състояние да подкопае демократичните ценности и принципи на достойнство, равноправие и взаимно уважение между хората. Светската държава е достижение на човешката цивилизация и никоя религия – традиционна или не – не бива да служи като оправдание за дискриминация. Ако един билборд с прегърнати гей двойки е в състояние да предизвика такава реакция, каква би била реакцията на тези от членовете на обществото, (...) които не приемат различната сексуалност, при среща с реална прегърната гей двойка на улицата, в парка или на друго обществено място. Зачитането на човешкото достойнство на хората с различна сексуална

ориентация изключва „цензурирането им“, като им се забрани публично да се прегръщат, за да не „въздействат“ на подрастващите“²³.

В българската практика съществуват и положителни примери. Един от тях е случаят срещу онлайн антигей публикация във вестник „Труд“ от 2019 г., където КЗД постановява Решение № 801 от 22.11.2021 г. по преписката № 856/2019 г., което открива тормоз въз основа на защитения признак „сексуална ориентация“ съгл. чл. 5, ал. 1 вр. чл. 4, ал. 1 от ЗЗДискр. В Решение № 4631 по адм. д. № 12615/2021 г. на АССГ постановява, че медията създава общ негативен образ към всички нехетеросексуални лица, като дава осъдителни оценки за тяхната ориентация и съдържа епитети с отрицателен смисъл, което несъмнено може да накърни достойнството на всеки от представителите на тази общност и да допринесе за създаване на трайно негативни и враждебни нагласи към всеки човек с различна сексуална ориентация.

ВАС също посочва правилен извод в Решение № 7579 от 10.07.2023 г. по адм. д. № 9989/2022 г., като подчертава, че „за доказаност на твърдението за създаване на враждебна, принизяваща и обидна среда спрямо хората с различна сексуална ориентация с процесната статия като задължителен елемент от фактическия състав на дискриминацията по смисъла на чл. 5, във вр. с § 1, т. 1 от ЗЗДискр.“. Оценката дали дадено поведение може да се счита за дискриминационно зависи от съвкупност от обективни критерии, вкл. естеството на използваните изрази, начинът на тяхното представяне и контекстът, в който са изказани. ВАС приема, че за да бъде установено нарушение, не е задължително поведението на лицето да е накърнило достойнството на конкретно определено лице, стига да се засягат интересите на определена социална група. Във връзка с това, публикацията във в. „Труд“ със заглавие „Педерасите в САЩ бият тревога“, която използва квалификации като „педерастии“, „содомити“, „перверзници“, се счита за превишаваща допустимото толерантно отношение към хомосексуалността, като създава обидна и враждебна среда за лица, които не са хетеросексуални.

При споменаването на *„традиционните семейни ценности“* е необходимо да обърнем поглед и към практиката на Европейския съд по правата на човека (ЕСПЧ) и как той тълкува последното понятие във връзка с речта на омразата. Съдът придава специално значение на плурализма, толерантността и широките възгледи; редовно подчертава, че плурализмът и демокрацията

²³ Решение № 7912 от 29.12.2021 г. по адм. д. № 4527/2021 г. на Административен съд – София-град.

се основават на истинско признаване и уважение към разнообразието. Хармоничното взаимодействие на лица и групи с различна идентичност е от съществено значение за постигане на социално сближаване (*Beizaras and Levickas* срещу Литва, §§ 106 – 107). Изявления, които разпространяват, подстрекават, насърчават или оправдават насилие, омраза или нетърпимост към дадено лице или група лица („реч на омразата“), застрашават социалното сближаване и представляват риск от насилие и нарушаване на правата на другите. Такова изразяване може да създаде среда, която благоприятства престъпления от омраза и подклажда мащабни конфликти.

В делото *Beizaras and Levickas* срещу Литва²⁴, жалбоподателите са двама мъже, които получава редица сериозни заплахи и обидни коментари, след като публикуват във Facebook своя снимка, на която се целуват. Част от коментарите са как те трябва да бъдат „кастрирани“, „убити“, „изгорени“, „застреляни“ и други²⁵. Компетентните органи отказват да започнат наказателно преследване, като намират, че поведението на жалбоподателите е било „ексцентрично“ и не е съответствало на „традиционните семейни ценности“ в страната. ЕСПЧ стига до заключението, че омразните коментари, включващи нескрити призови за насилие от страна на физически лица, насочени срещу гей двойката и ЛГБТИК+ общността като цяло, са били провокирани от фанатичното отношение към тази общност. Освен това Съдът установява, че това дискриминационно отношение е основната причина за неизпълнението от страна на литовските държавни органи на позитивното им задължение да разследват ефективно дали коментарите относно сексуалната ориентация на жалбоподателите, публикувани във Facebook, представляват подбуждане към омраза и насилие. Като са омаловажили опасността на тези коментари, органите най-малкото са ги толерирали. По този начин Съдът приема за установено, че жалбоподателите са претърпели дискриминация на основата на сексуалната си ориентация, следователно е налице нарушение на член 14 във вр. с член 8 ЕКПЧ²⁶. Съдът е установил и нарушение на член 13 ЕКПЧ, тъй като общовалидните средства за защита не са действали ефективно поради дискриминационните нагласи, които са се отразили негативно на прилагането на националното законодателство²⁷.

²⁴ *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020.

²⁵ Пак там, § 10.

²⁶ Пак там, § 129.

²⁷ Пак там, § 159.

В решенията на ЕСПЧ продължава да се подчертава, че държавите членки трябва да оценяват тежестта и вредата от речта на омразата в съответствие с неговата съдебна практика²⁸, което е отразено и в Препоръка СМ/Rec(2022)16 относно борбата с речта на омразата²⁹. След делото *Association ACCEPT and Others* срещу Румъния³⁰ държавите членки имат позитивно задължение да разследват по ефективен начин дали вербалните обиди, насочени към отделните жалбоподатели, представляват престъпление, мотивирано от омраза. В решението *Будинова и Чепразов срещу България*³¹ са очертани критериите за групите, които заслужават защита, и е подчертано, че налагането на сериозни наказателноправни санкции може да бъде оправдано в случаи на реч на омразата. Както и в решението *Бехар и Гутман срещу България*³² националните съдилища не са извършили необходимия баланс в съответствие с практиката на ЕСПЧ и следователно не са изпълнили позитивното си задължение да реагират адекватно на дискриминацията поради етническия произход на жалбоподателите и да осигурят зачитане на техния „личен живот“.

Поради неналичието на официални демографски и социални статистически данни от Националния статистически институт (НСИ) относно ЛГБТИК+ хората в Република България сме лишени от информация относно броя им, доходите, жилищния фонд, достъпа до здравеопазване и пазара на труда, социалното включване и условията на живот и др. Що се отнася до транс, небинарните и интерсексуалните хора – те са стигматизирани.

²⁸ Вж. наред с други; *Erkizia Almandoz v. Spain*, no. 5869/17, 22 юни 2021; *Yefimov and Youth Human Rights Group v. Russia*, no. 12385/15 и 51619/15, 7 декември 2021; *Üçdağ v. Turkey*, no. 23314/19, 31 август 2021; *Standard Verlagsgesellschaft mbH v. Austria*, no. 39378/15, 7 декември 2021; *Sanchez v. France*, no. 45581/15, 2 септември 2021; *Budinova and Chaprazov v. Bulgaria*, no. 12567/13, 16 февруари 2021.

²⁹ Като § 4 от Препоръка СМ/Rec(2022)16 гласи: „При оценката на тежестта на речта на омразата и определянето на вида отговорност, ако има такава, която следва да бъде приписана на всяко конкретно изразяване, органите на държавите членки и другите заинтересовани страни следва да вземат предвид следните фактори и взаимодействието между тях, като следват насоките, предоставени от съответната съдебна практика на Съда: съдържанието на изразяването; политическия и социалния контекст по време на изразяването; намерението на изразителя; ролята и статута на изразителя в обществото; начина, по който изразяването се разпространява или усилва; способността на изразяването да доведе до вредни последици, включително непосредствеността на такива последици; естеството и размера на аудиторията и характеристиките на целевата група“.

³⁰ *Association ACCEPT and Others v. Romania*, no. 19237/16, 1 June 2021.

³¹ *Будинова и Чепразов срещу България*, no. 12567/13, 16 февруари 2021.

³² *Бехар и Гутман срещу България*, no. 29335/13, 16 февруари 2021.

зиран и дискриминиран, защото тяхната джендър идентичност и/или полови характеристики не отговарят на социално изградените и широко разпространени стереотипи. Както отбелязва Европейската комисия, те са сред най-уязвимите групи в обществото³³. Крайно недостатъчни са данните от последното Национално преброяване на населението от 2021 г., според което на територията на РБ живеят 1428 еднополови двойки или общо 2856 лица, или 0,04% от цялото население на страната, които открито са заявили своята нехетеросексуална ориентация. Като тази информация се отнася само и единствено за двойките, които са посочили в системата на Националното преброяване на населението, че живеят с партньор/ка от същия пол.

С оглед подобряването на цялостната законодателна рамка, се налага извършването на нов, всеобхващащ анализ на сегашната правна уредба, включващ множество от правни отрасли. Този анализ трябва да бъде насочен към идентифицирането на пропуските в националното законодателство, които засягат правата на ЛГБТИК+³⁴. Това включва не само правата на еднополовите двойки и ограничението им да влизат в брак или да регистрират своето съжителство/партньорство, но и правата на транс, небинарните и интерсекс хората. След Тълкувателно решение № 2/2020 от 20.02.2023 г. на ВКС – ОСГК, последните не могат да променят своя юридически пол.

В този контекст българският съд заедно с КЗД могат да предприемат действия за прилагане на утвърдените принципи за недискриминация по защитен признак „сексуална ориентация“, които засягат ЛГБТИК+ хората. Тези принципи са заложиени в международните стандарти, видими от многобройните решения на ЕСПЧ.

³³ Европейска комисия (2020) Съобщение на Комисията до Европейския парламент, Съвета, Европейския икономически и социален комитет и Комитета на регионите – Съюз на равенството: Стратегия за равенство на LGBTIQ 2020–2025 г., COM (2020) 698, наличен на: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en, с. 3.

³⁴ Последното проучване е от 2018 г., изработено от екип на Адвокатско дружество „Попов, Арnaudов и партньори“ по поръчка на Сдружение „Младежка ЛГБТ организация Действие“ и представлява сравнителен анализ между правата на брачни двойки и правата на двойки от различен пол, живеещи във фактическо съжителство, и правата на двойки от един и същи пол – https://www.deystvie.org/_files/ugd/84be43_9f659966cd554ee597d3c32effe6d46.pdf (достъп 31.05.2024 г.).

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Сексуалният тормоз по смисъла на Закона за защита от дискриминация и в контекста на други нормативни актове в Република България

Владимира Стоименова-Делийска*

Сексуалният тормоз по смисъла на Закона за защита от дискриминация е поместен в § 1, т. 2. (доп. – ДВ, бр. 58 от 2012 г., в сила от 1.08.2012 г.), а именно, че „сексуален тормоз“ е всяко нежелано поведение от сексуално естество, изразено физически, словесно или по друг начин, с което се накърняват достойнството и честта и се създава враждебна, принизяваща, обидна, унижителна или застрашителна среда и, в частност, когато отказът да се приеме подобно поведение или принудата към него може да повлияе на вземането на решения, засягащи лицето. В тази връзка предмет на настоящото изследване е сравнението на горесцитираната разпоредба с Наказателния кодекс на Република България и новосъздадените и изменени разпоредби в Закона за защита от домашното насилие.

***Ключови думи:** дискриминация, домашно насилие, Закон за защита от дискриминация, жени, наказателен кодекс, сексуален тормоз*



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**Sexual harassment within the meaning of
the protection against discrimination act and in
the context of other normative acts in Republic of Bulgaria**

Vladimira Stoimenova-Deliyska

Sexual harassment within the meaning of the Protection against Discrimination Act is placed in § 1, т. 2. (add. – D.L, Act. 58 from 2012, effective from 01.08.2012). It states that “Sexual Harassment” is any unwanted behavior of a sexual kind, expressed physically, verbally or otherwise, which offends the dignity and honor and creates a hostile, humiliating, insulting or threatening environment and, in particular, when the refusal to accept such behavior or the coercion thereof may affect the decision-making affecting the person. In this regard, the subject of the present study is the comparison of the above-mentioned provision with the Criminal Code of the Republic of Bulgaria and the newly created and amended provisions in the Protection from Domestic Violence Act.

Keywords: *Discrimination, Domestic violence, Protection against Discrimination Act, Criminal Code, Sexual harassment*



Жертвите на сексуален тормоз, за жалост, са навсякъде край нас. Много често те са наши колеги, приятели и дори роднини. Рядко, можем да отбележим – почти никога, не споделят за това дори пред най-близките си и не търсят помощ, защото чувстват срам и вина.

Жертвите на сексуален тормоз имат не само нужда от специална закрила от държавата, но и от обществото като цяло.

Независимо от законите, които всяка държава приема и прави опити да прилага, те остават незабележими и скрити.

Целта на настоящото изследване е да бъде направен анализ на сексуалния тормоз през призмата на три нормативни акта, а именно – Закона за защита от дискриминация, Закона за защита от домашно насилие и Наказателния кодекс на Република България.

Законът за защита от дискриминация предвижда 19 на брой защитени признака подробно изброени в чл. 4, ал. 1 от Закона¹, но освен тях сексуалният тормоз също е обект на неговата защита. *Съгласно чл. 5 от същия, във връзка с параграф първи точка втора от допълнителните разпоредби на ЗЗДискр.* Тормозът на основата на признаците по чл. 4, ал. 1, *сексуалният тормоз*, подбуждането към дискриминация, преследването и расовата сегрегация, както и изграждането и поддържането на архитектурна среда, която затруднява достъпа на лица с увреждания до публични места, се смятат за дискриминация².

Определението за „Сексуален тормоз“ е следното. Това е всяко нежелано поведение от сексуално естество, изразено физически, словесно или по друг начин, с което се накърняват достойнството и честта и се създава враждебна, принизяваща, обидна, унижителна или застрашителна среда и, в частност, когато отказът да се приеме подобно поведение или принудата към него може да повлияе на вземането на решения, засягащи лицето.³

¹ Закон за защита от дискриминация (загл. изм. – ДВ, бр. 68 от 2006 г.), посл. изм. ДВ бр. 84 от 6 октомври 2023 г., чл. 4. (1) (Доп. – ДВ, бр. 70 от 2004 г., в сила от 1.01.2005 г.) Забранена е всяка пряка или непряка дискриминация, основана на пол, раса, народност, етническа принадлежност, човешки геном, гражданство, произход, религия или вяра, образование, убеждения, политическа принадлежност, лично или обществено положение, увреждане, възраст, сексуална ориентация, семейно положение, имуществено състояние или на всякакви други признаци, установени в закон или в международен договор, по който Република България е страна.

² Закон за защита от дискриминация (загл. изм. – ДВ, бр. 68 от 2006 г.), посл. изм. ДВ бр. 84 от 6 октомври 2023 г., цит. чл. 5.

³ Закон за защита от дискриминация (загл. изм. – ДВ, бр. 68 от 2006 г.), посл. изм. ДВ бр. 84 от 6 октомври 2023 г., цит. § 1, т. 2

Специално внимание трябва да се обърне на няколко елемента от изпълнителното деяние:

1. Поведението на извършителя на деянието от сексуално естество, трябва да бъде нежелано от пострадалия;
2. Може да бъде изразено по всякакъв начин – в това число – физически или словесно;
3. Освен, че с деянието се накърняват достойнството и честта на пострадалия, следва и да се създава враждебна, принизяваща, обидна, унизителна или застрашителна за него среда;
4. Ако пострадалият откаже да приеме такова поведение, това може да повлияе на вземането на решения, които го засягат, което следва да се приеме като йерархическа зависимост между извършител и пострадал.

Освен гореописаната разпоредба, законодателят е създал и друга разпоредба, свързана със сексуален тормоз, която е поместена в Закона за защита от домашно насилие. В чл. 2, ал. 2 от същия „Домашно насилие е всеки акт на физическо, *сексуално*, психическо или икономическо насилие, както и опитът за такова насилие, принудителното ограничаване на личния живот, личната свобода и личните права, извършени спрямо лица, които се намират в родствена връзка, които са или са били в семейна връзка или във фактическо съпружеско съжителство или в интимна връзка.“⁴

В тази разпоредба отново съществува проява на нежелано поведение от сексуално естество, но извършителят и адресатите се различават. Докато по смисъла на ЗЗДискр. извършителите и пострадалите могат да бъдат всички физически лица, намиращи се на територията на Република България, то Законът за защита от домашно насилие ги ограничава в конкретна група – които се намират в родствена връзка, които са или са били в семейна връзка или във фактическо съпружеско съжителство или в интимна връзка.

Извършителите на домашно насилие са изчерпателно изброени в чл. 3 от закона:

1. съпруг или бивш съпруг;
2. (доп. – ДВ, бр. 69 от 2023 г.) лице, с което се намира или е било във фактическо съпружеско съжителство или в интимна връзка;
3. лице, от което има дете;

⁴ Закон за защита от домашното насилие (загл. изм. – ДВ, бр. 102 от 2009 г., в сила от 22.12.2009 г.), посл. изм. и доп. ДВ, бр. 69 от 11 август 2023 г., цит. чл. 2, ал. 2.

4. възходящ;
5. низходящ;
6. (изм. – ДВ, бр. 102 от 2009 г., в сила от 22.12.2009 г.) лице, с което се намира в родство по съребрена линия до четвърта степен включително;
7. (изм. – ДВ, бр. 102 от 2009 г., в сила от 22.12.2009 г.) лице, с което се намира или е било в родство по сватовство до трета степен включително;
8. (изм. – ДВ, бр. 66 от 2023 г., в сила от 01.01.2024 г.) настойник, попечител, лице, на което са възложени грижи за детето, или лице, на което детето е поверено;
9. (нова – ДВ, бр. 102 от 2009 г., в сила от 22.12.2009 г., изм. – ДВ, бр. 66 от 2023 г., в сила от 01.01.2024 г., изм. – ДВ, бр. 69 от 2023 г.) лице, което е роднина по права или по съребрена линия до четвърта степен включително, на лицето, с което се намира или е било във фактическо съпругеско съжителство или в интимна връзка;
10. (нова – ДВ, бр. 102 от 2009 г., в сила от 22.12.2009 г., доп. – ДВ, бр. 69 от 2023 г.) лице, с което родителят се намира или е бил във фактическо съпругеско съжителство или в интимна връзка;
11. (нова – ДВ, бр. 66 от 2023 г., в сила от 1.01.2024 г.) лице, което е съпруг или бивш съпруг на родителя.

Последното изменение на тези разпоредби е в сила от 01 януари тази година.

Освен че актът на сексуално насилие е преследван от закона, така и опитът за сексуално насилие е наказуем. Независимо, че последната ал. 3 на чл. 2 предвижда, че „Актовете по ал. 1 и 2 може да се извършват чрез действие или бездействие“, сексуалното насилие може да се извърши единствено чрез действие.

Извън хипотезите, разгледани в двата нормативни акта, нежеланото поведение от сексуално естество или законово недопустимото такова може да се разглежда и по смисъла на българското наказателно право.

Изнасилването като акт на нежелано поведение от сексуално естество е поместено в няколко разпоредби от Наказателния кодекс на Република България.⁵

⁵ Вж. Наказателен кодекс, посл. изм. ДВ. бр. 42 от 14 май 2024 г.

Според чл. 152. (1) (който е и основният състав на престъплението) Който се съвкупни с лице от женски пол:

1. лишено от възможност за самоотбрана, и то без негово съгласие;
2. като го принуди към това със сила или заплашване;
3. като го приведе в безпомощно състояние, се наказва за изнасилване с лишаване от свобода от две до осем години.

Престъплението е двуактно – от една страна трябва да има съвкупление, което не е престъпление, но от друга, то трябва да бъде без съгласието на пострадалата или насилствено. В теорията и практиката се приема, че субект на такова противоправно деяние може да бъде само лице от мъжки пол, а пострадал в горечитираната разпоредба – само жена.

Квалифицираните състави на това престъпление са с оглед възрастта на пострадалата, ако е низходяща сродница, ако е извършено повторно, ако е извършено от две или повече лица, ако е съпътствано със средна или тежка телесна повреда, ако е последвал опит за самоубийство или самоубийство, ако представлява особено тежък случай.

Интересни са първите два от привилегированите състави на изнасилването (при които се налага по-леко наказание), а именно – Чл. 153. (Изм. – ДВ, бр. 75 от 2006 г., в сила от 13.10.2006 г.) Който се съвкупни с друго лице, като го принуди към това чрез използване на служебната му или материална зависимост от него, се наказва с лишаване от свобода до три години.

Чл. 154. Съвкупление между възходящи и низходящи, между братя и сестри и между осиновители и осиновени се наказва с лишаване от свобода до три години.

Първият от двата състава попада и в обекта на защита на Закона за защита от дискриминация, когато пострадалият е принуден към съвкупление като се използва служебната му зависимост, и в обекта на защита на Закона за защита от домашно насилие, като се използва материалната му зависимост.

Вторият състав също дублира донякъде разпоредбата от Закона за защита от домашно насилие по отношение на роднинската връзка между извършител и пострадал.

Като законово недопустимото деяние от сексуално естество следва да се приемат блудството и съвкуплението с лице, ненавършило 14-годишна възраст, но с негово съгласие.

По смисъла на чл. 149 от НК (Изм. – ДВ, бр. 28 от 1982 г., в сила от 1.07.1982 г., изм. – ДВ, бр. 89 от 1986 г.) (1) (Изм. – ДВ, бр. 107 от 1996 г.,

изм. – ДВ, бр. 75 от 2006 г., в сила от 13.10.2006 г.) (основният състав) Който извърши действие с цел да възбуди или удовлетвори полово желание без съвкупление по отношение на лице, ненавършило 14-годишна възраст, се наказва за блудство с лишаване от свобода от една до шест години.

Квалифицираните и привилегировани състави са описани в следващите разпоредби от закона, като ще се спрем подробно на случаите, които са свързани с другите два нормативни акта, които са предмет на настоящото изследване.

Когато блудството е извършено спрямо лице, ненавършило 14-годишна възраст (чл. 149, ал. 2, т. 4) или навършило такава възраст (чл. 150, ал. 1), чрез използване на положение на зависимост или надзор, престъплението е квалифицирано и законодателят предвижда по-високо наказание – от 2 до 8 години лишаване от свобода. Следва да се отбележи, че законодателят може да предвиди по-тежко наказание в първата хипотеза с оглед възрастта на пострадащото лице.

Когато е извършен акт на съвкупление с лице, което е ненавършило 14-годишна възраст (чл. 151, (1), доколкото извършеното не съставлява престъпление по чл. 152, се наказва с лишаване от свобода от две до шест години, а когато е извършено спрямо лице чрез използване на положение на зависимост или надзор (чл. 151, ал. 2, т. 2), наказанието е по-тежко – от 2 до 8 години лишаване от свобода. Тълкуването на разпоредбата води до извод, че липсва несъгласието на пострадалия, но възрастта му е повод за законово недопустимо поведение.

Няколко са основните постановки, които различават блудството и съвкуплението със съгласие на малолетно лице от изнасилването:

1. Субектът може да бъде както от мъжки, така и от женски пол;
2. Пострадалият също може да бъде лице както от женски, така и от мъжки пол;
3. Не трябва да бъде извършено съвкупление или такова може да бъде извършено в конкретни хипотези от закона, които се отнасят основно до съгласието на лицето с оглед неговата възраст и психическо и физическо състояние или чрез използване на положение на зависимост или надзор;

Изхождайки от тълкуването на горните разпоредби, можем да заключим, че и те са сходни с чл. 2 от Закона за защита от домашното насилие – отнасят се до сексуални посегателства спрямо определен защитен от държавата кръг лица – тези, които са поставени в зависимост. Така също можем

и да ги разгледаме през призмата на Закона за защита от дискриминация, който не предвижда ограничение в пола и възрастта на пострадалите лица.

В заключение ще се спрем на няколко момента, свързани с изследваните законови разпоредби в настоящата разработка.

Производството по Закона за защита от дискриминация е административно, а по Закона за защита от домашното насилие е гражданско. ЗЗДискр. не ограничава кръга от пострадали лица за разлика от другия нормативен акт. Така пострадалите от домашно насилие лица могат в конкретни хипотези да подават жалби и по двата закона и пред различни институции – пред Комисия за защита от дискриминация или районен съд, когато жалбоподателят прецени, че неговите права и законни интереси са накърнени по ЗЗДискр. или пред районен съд, когато прецени, че е засегнат по Закона за защита от домашното насилие. Изискване на ЗЗДискр. е да няма подадена жалба за дискриминация пред Районен съд, но не и да няма подадена жалба за домашно насилие. Това води до извода, че сходни или дори в някои случаи еднакви оплаквания могат да се разглеждат от различни органи и постановените актове да бъдат с коренно различни мотиви и заключения.

Изследвайки разпоредбите на Наказателния кодекс, също следва да се има предвид, че в съставите, отнасящи се до престъпления от сексуално естество, също има деяния, които могат да се разглеждат и в едно административно или гражданско производство. Тук въпросът не се свежда до това пред кой орган е подсъдно едно деяние, защото това е донякъде регламентирано от закона – извършването на престъпление поглъща административното нарушение. Законът за защита от домашното насилие не изключва наказателната отговорност, а ЗЗДискр. указва, че при установено престъпление Комисията за защита от дискриминация трябва да сезира компетентния орган.

Жертвите на сексуален тормоз, както отбелязахме и в началото, често се срамуват и трудно прибягват до сезиране на която и да е институция. Недопустимо е да бъдат поставяни пред избор на институция, нормативен акт или препращането им към други органи, независимо, че основната цел е да се защитят правата им.

Сексуалният тормоз може да нарушава различни забрани и да засяга различни обществени отношения, да бъде извършен от определен кръг извършители спрямо определен кръг пострадали лица, но важното е да преследва законовата цел и пострадалите да получат ефективна защита.

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Тежест на доказване по съдебни дела по Закона за защита от дискриминация

Борислав Борисов*

В изложението е поставен акцент върху въпросите за тежестта на доказване в съдебните производства по Закона за защита от дискриминация. На базата на натрупаните теоретични постановки за същността на понятието „тежест на доказване“ в гражданския процес и натрупаната до момента съдебна практика, е предложен кратък анализ на това понятие в българския Закон за защита от дискриминация. Авторът приема, че в уредбата по Закона за защита от дискриминация е закрепено особено правило, което налага да бъде съобразено от съдебните състави и страните по този вид дела с оглед спецификите на този вид съдебни производства и фактите, които се твърдят в тях.

Ключови думи: тежест на доказване, равно третиране, дискриминация, факти в процеса, разделяне



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Burden of Proof In Court Cases under the Anti-Discrimination Act

Borislav Borisov

The article focuses on issues of burden of proof in legal proceedings under the Law on protection against discrimination. On the basis of the accumulated theoretical statements about the essence of the concept “burden of proof” in the civil process and the judicial practice accumulated up to now, a brief analysis of this concept is proposed in the Bulgarian Law on protection against discrimination. The author accepts that a special rule is enshrined in the provisions of the Law on Protection from Discrimination, which must be complied with by the court panels and the parties in this type of case in view of the specifics of this type of court proceedings and the facts that are alleged in them.

Keywords: *burden of proof, equal treatment, discrimination, facts at trial, division*



1. Законът за защита от дискриминация (ЗЗДискр.)¹ представлява основен нормативен акт в системата от мерки за защита в българското законодателство на правото на равно третиране². Законодателят следва подход за приемането на общ закон, който има за предмет на правна уредба осигуряването и гарантирането на защита срещу всички форми на дискриминация и начините за нейното предотвратяване (чл. 1 ЗЗДискр.)³. Целта на закона е да осигури на всяко лице правото на равенство пред закона, равенство в третирането и във възможностите за участие в обществения живот и ефективна защита срещу дискриминацията (чл. 2 ЗЗДискр.).

В правната теория дискриминацията се определя като „многогранно явление, което се проявява не само в дейността на държавните и обществените структури, но и на нивото на гражданското общество като цяло. В този смисъл дискриминацията може в една или друга степен да оказва влияние върху всички сфери на обществото – политика, образование, заетост, медицина, правосъдие и др. Именно чрез характера и степента, в които засяга съществуващата система от обществени отношения, дискриминацията създава обществен ред, който не предоставя равни възможности за социализация, упражняване на професия, заемане на постове и др. на членовете на обществото“⁴. Дискриминацията се определя и като „форма на насилие, доколкото лишава човека от правото му на свободен избор, поставяйки го в различно, неблагоприятно положение по даден признак“⁵. Във връзка с дискриминацията в трудовите отношения доц. Ивайло Стайков определя дискриминацията „...като всеки умишлен акт (поведение) – действие или бездействие, който има за цел неблагоприятно третиране на отделни физи-

¹ Обн., ДВ, бр. 86 от 2003 г., изм. и доп. Законът влиза в сила на 1 януари 2004 г.

² Вж. Кирилова, Г., 2004. *Директиви на Европейския съюз за забрана на дискриминацията и тяхната проекция в националното законодателство*. – В: Сборник „Правна система и европейска интеграция (семинар на млади научни работници)“. Свищов: СА „Д. А. Ценов“, с. 22.

³ Както е изяснено в Реш. № 475 от 12.12.2023 г. по н. д. № 579 от 2023 г., НК, I н. о. на ВКС, с този закон са въведени разпоредбите на Директива 2006/54/ЕО на Европейския парламент и на Съвета от 5 юли 2006 г. за прилагането на принципа на равните възможности и равното третиране на мъжете и жените в областта на заетостта и професиите, както и изискванията на Директива 2010/41/ЕС на Европейския парламент и на Съвета от 7 юли 2010 г. за прилагане на принципа на равно третиране на мъжете и жените, които извършват дейности в качеството на самостоятелно заети лица (вж. § 1а и § 1б от ДР на същия закон).

⁴ Андонова, Г., 2015. *Равноправието в сферата на материалното и процесуалното наказателно право*. – Право, Политика, Администрация, т. 2, № 2, с. 43.

⁵ Терзиева, М., 2023. *Местна подсъдност на съдебни дела по Закона за защита от дискриминация*. – Собственост и право, № 12, с. 7.

чески лица или групи от физически лица и е мотивиран от действителното (настоящо или минало) или предполагаемо наличие на един или повече дискриминационни признаци у дискриминираното лице (група) или у лице, с което то е свързано или се предполага, че е свързано, когато тази връзка е причина за поведението, представляващо поставяне на дискриминираното лице (група) в по-неблагоприятно положение спрямо други лица (групи) при сравними сходни обстоятелства, и засягащ пряко или непряко субективни права или законни интереси⁶.

Заслужава внимание и определението за дискриминация, което е намерило израз в особено мнение по Тълкувателно постановление от 16.01.2019 г. по адм. д. № 1/2016 г., ОСС от ГК от ВКС и ОСС от I и II колегия на ВАС – „тя е юридически факт, който не съществува самостоятелно, а се проявява винаги в рамките на развитието на едно конкретно правоотношение, при упражняване на конкретни права, респ. правомощия, т.е. то е функция на правосубектността – административна или гражданска. Като юридически факт различното третиране следва да се приема като юридическо действие, а от гледна точка на съобразеността му с предписаното от правото поведение – то е неправомерно юридическо действие (нарушение)“. Проявата на този юридически факт сочи на отклонение от нормалното развитие на съответното по вид правоотношение, доколкото нарушава или застрашава конкретни права на правните субекти.

Както се посочва в Определение № 1285/20.03.2024 г. по гр. д. № 2684/2023 г., IV г. о. на ВКС дискриминацията представлява различие, изключение, ограничение или предпочитание по някой, но не на някакво общо основание, без значение какво, а конкретно по поне един от посочените признаци. Както пряката дискриминация по смисъла на чл. 4, ал. 2 и ал. 3 ЗЗДискр., изразяваща се в по-неблагоприятно третиране, така и непряката дискриминация, свързана с поставяне в по-неблагоприятно положение, а също и приравненият на тях тормоз – чл. 5 ЗЗДискр., водещ до накърняване достойнство, създаване на враждебна, обидна или застрашителна среда, представлявали недопустимо поведение, което във всички случаи било основано на някой от обсъдените законови признаци.

2. Правната уредба в ЗЗДискр. се отличава с това, че се установяват изчерпателно определени способи за защита от нарушения на равенството в третирането – по административен и по съдебен ред (ТП от 16.01.2019 г. по адм. д. № 1/2016 г., ОСС от ГК от ВКС и ОСС от I и II колегия на ВАС).

⁶ Стайков, Ив., 2005. *Понятие за дискриминация в трудовите отношения*. – Правен преглед, № 1, с. 37.

Друга особеност е, че съдебната защита по реда на чл. 71 ЗЗДискр. пред районния съд и защитата в административното производство по Раздел I, Глава IV пред КЗД представляват алтернативи, които засегнатите от дискриминационно третиране или поведение лица могат да изберат. И двете процедури важат за всички случаи на дискриминация срещу всички субекти, като целят установяване и санкциониране на установения акт на дискриминация. За пълна и всеобхватна защита на съществени права на правните субекти, всяко засегнато лице има право на избор относно реда за защита за установяване на дискриминация и преустановяването ѝ: административно производство пред КЗД или съдебното производство пред районния съд (ТП от 16.01.2019 г. по адм. д. № 1/2016 г., ОСС от ГК от ВКС и ОСС от I и II колегия на ВАС).

3. Доколкото става дума за съдебното производство по ЗЗДискр. има състезателен характер и от значение е установяване на факти и обстоятелства в тях, един от съществените въпроси е за доказателствената тежест⁷. Извън случаите по раздел I на Глава IV всяко лице, чиито права по този или по други закони, уреждащи равенство в третирането, са нарушени, може да предяви иск пред районния съд, с който да поиска установяване на нарушението; осъждане на ответника да преустанови нарушението и да възстанови положението преди нарушението, както и да се въздържа в бъдеще от по-нататъшни нарушения и обезщетение за вреди (чл. 71, ал. 1 ЗЗДискр.).

Съгласно чл. 9 ЗЗДискр. в производство за защита от дискриминация, след като страната, която твърди, че е дискриминирана, представи факти, въз основа на които може да се направи предположение, че е налице дискриминация, ответната страна трябва да докаже, че принципът на равно третиране не е нарушен. Това правило намира приложение в производствата пред Комисията за защита от дискриминация (КЗД)⁸ и в рамките на съдебните дела по ЗЗДискр.

⁷ Иванов, Ат., 2015. *Актуални въпроси на доказването в гражданското съдопроизводство*. С.: Нова звезда, с. 41. Според автора „законодателят е предвидил и един съществен инструмент за гарантиране правата на равно третиране, а именно – разместване на доказателствената тежест“.

⁸ Следва да се отбележи, че в чл. 3 от Правилата за производство пред Комисията за защита от дискриминация се посочва, че в производството за защита от дискриминация след като страната, която твърди, че е дискриминирана, представи факти, въз основа на които може да се направи предположение, че е налице дискриминация, ответната страна трябва да докаже, че принципът на равно третиране не е нарушен. – вж. интернет страницата на Комисията за защита от дискриминация <https://kzd-nondiscrimination.com/layout/index.php/layout-over-40-positions/normativni-dokumenti/pravila-za-proizvodstvo>.

Понятието за тежест на доказване намира място във всички съдебни дела (граждански, административни или наказателни). В настоящата разработка се поставя акцент върху съдържанието и значението, което има тежестта на доказване в съдебното производство по ЗЗДискр. При определяне на съдържанието на понятието за тежест на доказване в съдебните производства по ЗЗДискр. би следвало да обърнем внимание на общото правило в гражданското съдопроизводство, установено в чл. 154, ал. 1 ГПК – всяка страна е длъжна да установи фактите, на които основава своите искания или възражения.

В процесуалната теория проф. Огнян Стамболиев приема, че „при разпределянето на задължението за доказване не е необходимо да бъдат създадени процесуални норми, които да следват материалноправните. Достатъчно е общото правило на чл. 154, ал. 1 ГПК за определяне на принципа при разпределянето на задължението за доказване, който може по-нататък да бъде разбран от страните и приложен от съда, когато при постановяване на съдебното решение се наложи да бъде приложена последицата от недоказването на факта, наречена доказателствена тежест“⁹. Изводите на проф. Стамболиев, свързани с тежестта на доказване при действащата уредба по ГПК, се изразяват и в това, че „след въвеждането на състезателното начало в българския граждански процес правото на страните да провеждат доказване на фактите може да се свърже със задължение за тях да докажат изгодните им факти. Неизпълнението на това процесуално задължение довежда до настъпването на специфичната процесуална санкция на доказателствената тежест.“¹⁰ Нещо друго важно, свързано с тежестта на доказване се посочва от авторите (проф. Стамболиев и проф. Корнезов), а именно – интересът е в основата на доказателствената тежест, което предопределя всяка една от страните се стреми чрез твърдените от нея факти и доказването им към благоприятно за себе си съдебно решение¹¹. При действащия процесуален модел съдът има съвсем друга процесуална функция – съдът е длъжен в доклада по делото да определи как се разпределя доказателствената тежест за подлежащите на доказване факти. Правилото за доказателствената тежест ще намери приложение едва в момента на тайното съвещание при постановяването на съдебното решение¹².

⁹ Стамболиев, О., 2010. *Доказването в гражданския процес*. С.: Сиела, с. 56.

¹⁰ Стамболиев, О. Цит. съч., с. 59.

¹¹ Корнезов, Л., 2009. *Гражданско съдопроизводство. Том Първи. Исков процес*. С.: Сиби, с. 516; Стамболиев, О. Цит. съч., с. 56.

¹² Сталев, Ж., А. Мингова, В. Попова, О. Стамболиев, Р. Иванова, 2020. *Българско гражданско процесуално право*. Десето преработено и допълнено издание. С.: Сиела, с. 252.

От изложеното следва, че тогава, когато страна по гражданско дело се стреми да докаже изгоден за нея факт, то върху нея се възлага процесуалното задължение за доказването му по несъмнен и категоричен начин и за него същата носи доказателствена тежест. От гледна точка на съда, ако страната не успее да проведе доказване на факт, от който претендира изгодни за себе си правни последици, то за съдът възниква задължение да го приеме за ненастъпил.

4. Изложеното по отношение на тежестта на доказване в гражданския процес по чл. 154 ГПК, в някои случаи, посочени в закона не намира приложение, тъй като по преценка на законодателя може да се създават други, особени правила, които водят до разместване на доказателствената тежест¹³.

Подобно правило е разпоредбата на чл. 9 3ЗДискр., водещо до т. нар. *разместване на доказателствената тежест* между страните в производството по защита от дискриминация. Друг случай, при които се достига до отклоняване от общото правило на чл. 154 ГПК и разместване на доказателствената тежест е при законните оборими презумпции, при които за тяхното опровергаване е нужно да се проведе пълно обратно доказване. Оборимите презумпции изрично се регламентират в закона, защото разместват доказателствената тежест. Те са доказателствено правило, което задължава съда да приеме, че щом е налице фактът, визиран в хипотезиса на презумпцията, налице е и презюмираният факт (като съществуващ и ненуждаещ се от доказване)¹⁴.

Както се посочи, за да е налице проява на дискриминация, е необходимо от неправомерния акт, действие или бездействие да са засегнати права или законни интереси на едно лице или лица. Законодателно е възприет принципът на разпределяне на доказателствената тежест между ищец и ответник, като в тежест на ищеца е да докаже фактите, въз основа на които може основателно да се предположи, че срещу същия е налице акт на дискриминация. В този случай законът възлага доказателствената тежест на ответника да установи обратното, а именно, че правото на равно третиране на ищеца не е нарушено (Реш. № 511/27.07.2010 г. по гр. д. № 587/2009 г., III г.о. на ВКС и Реш. № 85/13.09.2016 г. по гр. д. № 4328/2015 г., IV г. о. на ВКС).

Разпоредбата на чл. 9 3ЗДискр. се налага от нуждата да бъде уредено правило, което да разпределя доказателствената тежест с оглед естеството на споровете, които възникват – нарушения на антидискриминационното

¹³ Иванов, Ат. Въпроси на ..., с. 41.

¹⁴ Сталев, Ж., А. Мингова, В. Попова, О. Стамболиев, Р. Иванова. Цит. съч., с. 251.

право. Подобни актове (действия или бездействия) имат негативни правни последици за определен кръг лица и съществено влияят върху тяхната правна сфера, с което се засяга правото им на равно третиране в обществото. Законодателят е предвидил, че за лицето, жертва на дискриминация е трудно или невъзможно да установи всички факти, които са от значение за определяне на дадени действия като дискриминационни и поради това размества доказателствената тежест¹⁵.

Разпоредбата на чл. 9 ЗЗДискр. като правило, отклоняващо се от чл. 154 ГПК, е с процесуален характер. Подобно становище се среща в съдебната практика, в която се приема, че тази норма има процесуален характер и не освобождава ищеца от тежестта да доказва, а само го подпомага като размества доказателствената тежест – Реш. от 5.08.2022 г. по гр. д. № 3636 от 2021 г. на СГС. Своята процесуална същност то дължи на обстоятелството, че регулира процесуалното поведение на съда и страните във връзка с посочването на факти и обстоятелства, тяхното установяване от страните и преценката на съда за тяхното осъществяване. Разпоредбата на чл. 9 ЗЗДискр. служи като ориентир в съдебните производства по ЗЗДискр. при реализиране на процесуалната дейност на съда и страните по повод доказване на твърденията на страните и тяхното опровергаване.

5. Наличието на разместване на доказателствената тежест по чл. 9 ЗЗДискр. предполага внимателното изготвяне на доклада по делото по чл. 146 ГПК. По своята същност докладът по делото е поредица от процесуални действия на съда и страните, насочена към изясняване и очертаване на рамките на спора и даване на правна квалификация на спора, както и ориентиране на страните към посочване и представяне на доказателствата по делото за релевантните за правния спор факти при едно редовно учредено исково производство. Затова и процесуалните действия на съда и страните, свързани с изготвянето на доклада по делото, се характеризират като основни и централни за цялото исково производство с важни за цялостното му понататъшно развитие процесуални последици. Важна процесуална последица е, че докладът обвързва съда и страните. Съдът е длъжен да постанови решението си в съответствие определената от него правна квалификация и установените факти съгласно чл. 146, ал. 1 ГПК, а страните са длъжни да доказват фактите съобразно *разпределената доказателствена тежест за тях*. Всичко това налага съдебните състави да разясняват на страните как се разпределя тежестта на доказване по смисъла на правилото на чл. 9 ЗЗДискр.

¹⁵ Иванов, Ат. Въпроси на ..., с. 41.

6. С оглед на негативните последици, настъпващи в правна сфера на едно лице или лица в резултат от дискриминационно отношение или друг акт на неравно третиране, в производството по защита по 33Дискр. се възлага на ищеца първи по време да изпълни *процесуалното задължение* да изложи твърдения за извършен акт на дискриминация, от които може да се направи *предположение*, че е налице дискриминация или неравно третиране. От значение при установяване на дискриминация е *обективно съществуващия резултат* при упражняване на съответната дейност, независимо дали при осъществяването на тази дейност са спазени съответните изисквания (Реш. № 231/31.03.2010 г. по гр. д. № 204/2009 г. на ВКС, IV г. о. и Реш. № 153/14.06.2010 г. по гр. д. № 6/2009 г. на ВКС, III г. о.). Едва след успешното установяване, че е налице акт на дискриминация или неравно третиране, то за насрещната страна (ответника в производството) ще възникне задължението да установи обратното, а именно: ненарушаване на правото на равно третиране на ищеца. При доказване на неравно третиране дискриминираното лице дължи извършването на т.нар. непълно доказване, или да докаже вероятност, предположение за дискриминация. Ищецът следва да представи всички факти и обстоятелства, свързани с твърдяното антидискриминационно поведение, а за доказването им са допустими всички доказателствени средства – напр. Реш. по гр. д. № 587/2009 г. на III г.о. на ВКС, Реш. по адм. д. № 10380/2017 г. на V отд. на ВАС.

Тогава когато ищецът е бил лишен от възможност да изложи факти и обстоятелства, от които може да се предположи наличието на дискриминационно поведение, то с това се засягат неговите процесуални права и биха предопределили изхода на делото. В това отношение може да се посочи пример за нуждата от гарантиране на последователното доказване на определена група факти от всяка една от страните по делото, което се дължи на установеното в 33Дискр. разместване на доказателствената тежест, съдържащ се в Реш. № 183/08.06.2015 г. по гр. д. № 7381/2014 г., ГК, IV г. о. на ВКС – когато работникът твърди, че уволнението му е проява на дискриминация, то съгласно чл. 9 от 33Дискр., ответникът работодател следва да докаже, че правото на равно третиране не е било нарушено, но след като ищецът докаже факти, от които може да се направи извод, че е била налице дискриминация¹⁶. Когато в производство по трудов спор по оспорване на дисциплинарно наказание е направен довод за неправно третиране – дискриминация, по признак членство в синдикална организация, съдът не може да откаже

¹⁶ Вж. и Стайков, Ив., 2003. *Дискриминация при прекратяване на трудовото правоотношение*. – *Съвременно право*, № 6, 16–31.

да разгледа този довод, включително с мотива, че той имал значение само в производствата пред КЗД по 33Дискр.¹⁷.

7. На следващо място, от правилото на чл. 9 33Дискр може да се направи и друг извод. Основна последица от неуспешното изпълнение на процесуалното задължение на ищеца за доказване на осъществяването или наличието на дискриминационно поведение ще бъде основание за отхвърляне на предявения иск (Реш. № 511/27.07.2010 г. по гр. д. № 587/2009 г., III г. о. на ВКС; Реш. № 115 от 2.08.2013 г. по гр. д. № 626/2012 г., IV г. о. на ВКС; Реш. № 8273 от 7.05.2024 г. по гр. д. № 24963/2022 г. на СРС). Достатъчно е пострадалият само да докаже факти за *prima facie* дискриминация (т. нар. на пръв прочит дискриминация), които дават основание за съмнение или подозрение за вероятно, макар и не сигурно извършена дискриминация по посочените признаци. В този смисъл не е необходимо пострадалият да доказва пълно и изцяло, че е налице спрямо него дискриминация, нито умисъл у извършителя на дискриминация или съзнателност, респективно целенасоченост на дискриминиращите действия; пълно и изцяло причинно-следствена връзка между защитения признак и по-неблагоприятното третиране. Само тогава тежестта за доказване се прехвърля върху ответника – да докаже, че не е нарушил принципа за равенство в третирането, действал е разумно и оправдано или, че по-неблагоприятното третиране се дължи на други причини извън наличието на защитения признак у жертвата (Реш. № 2727/15.05.2024 г. по в. гр. д. № 9782/2021 г. на СГС).

При твърдения за извършена дискриминация ищецът е длъжен да установи определен кръг факти, от които може да се направи предположение за наличие на дискриминационни действия, и само тогава за съда се поражда задължение да прецени фактите и доказателствата, които сочи ответникът и установяващи равно третиране. Разместването на доказателствената тежест настъпва едва тогава, когато страната, която твърди, че е жертва на дискриминация докаже факти, от които може да се направи извод, че е налице дискриминация. Непредставянето на доказателства във връзка с релевираните оплаквания за дискриминация, респ. неуспешното доказване на твърдения за дискриминация не позволява на съдът да извърши разместване на доказателствената тежест и възлагане на ответната страна

¹⁷ Вж. подробно Стайков, Ив., 2012. *Защита от дискриминация при реализация на дисциплинарната отговорност*. – В: Сборник трудове от Юбилейната научна конференция по повод 10 години от създаването на НВУ „Васил Левски“, 14–15 юни 2012 г. Том 5 – Научно направление „Социални, стопански и правни науки“. В. Търново: ИК на НВУ „В. Левски“, 163–170.

или вменяване на задължението да докаже, че не е нарушено правото на равно третиране.

На практика говорим за разместване на тежестта на доказване, която настъпва едва след преценка на съда за успешно проведено косвено доказване на дискриминационни действия от страна на ищеца. От една страна, разпоредбата на чл. 9 3ЗДискр. съдържа указания за ищеца по отношение на процесуалната задача във връзка със доказването, а от друга страна посоча на съда условията, при които ще разпредели на ответника доказателствената тежест за установяване на фактите, че е налице равно третиране на ищеца. Нещо повече, това се прави в етап, при които се провежда доказване, което не е характерно за делата, при които се прилага правилото на чл. 154 ГПК. В теорията се посочва, че „след като е възникнала оборимата фактическа презумпция за дискриминация, съдът следва да прехвърли тежестта на доказване, като за ответника възниква задължението да докаже легитимността на разликата в третирането.“¹⁸ В съдебната практика също се споменава за въвеждането в 3ЗДискр. на презумпция за осъществена дискриминация, при която правоприлагащият орган трябва да приеме дискриминацията за осъществена, само ако засегнатото лице докаже само определени елементи от състава на дискриминацията (Реш. № 393/15.11.2019 г. по адм. д. № 357/2019 г. на Административен съд Стара Загора).

При пряката дискриминация извод за оправданост *не е възможен*, тъй като забраната за неравно третиране в пряка причинност със защитен признак е абсолютна. Законът не допуска случаи на пряка дискриминация да бъдат оправдани с оглед легитимна законова цел и съответност на средството; изключенията са изброени стриктно в хипотезите на чл. 7 3ЗДискр. (Реш. № 246 от 28.12.2018 г. по гр. д. № 4719/2017 г., IV г. о. на ВКС).

В заключение може да се каже, че дискриминацията може да се определи като несправедливо или по-неблагоприятно отношение към един или повече членове на определена група по определени критерии, посочени в закона. Законодателният подход за въвеждане на правило за разместване на доказателствената тежест по чл. 9 3ЗДискр. способства за правилното и обективно установяване на факти и обстоятелства, сочещи наличието на акт на дискриминация. По отношение на тази разпоредба е налице съдебна практика, която последователно отчита разместването на доказателствената тежест и установява особено правило, съдържащо оборима презумпция за дискриминация. Това налага съдът коректно да указва на страните разпределението на тежестта на доказване в съдебните производства по 3ЗДискр.

¹⁸ Иванов, Ат. Цит. съч., с. 44.

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Споразумението по чл. 62 от Закона за защита от дискриминация

Благой Гинев*

В статията е разгледано сключването на споразумение в административното производство пред Комисията за защита от дискриминация. Изследван е въпросът за правната същност на споразумението. Анализирани са съотношенията на споразумението по чл. 62 ЗЗДискр. със споразумението по чл. 20 АПК. Проследява се дали е допустимо сключване на споразумение, когато страна в производството е сигналподател, или производството е по инициатива на Комисията с оглед правния интерес, който субектите имат. Анализирани са и правната същност на решението, с което Комисията одобрява постигнатото споразумение, както и неговата функция на способ за обезпечаване законосъобразността на постигнатото споразумение.

Ключови думи: споразумение, защита от дискриминация, допустимост, административно производство



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The Settlement under art. 62 of the Defence Against Discrimination Act

Blagoy Ginev

This report deals with the conclusion of a settlement in the administrative procedure before the Commission for the defense against discrimination. The question about the legal character of the settlement is examined. The correlation between the settlements in Art. 62 DADA and Art. 20 APC is analyzed. It is examined if a settlement is allowed when one of the sides is the sender of a signal, or a member of the Commission, based on the legal interest. The legal character of the decision for approval of settlements is also analyzed, as well as the decision's function.

Keywords: *settlement, defense against discrimination, admissibility, administrative procedure*



Законът за защита от дискриминация (ЗЗДискр.) е приет през 2003 г.¹. Още с обнародването му в нашето административно право се въвежда един непознат дотогава институт – този на споразумението. Този значителен напредък е белязан обаче и от рядкото му практическо приложение в първите години от действието на закона. Не само това, но уредба на споразумението в общ, кодифициращ закон, уреждащ административнопроцесуални отношения, е осъществена няколко години по-късно². По-късното приемане на Административнопроцесуалния кодекс (АПК) води до съществени размивания в правната уредба, които и към момента не са решени.

Настоящата статия има за цел да изясни същността на споразумението по чл. 62 ЗЗДискр. Това е породено от факта, че въпреки все по-набиращата „популярност“ тема за защитата от дискриминация институтът на споразумението не е бил предмет на изследване в доктрината. Неговото споменаване най-често е свързано с отбелязване възможността за такова развитие на производството, но без да се изследват неговите особености. Всичко това обуславя актуалността на темата.

1. Обща характеристика на производството по защита от дискриминация

Преди да се пристъпи към разглеждане на института на споразумението, следва да бъде анализирана дейността на Комисията за защита от дискриминация (КЗД или Комисията), като се изяснят не само актовете, които се издават, но също и другите основни характеристики на тази дейност. Всичко това е с цел даване на една обща дефиниция, посредством която да се изследват особеностите на споразумението по чл. 62 от ЗЗДискр. като институт на правото.

Производството пред Комисията за защита от дискриминация е особено производство. От една страна, е налице равнопоставеност между участващите субекти, като производството може да се определи като състезателно, тъй като дори членът на комисията, който е инициирал производството, не участва като участник от решаващия състав. В този смисъл са налице независимост и самостоятелност на правораздавателния орган от страните по правния спор. Всички тези характеристики биха били достатъчни, за да бъде КЗД определена като правораздавателен орган (административна

¹ Обн. ДВ. бр. 86 от 30 септември 2003 г., в сила от 1.01.2004 г.

² Това се осъществява с приемане на АПК, обн. ДВ. бр. 30 от 11 април 2006 г., в сила от 12.07.2006 г.

юрисдикция) с едно изключение. Решенията на КЗД не се характеризират с така присъщата за правораздавателните актове сила на пресъдено нещо³. Напротив, както доктрината⁴, така и съдебната практика⁵ третира решенията на КЗД като индивидуални административни актове, за които е присъща само формалната сила⁶. Това е породено и от правилото на чл. 70, ал. 1 ЗЗДискр., съгласно което АПК се прилага за въпросите, които не са уредени в гл. IV, раздел 1 (Производство пред Комисията за защита от дискриминация).

Освен това следва да се отбележи и спецификата на мерките, които КЗД може да предприеме. Според едната теория „осъществяването на някоя от формите на дискриминация не представлява административно нарушение и за него не се налага административно наказание“⁷. Отбелязва се също така, че са налице съществени разлики от определението за административно нарушение по чл. 6 ЗАНН, което налага нова дефиниция за принудата, прилагана от КЗД⁸. Другата теория е, че мерките на принуда, въпреки своите

³ За силата на пресъдено нещо по отношение правораздавателните актове на административните органи вж. Янкулова, С., 2021. Административните юрисдикции. С.: Монт, 100–118.

⁴ Пак там, 264–66.

⁵ В този смисъл вж. Решение № 5658 от 31.05.2023 г. по адм. д. № 6972/2022 г., V отд. на ВАС, Решение № 7343 от 21.07.2022 г. по адм. д. № 2768/2022 г., V отд. на ВАС, Решение № 7539 от 16.06.2020 г. по адм. д. № 10554/2019 г., V отд. на ВАС, Решение № 11869 от 14.08.2019 г. по адм. д. № 5334/2018 г., V отд. на ВАС, Решение № 11993 от 01.10.2012 г. по адм. д. № 4534/2012 г., VII отд. на ВАС, Решение № 9486 от 25.06.2013 г. по адм. д. № 4403/2013 г., VII отд. на ВАС.

⁶ За формалната доказателствена сила и съотношението със силата на пресъдено нещо вж. Георгиева, К., 2020. *За възможността да се налагат административни наказания с индивидуален административен акт*. – В: Сивков, Ц., П. Панайотов, К. Георгиева, Н. Кузманова. *50 години Закон за административните нарушения и наказания – история, традиции, бъдеще*. Сборник доклади. С.: Университетско издателство „Св. Климент Охридски“, 243–244.

⁷ Янкулова, С. Цит. съч., 267. Авторът отбелязва също така, че в ЗЗДискр. не е посочено, че осъществяването на дискриминация е административно нарушение. Посочва се и фактът, че законодателно е предвидено алтернативно производство за защита от дискриминация, а „обикновено законодателят не предвижда два правораздавателни органа да решават един и същ вид спорове“.

⁸ Чакърова, Д., 2023. *Особености на правната принуда, осъществявана от някои независими специализирани държавни органи*. – В: Новкиришка-Стоянова, М., Р. Илкова, К. Манов, Д. Начев. *Научни четения на тема „Право и принуда“*. Сборник доклади. С.: Университетско издателство „Св. Климент Охридски“, с. 85. Така „очевидните съществени отклонения от всички дефинирани в теорията видове юридическа отговорност... налагат задълбочено внимание към тази законодателна реалност, за да бъдат намерени от правната наука съответните дефиниции или да бъде променена от законодателя по начин, който да съответства на общата теория на правото“.

специфики са от вида на административните наказания и принудителните административни мерки⁹.

Вижданията за характера на принудата, налагана от страна на КЗД, подлагат на критика бланкетното използване на терминологията на ЗАНН, но в същото време не е предложено ново понятие за мерките. Затова може да се приеме, че производството за защита от дискриминация е производство по издаване на индивидуален административен акт¹⁰, но с него се налагат мерки за принуда от вида на административните наказания и принудителните административни мерки. Производството обаче има множество специфики, за разлика от общите правила в глава V на АПК, които ще бъдат само споменати с оглед изясняване същността на института на споразумението.

Производството по защита от дискриминация преминава през няколко фази. Първата фаза е свързана с проучване¹¹. В нея докладчикът събира писмени доказателства, необходими за пълното всестранно изясняване на обстоятелствата (чл. 55, ал. 1 ЗЗДискр.). Подобно на производството по издаване на индивидуални административни актове, и в производството пред КЗД събирането на доказателства се извършва служебно. Това обаче не лишава страните от възможността да представят или да искат събирането на доказателства.

След събирането на относимите и допустими доказателства съставът на Комисията призовава страните и уведомява заинтересованите лица за открито заседание (чл. 60 ЗЗДискр.). Това може да се определи като начало

⁹ Делиев, Б., 2020. *За някои административнонаказателни аспекти на производствата пред Комисията за защита от дискриминация*. – В: Сивков, Ц., П. Панайотов, К. Георгиева, Н. Кузманова. *50 години Закон за административните нарушения и наказания – история, традиции, бъдеще*. Сборник доклади. С.: Университетско издателство „Св. Климент Охридски“, с. 405. Авторът заключава, че „квалифицирането на дискриминационното нарушение (чл. 4–5 от ЗЗДискр.) като административно (чл. 6 от ЗАНН) е с много уговорки, които изискват отклоняване от общите правила“. Това е разбираемо и с оглед на факта, че при административното наказване е налице обвързана компетентност и при извършване на нарушение органът е длъжен да наложи наказание.

¹⁰ В този смисъл в Решение № 3280 от 21.03.2008 г. по адм. д. № 1124/2008 г., VII отд. на ВАС се отбелязва, че „съобразно легалната дефиниция на чл. 40, ал. 1 от ЗЗДискр. обаче, КЗД е независим държавен орган – юридическо лице със седалище в град София, а юридическата характеристика на постановяваните актове сочи на осъществявана форма на изпълнително-разпоредителна, а не правораздавателна дейност“.

¹¹ Такава фаза обаче не е приложима при самосезиране, тъй като тогава доказателствата се представят с писмения доклад на члена на КЗД (чл. 7, ал. 2, т. 3 от Правила за производство пред Комисията за защита от дискриминация).

на втората фаза от производството – същинската фаза¹². В това заседание също могат да се събират доказателства, но практиката показва, че страните първо се канят да се помирят. Това е разбираем подход с оглед на процесуалната икономия. Същинската фаза от своя страна има два етапа: 1) помирително производство, при което страните се канят да се помирят и приключва със споразумение и 2) разглеждане на преписката по същество. Предмет на настоящата статия е именно споразумението по 33Дискр. и помирителното производство, въз основа на което се е постигнало това съгласуване на волеизявления.

2. Съотношение на споразумението по чл. 62 33Дискр. и споразумението по чл. 20 АПК

Поради субсидиарното приложение на АПК въпросът за съотношението на споразумението по чл. 62 33Дискр. със споразумението по АПК следва също да бъде разгледан. Традиционно споразумението по АПК се разглежда, от една страна, в материалноправен смисъл като акт, който замества административния акт. От друга страна, споразумението по АПК е и вид производство, правилата за провеждането на което са уредени в чл. 20 АПК. В случая на 33Дискр. обаче законодателят използва различна терминология, за да обозначи, от една страна, производството по сключване, наричайки го помирително, а от друга, актът, с който приключва това производство, се нарича споразумение.

Споразумението по чл. 20 АПК се определя като начин „за съгласуване на воли на различни и равнопоставени (като правило) правни субекти (най-малко двама), вследствие на което се стига до резултат, който има юридическа и фактическа стойност, т.е. с определени правни и фактически последици“¹³. То може да се сключва до влизането в сила или до оспорването на административния акт пред съд (чл. 20, ал. 3 АПК), което се обяснява с оглед съгласуване волята на страните и постигане на съответен резултат с възможно най-ограничено участие на административните органи. Това

¹² Като такава я определя Палева, И., 2015. *Особености на процесуалните правила на Комисията за защита от дискриминация*. – В: Научни трудове на Института за държавата и правото. Т. XIII. С.: Издателство на БАН, с. 38.

¹³ Сивков, Ц., 2006. *Споразумението по член 20 на Административнопроцесуалния кодекс*. С.: Сиела, с. 26. В този смисъл и Сивков, Ц., 2012. *Споразумението по Административнопроцесуалния кодекс*. С.: Сиела, с. 68.

означава, че споразумението може да се сключи в периода между съобщаването до оспорването на административния акт пред съда¹⁴.

За разлика от уредбата в АПК, споразумението по 33Дискр. може да се сключи само въз основа на специална процедура. Тази процедура може да се проведе във всяка една фаза на производството, ако страните са имали воля да се помирят¹⁵. Такава обаче трябва да е изявена. Затова ако една от страните не е изпратила процесуален представител на заседанието пред КЗД, то разпоредбата на чл. 62 33Дискр. не намира приложение¹⁶. Налице е и различие в крайния момент, в който може да се сключи споразумение. Споразумението следва да се сключи, докато преписката се разглежда от КЗД¹⁷. Веднъж постановено решение, дори да не е влязло в сила (каквото е общото правило по чл. 20, ал. 3, предл. 2 АПК), не може да сключи споразумение между страните.

На следващо място различие в уредбата има относно предметния обхват на споразумението. Съгласно чл. 20, ал. 4 АПК със сключването на споразумението административният акт се обезсилва. Това означава, че производството се прекратява, тъй като предметът е изчерпан. За разлика от общата уредба споразумението по чл. 62 33Дискр. може да се сключи само за част от спора, като производството продължава за частта, за която не е постигнато споразумение (чл. 62, ал. 3 33Дискр.). Практически най-често срещаната хипотеза е когато две лица са обвинени в нарушаване забраната за дискриминация – едното сключва споразумение, а другото не – в този случай производството продължава в съответната част¹⁸.

¹⁴ Сивков, Ц., 2006. *Споразумението по член 20...*, с. 45.

¹⁵ В този смисъл вж. Решение № 10194 от 5.10.2015 г. по адм. д. № 6859/2014 г., VII отд. на ВАС.

¹⁶ Решение № 11851 от 12.10.2009 г. по адм. д. № 6881/2009 г., VII отд. на ВАС и Решение № 2077 от 10.02.2020 г. по адм. д. № 10561/2019 г., V отд. на ВАС.

¹⁷ Затова в Решение № 305 от 11.03.2021 г. по пр. № 113/2020 г. на КЗД, пети с-в, се отбелязва, че „когато съставът констатира, че не е дал възможност на страните за водене на помирителна процедура по реда на чл. 62 от 33Дискр., което представлява нарушение на процесуалните правила при поведение на производството по 33Дискр., тъй като правото на страните да изразят желание за водене на преговори за постигане на споразумения е преклудирано, се отменя решение на комисията за обявяване на преписката за решаване и преписката се връща на фаза открито заседание, с цел да се даде възможност за вземане на становище във връзка с процедурата по чл. 62 33Дискр.“.

¹⁸ Решение № 1013 от 31.01.2023 г. по адм. д. № 5811/2022 г., V отд. на ВАС и Решение № 16529 от 14.12.2011 г. по адм. д. № 690/2011 г., VII отд. на ВАС.

Споразумението по 33Дискр. има своите специфики от общите правила по АПК, но все пак те са приложими за неуредените от специалния закон случаи¹⁹. В следващите редове ще бъдат представени конкретни въпроси, като се разгледа и съотношението на двата института в по-голяма дълбочина.

3. Страни в помирителното производство

В процесуалното право традиционно е възприето понятието, че „страна“ е участник в административния процес, който брани собствени права или защитени от правото интереси²⁰. В производството по издаване на административен акт, което се прилага субсидиарно, това е лицето, за което административният акт ще създаде права или задължения²¹. Производството пред КЗД обаче е спорно, тъй като едната страна твърди, че е нарушено правото на равенство, а другата твърди, че действията или бездействията ѝ са законово оправдани²². В този смисъл са налице две страни – инициаторът на производството и този, който е обвинен в нарушаване забраната за дискриминация. Интересен от процесуална точка е въпросът за това кои страни могат да сключат споразумение по чл. 62 33Дискр., особено при положение че в 33Дискр. не е уредено кои са лицата, които могат да участват в помирителното производство, а се използва общото понятие „страна“.

Една от страните е лицето, за което се твърди, че е нарушило забраната за дискриминация (наричано и ответна страна)²³. То винаги би било страна в производството, тъй като с решение, установяващо дискриминационно отношение, дори и да не се налага административно наказание, би се наложила принудителна административна мярка. В този случай биха се засегнали права и законни интереси на лицето, за което се твърди, че е нарушило 33Дискр. Ето защо ответната страна винаги е страна в производството пред КЗД. Това гарантира и възможността да бъде страна по помирителното производство.

¹⁹ Решение № 4108 от 29.03.2010 г. по адм. д. № 16167/2009 г., VII отд. на ВАС.

²⁰ В този смисъл вж. Костов, Д., Д. Хрусанов., 2011. *Административен процес на Република България*. Второ преработено и допълнено издание. С.: Сиби, 69–70.

²¹ Пак там, с. 67.

²² В този смисъл в теорията се отбелязва, че административноправният спор е разногласие относно законосъобразността на поведението на едната от страните по административното правоотношение. – Лазаров, К., 1978. *Въпроси на административния процес*. С.: Издателство на Българската академия на науките, с. 40.

²³ Публикувани на <https://kzd-nondiscrimination.com/layout/index.php/layout-over-40-positions/normativni-dokumenti/pravila-za-proizvodstvo>.

По друг начин стои въпросът с правния интерес на инициатора на производството. Съгласно разпоредбата на чл. 50 ЗЗДискр., производството пред комисията се образува посредством един от трите начина: жалба на засегнатите лица, сигнал и инициатива на комисията.

Ако производството се инициира чрез жалба, „лицето, което се оплаква, е лично засегнато от акт на дискриминация и има пряк правен интерес от нейното установяване“²⁴. Този пряк интерес се изразява в това, че лицето желае да бъде третирано като равно при упражняване на своите права и законни интереси²⁵. Както се отбелязва в практиката, „жалбоподателят търси защита от КЗД за нарушени [свои] лични субективни права от неравно третиране, поради което става страна в административното производство пред КЗД с цел да получи благоприятно решение по чл. 47 ЗЗДискр.“²⁶.

Всички тези предпоставки обуславят и участието му в помирително производство, в резултат от което да бъде сключването на споразумение²⁷. Споразумението е начин и възможност за съгласуване на волята на различни страни²⁸. Като такова, това е най-благоприятното развитие на спора, тъй като се постига съгласие между лицето, което е третирано неравноправно, и осъществилия дискриминационното отношение. Както дискриминацията може да се проявява през множество различни форми, така и мерките за нейното преодоляване са различни. Споразумението позволява най-голяма свобода на действие при преодоляване на неблагоприятното третиране, тъй като изборът на мерки за преодоляване е предоставен на страните, а не с общата формулировка да се преустанови нарушението или възстанови първоначалното положение, каквото е правомощието на КЗД (чл. 47, т. 2 ЗЗДискр.).

Друг способ за започване на производството е чрез подаването на сигнал. Сигналът предполага, че „заявителят не е лично засегнат от акт на

²⁴ Генчева, З., 2011. *Основни положения в Закон за защита от дискриминация*. – В: Белов, М., Хр. Христов, Ст. Ставру. (Сб.). *Антидискриминационно право – гражданско-правни аспекти на защитата от дискриминация*. С., с. 92.

²⁵ Делиев, Б., 2015. *Значение на интереса при защитата от дискриминация*. – Правна мисъл, № 4, с. 82.

²⁶ Решение № 1155 от 31.01.2024 г. по адм. д. № 3032/2023 г., V отд. на ВАС.

²⁷ В преобладаващата част от практиката по чл. 62 ЗЗДискр. споразуменията, които се одобряват, са между жалбоподател и ответна страна. В този смисъл вж. Решение № 755 от 12.10.2021 г. по пр. № 462/2020 г. на КЗД, трети с-в, Решение № 373 от 13.04.2021 г. по пр. № 40/2020 г. на КЗД, четвърти с-в, Решение № 292 от 24.04.2019 г. по пр. № 576/2018 г. на КЗД, пети с-в и др.

²⁸ Сивков, Ц., 2006. *Споразумението по член 20 ...*, с. 27.

дискриминация и няма пряк правен интерес от нейното установяване²⁹. Сигналоподателят е такова лице, за което липсва засягане или застрашаване на субективно право или интерес, което търси защита от дискриминация на трети лица³⁰. Затова в практиката се твърди, че той само уведомява Комисията за наличие на неравно третиране³¹.

В 33Дискр. не е уредно специално правило за участие на сигналоподател в помирителното производство. Въпреки това в чл. 30, ал. 5 от Правилата за производството пред КЗД е записано, че когато производството е по сигнал като страна, в помирителното производство участва страната, подала сигнала. В практиката на Комисията се срещат решения, при които се одобрява споразумение между сигналоподател и лице, нарушило забраната за дискриминация³².

Такава практика следва да се приеме за неправилна. На първо място, споразумението не би имало правно действие спрямо сигналоподателя – той не би черпил права от този акт, неговото положение няма да се промени. Не може да се приеме и тезата, че интересът се основава на правото на всеки член да живее в общество на толерантност, недискриминация и сигурност, на основание чл. 6 КРБ. Освен това едно споразумение между сигналоподателя и ответната страна може да предвижда мерки, които да не са в полза на неравноправно третираните, даже напротив. Сигналоподателят не може да оспорва решения на КЗД, в производството по което е бил страна, тъй като правото на оспорване пред съд се основава само на наличие на доказан пряк и личен правен интерес³³. В този смисъл той не може да иска от съда утежняване положението на ответната страна. Щом не може да утежни положението на лицето, обвинено в дискриминация, защо неговата воля да бъде решаваща при избора на мерки за преодоляване на дискриминационното отношение? Ето защо следва да се приеме, че сключването на споразумение между сигналоподателя и ответната страна е недопустимо.

Последната възможна хипотеза за започване на производство съгласно чл. 50 33Дискр. е чрез самоинициатива на КЗД. В Правила за производство

²⁹ Делиев, Б., 2016. *Значението на интереса* ..., с. 82.

³⁰ Решение № 3429 от 16.03.2021 г. по адм. д. № 10485/2020 г., V отд. на ВАС.

³¹ Решение № 1155 от 31.01.2024 г. по адм. д. № 3032/2023 г., V отд. на ВАС.

³² Решение № 107 от 19.02.2019 г. по пр. № 568/2018 г. на КЗД, първи с-в, Решение № 607 от 16.12.2019 г. по пр. № 95/2019 г. на КЗД, трети с-в, Решение № 137 от 1.03.2019 г. по пр. № 162/2018 г. на КЗД, втори с-в, Решение № 90 от 10.04.2012 г. по пр. № 69/2011 г. на КЗД, четвърти с-в, Решение № 78 от 6.04.2010 г. по пр. № 151/2009 г. на КЗД, първи с-в.

³³ Определение № 8863 от 12.06.2019 г. по адм. д. № 4499/2019 г., V отд. на ВАС.

то пред КЗД е уточнено, че производството може да се образува по писмен доклад от член на Комисията до председателя. Това е инициращият документ, въз основа на който започва производството по чл. 50, т. 2 ЗЗДискр.

Приема се, че „наличието на дискриминация спрямо определена категория лица дава правомощие на Комисията да се сезира и установи въпросното нарушение, като даде задължителни предписания за отстраняването му с цел защита интересите на определената обществена група“³⁴. Самосезирането е способът КЗД да осъществи целите, за които е създадена – предотвратяване на дискриминация, защита от дискриминация и осигуряване равенство на възможностите (чл. 40, ал. 1 ЗЗДискр.). В този смисъл, при самосезиране е допустимо сключване на споразумение³⁵, тъй като целите на Комисията могат да бъдат най-ефективно постигнати при изразено желание от страна на нарушителя и от страна на члена на КЗД. Не само това, но органът и неговите членове притежават специални знания, свързани с преодоляването и предотвратяването на неравното третиране, което би могло да допринесе до по-благоприятни от юридическа и обществена гледна точка мерки за въздействие³⁶.

В обобщение относно страните в помирителното производство, сключването на споразумение е допустимо между ответна страна и жалбоподател/член на Комисията (в хипотезата на чл. 50, ал. 3), но не и при участие на сигналаподател. Затова следва чл. 62, ал. 1 ЗЗДискр. да се допълни, като се добави, че споразумение между подателя на сигнала и ответната страна е недопустимо.

4. Съдържание на споразумението

Споразумението следва да реши правния спор, тъй като неговата цел е да определи дали поведението на ответната страна е законосъобразно или не, наборът от мерки, които могат да се предприемат, е разнообразен.

³⁴ Решение № 538 от 19.01.2015 г. по адм. д. № 4207/2014 г., VII отд. на ВАС.

³⁵ Решение № 71 от 3.02.2022 г. по пр. № 372/2020 г. на КЗД, Ad hoc с-в, Решение № 324 от 9.06.2022 г. по пр. № 218/2021 г. на КЗД, Ad hoc с-в, Решение № 372 от 29.06.2022 г. по пр. № 220/2021 г. на КЗД, Ad hoc с-в, Решение № 325 от 9.06.2022 г. по пр. № 221/2021 г. на КЗД, Ad hoc с-в, Решение № 103 от 24.02.2022 г. по пр. № 62/2021 г. на КЗД, Ad hoc с-в и др.

³⁶ Тук може да се постави въпросът дали не се нарушава принципът за равенство на страните поради това, че често в практиката се наблюдава хипотеза, при която споразумението от името на член на Комисията се подписва от юрисконсулт, но въпреки че представлява научен интерес, обсъждането на този въпрос значително надхвърля рамките на настоящото съчинение.

Всички те са с цел ефективно постигане целите на закона за равенство в третирането им във възможностите. С цел да се подчертаят предимствата на споразумението, най-удачно би било да се изясни съдържанието му чрез сравнение със съдържание на решение на КЗД при преписка, приключила по общия ред.

На първо място, решението на заседателния състав при приключване на преписката по общия ред има установително действие – установява се дали е извършено нарушение, кой е нарушителят и кое е засегнатото от дискриминационното отношение лице (чл. 65, т. 1–2 ЗЗДискр.). Установяване на самоличността на нарушителя и засегнатото лице е въпрос, който се обуславя от това дали е извършено нарушение. Често в практиката на Комисията се забелязва, че чрез споразумението не се установява дали е извършено нарушение. Така например в Решение № 155 от 20.04.2023 г. по пр. № 42/2021 г. на КЗД, 5–чл. с-в, се отбелязва, че страните нямат повече претенции една към друга и молят да се прекрати производството³⁷. Има и други случаи, при които ответната страна се съгласява, че действията ѝ могат да се тълкуват като дискриминиращи и ограничаващи права, но не се установява, че е налице нарушение на закона³⁸.

Видно от посочената практика, споразумението може да няма установителен характер спрямо отношението на ответната страна, както и въпросът дали то води до неравноправно третиране в нарушение на ЗЗДискр. В същото време ответната страна признава вина за определено деяние и често поема определени задължения, без да е налице основание за това. Необходимо ли е обаче да се сключи споразумение само с цел да се избегне установяване на нарушение? Следва да се приеме, че споразумението задължително трябва да има установителна клауза. Само така може да се гарантира възможността на пострадало лице да търси отговорност за вреди от ответната страна с иск по чл. 74 ЗЗДискр. Освен това е възможна хипотеза на помиряване на страните извън производството, въз основа на което едната страна да оттегли жалбата си и производството да се прекрати. Защо тогава да е налице възможност за „легитимиране“ на лично договаряне, което да няма за цел постигане на равно третиране?

На следващо място, с решението по реда на общото производство, Комисията определя вида и размера на санкцията. В теорията³⁹ се приема,

³⁷ В същия смисъл и Решение № 476 от 3.12.2018 г. по пр. № 15/2018 г. на КЗД, първи с-в.

³⁸ Решение № 373 от 13.04.2021 г. по пр. № 40/2020 г. на КЗД, четвърти с-в.

³⁹ Делиев, Б., 2020. *За някои...*, с. 394.

че не е задължително налагането на административно наказание. Това е възприето и в практиката, като например с Решение № 82 от 27.02.2024 г. по пр. № 508/2020 г. на КЗД, 5–чл. с-в, се установява административно нарушение, но не се налага административно наказание. Няма текст в закона, който да предположи, че тук е налице оперативна самостоятелност, което принципно е недопустимо в административното наказване. Формулировката на чл. 47, т. 3 ЗЗДискр. не позволява преценка относно налагането на наказание, но въпреки това в практиката се допуска „не-налагане“ на наказание при установено административно нарушение.

За разлика от решение по чл. 65 ЗЗДискр., при което преписката се прекратява по общия ред, със споразумението по чл. 62 ЗЗДискр. не може да се наложи административно наказание. Неучастието на компетентния държавен орган (Комисията) обуславя невъзможност за прилагане на държавна принуда, поради което няма как със споразумение да се наложи административно наказание. С решението по чл. 65 ЗЗДискр. се прилагат и принудителни административни мерки. Те често са формулирани без конкретизация, като в Решение № 78 от 16.02.2023 г. по пр. № 458/2020 г. на КЗД, 5–чл. с-в, се налага принудителна административна мярка, като предписва занапред виновното лице да се въздържа от бъдещо допускане на нарушения на действащото антидискриминационно законодателство в Република България.

По-различно стоят нещата със споразумението. В него често се уреждат по-конкретни задължения. Когато предметът на преписката е свързан с липсата на достъпна архитектурна среда, практиката е споразумението да съдържа задължение за осигуряване на такова съоръжение и срок за изпълнението му⁴⁰. Често се конкретизира и способът, като например в Решение № 162 от 15.03.2022 г. по пр. № 75/2021 г. на КЗД, Ad hoc с-в, където се отбелязва, че „достъпната архитектурна среда ще бъде осигурена с доставката на съоръжението – рампа за преодоляване на стълби, стъпала, препятствия и височини, осигуряваща безпроблемно влизане в помещението на хора със затруднено придвижване за осигуряване на достъпна среда“. В други случаи се посочва, че е допустим един от няколко различни варианта⁴¹. Съществува и практика, при която споразумението съдържа задължения за провеждане на действия – като инструктаж, лекция и други подобни – мерки, предприети

⁴⁰ Напр. Решение № 188 от 29.03.2022 г. по пр. № 281/2021 г. на КЗД, Ad hoc с-в.

⁴¹ Решение № 248 от 9.05.2021 г. по пр. № 112/2021 г. на КЗД, Ad hoc с-в.

с цел превенция и преодоляване на унизителната, обидна и застрашителна среда, резултат от вербалното насилие на лице в съответното учреждение⁴².

Въпросът, който следва да се постави на този етап, е свързан с характера на тези задължения. Представяват ли принудителни административни мерки, или са друг вид мерки? За да се отговори, следва да се разграничат двете на база няколко критерия. Принудителните административни мерки се налагат с конкретни цели – преустановяване на нарушение или предотвратяване и отстраняване на вредните последици от него. Задълженията, които се договарят като част от споразумението, често се припокриват като цел с тези по чл. 22 ЗАНН. Например мярка за създаване на достъпна архитектурна среда се налага с цел да се преустанови нарушението и да се предотврати последващо нарушаване правото на достъпна среда. Така и провеждането на инструктаж е с цел предотвратяване на бъдещо вероятно нарушение. Видно е, че тези мерки имат сравнително подобни цели. Въпреки това е налице съществено различие – принудителните административни мерки се налагат от държавен орган. И тук важи казаното по отношение на административното наказание. Не може по волята на две равнопоставени страни да се индивидуализират принудителни административни мерки. Това показва, че задълженията, които възникват на база споразумението, имат по-скоро договорен характер – най-вече на база свободата на договаряне, която равнопоставените страни имат.

С оглед изложеното по отношение на съдържанието на споразумението, може да се приеме, че предмет следва да е установяването на неправомерно третиране и поемането на договорни задължения. Тъй като административно наказание не може да се налага на база взаимно съгласие на равнопоставени субекти, такова не може да бъде предмет споразумението. Затова следва *de lege ferenda*, чл. 62 ЗЗДискр. да се измени така, че да въведе като задължителен реквизит на споразумението – установителна част.

5. Решение по чл. 62, ал. 2 ЗЗДискр.

За да породи правно действие, едно административно споразумение, сключено между страните по спора, следва да бъде одобрено (чл. 20, ал. 2, изр. 2 АПК). В доктрината е поставян въпросът за характера на това одобрение, като се приема, че това е „особен вид административен акт, издаден при усложнена процедура, в която е включен специфичен юридически факт –

⁴² Решение № 764 от 13.10.2021 г. по пр. № 895/2019 г. на КЗД, 5-чл. с-в.

споразумение между страни в производство пред административен акт⁴³. В същото време, по отношение на този акт не е изрично регламентирано, че подлежи на съдебен надзор за разлика от споразумението, което дава основание да се предлага допълнение на чл. 128, ал. 1, т. 2 АПК, с което изрично да се предвиди или изключи такава възможност⁴⁴.

Подобни въпроси не подминават и специалната по отношение на АПК хипотеза в антидискриминационното законодателство. В чл. 62, ал. 2 ЗЗДискр. е записано, че ако споразумението е постигнато въз основата на равно третиране, Комисията го одобрява с решение и прекратява преписката. От текста на разпоредбата е видно, че става дума за самостоятелен акт на компетентен орган – решение. Спорен обаче остава въпросът за възможността за оспорването му. В практиката на КЗД трайно е възприето, че споразуменията не подлежат на оспорване в частта, в която се одобрява едно споразумение между страните по преписката⁴⁵. Тази практика обаче не се базира на законово основание. Никъде не е уредено правилото, че споразумението не подлежи на съдебен контрол. Може да се приеме, че решението на Комисията следва да подлежи на съдебен контрол. Тази теза е вярна, доколкото решението може да е нищожно. Така например то може да е взето от некомпетентен орган или незаконен състав. Това са нарушения, които винаги водят до неговата нищожност, а както е известно, нищожността не настъпва, тя само се обявява. Един нищожен акт принципно не поражда действие, той е едно правно нищо⁴⁶. Тогава как може да се обясни хипотеза, при която решението за одобряване е нищожно? Няма ли производството по сключване на споразумението да е незавършено?

Следва да се постави и въпросът за това, доколко лицата имат правен интерес от оспорване на такова решение. Трудно може да се аргументира, че страни, изразили принципно съгласие по споразумението и неговото съдържание, имат правен интерес да оспорват акта по одобряването му. Освен това компетентен орган проверява дали е сключено на основата на равното третиране, което е основната цел на ЗЗДискр. Остава тогава възможността за

⁴³ Сивков, Ц., 2006. *Споразумението по член 20...*, с. 41.

⁴⁴ Пак там, с. 42.

⁴⁵ Решение № 129 от 7.06.2023 г. по пр. № 274/2012 г. на КЗД, пети с-в, Решение № 71 от 3.02.2022 г. по пр. № 372/2020 г. на КЗД, Ад хос с-в, Решение № 324 от 9.06.2022 г. по пр. № 218/2021 г. на КЗД, Ад хос с-в, Решение № 372 от 29.06.2022 г. по пр. № 220/2021 г. на КЗД, Ад хос с-в, Решение № 325 от 9.06.2022 г. по пр. № 221/2021 г. на КЗД, Ад хос с-в и др.

⁴⁶ Сивков, Ц. (2013) *Административно право и административен процес*. Първо издание. П.: Медицински университет – Плевен, с. 76.

трети лица, чиято правна сфера е засегната от споразумението, да оспорват решението за одобряването. Това не биха могли да бъдат пострадалите, тъй като, ако споразумението има установителна сила, каквато теза се изрази по-горе, те могат да се възползват от правото си на обезщетение по чл. 74 ЗЗДискр. Възможно ли е тогава да се мисли, че това са трети лица, на които споразумението вменява задължения? Отговорът по-скоро следва да е отрицателен. Решението на КЗД има контролна функция и следва да провери доколко задълженията, които се поемат със сключването на споразумението, са задължения по отношение на страните по преписката. Не би било мислимо в едно производство да се вземат решения, които да имат отношение в правната сфера на неучастващите в производството лица⁴⁷. Ако установи такова задължение, Комисията по-скоро следва да откаже да одобри споразумението и да конституира третото лице като страна в производството, ако счете, че неговото участие е от значение за решаване на правния спор, и пак да предостави възможността за сключване на споразумение⁴⁸. В това се наблюдава и обезпечителната функция на решението по чл. 62, ал. 2 ЗЗДискр. От една страна, се обезпечава законността, като се гарантира спазване на административнопроизводствените правила, а от друга страна, се постига основната цел на закона – равното третиране на лицата.

Интересен е и друг момент – следва ли решението да възпроизведе текста на споразумението. В по-старата практика текстът на споразумението или не се възпроизвежда⁴⁹, или се възпроизвеждат само в мотивите⁵⁰. Новата практика е възприела подхода да се възпроизвежда текстът на споразумението в диспозитива на решението⁵¹. Въпросът за мястото на текста на споразумението е и причината за особеното мнение на Атанас Мусорлиев към

⁴⁷ Все пак е възможна такава хипотеза.

⁴⁸ Такава хипотеза би била мислима при спор, когато е конституиран работодателят като юридическо лице, а личното отношение на съответно физическо лице от неговата структура е виновно за неравноправното третиране.

⁴⁹ Решение № 124 от 19.03.2015 г. по пр. № 280/2014 г. на КЗД, трети с-в, Решение № 275 от 14.07.2016 г. по пр. № 337/2015 г. на КЗД, първи с-в, Решение № 148 от 15.04.2016 г. по пр. № 80/2015 г. на КЗД, 5-чл. с-в, Решение № 209 от 5.12.2011 г. по пр. № 206/2011 г. на КЗД, втори с-в, Решение № 106 от 11.05.2010 г. по пр. № 154/2009 г. на КЗД, 5-чл. с-в и др.

⁵⁰ Решение № 128 от 15.07.2011 г. по пр. № 110/2010 г. на КЗД, първи с-в, Решение № 11 от 6.03.2007 г. по пр. № 95/2006 г. на КЗД, пети с-в, Решение № 10 от 6.03.2007 г. по пр. № 96/2006 г. на КЗД, пети с-в и др.

⁵¹ Решение № 91 от 11.04.2013 г. по пр. № 266/2012 г. на КЗД, четвърти с-в, Решение № 142 от 26.03.2015 г. по пр. № 354/2013 г. на КЗД, 5-чл. с-в, Решение № 422 от 25.10.2016 г. по пр. № 426/2015 г. на КЗД, трети с-в, Решение № 256 от 29.06.2016 г. по пр. № 48/2015 г. на КЗД, 5-чл. с-в и др.

Решение № 11 от 17.03.2015 г. по пр. № 242/2013 г. на КЗД, трети с-в, където се приема, че споразумението следва да се възпроизведе в диспозитива, като това изискване е свързано с възможността за принудително изпълнение на споразумението. Такъв спор е безпредметен, доколкото самото споразумение е изпълнително основание по реда на дял V от АПК (чл. 268, т. 3 АПК).

Заклучение

В заключение може да се направи изводът, че споразумението по ЗЗДискр. е институт, който е нужен и полезен. Неговите ползи са от изключително значение, тъй като дискриминацията е лично негативно отношение към някого, което най-лесно и ефективно може да се преодолее чрез постигане на взаимно съгласие между страните по спора. Въпреки това определени промени в законодателството следва да се предприемат с оглед съобразяване на уредбата с основните принципи на правото, което може да доведе до по-голямото доверие в този институт и повишаване на неговата приложимост.

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По някои въпроси, свързани със съдебното производство по член 71 от Закона за защита от дискриминация

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В настоящия доклад са разгледани някои особености, свързани със съдебното производство по дела, образувани по чл. 71 от Закона за защита от дискриминация. Обсъдени са формите на дискриминация: пряка и непряка дискриминация, тормозът, сексуалният тормоз, подбуждането към дискриминация; преследването, расовата сегрегация и изграждането и поддържането на архитектурна среда, която затруднява достъпа на лица с увреждания до публични места, както и възможността за съдебна и извънсъдебна защита на пострадалите от дискриминационно отношение лица. Разгледани са спецификите от гледна точка на образуване и водене на гражданско дело – безплатна процедура; особености във връзка с подаването на исковата молба в съда; страните; родовата и местната подсъдност; начина на предявяване на исковите претенции и силата на съдебното решение.

Ключови думи: *съдебно производство; дискриминация; закон; признаци; защита; съд; решение; обезщетение; вреди*



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On Some Issues Related to the Court Proceedings under the Article 71 of the Law of Protection Against Discrimination

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This report examines some questions related to the court proceedings in case initiated under Art. 71 of The Law of Protection against discrimination. The forms of discrimination are discussed: direct and indirect discrimination; harassment; sexual harassment; incitement of discrimination; persecution; racial segregation; and the establishment and maintenance of an architectural that impedes the access of people with disabilities to public places, as well as the possibilities of judicial and extrajudicial protection of the victims of discrimination. The specifics in terms of initiation and conduct a civil case: free procedure; specifics of the claim; parties jurisdiction are also examined in the report.

Keywords: *court proceeding; discrimination; law; signs; defense; court; decision; compensation; damage*



1. Същност на дискриминацията

Етимологията на думата дискриминация произтича от латинското „discrimination“, което означава „намирам различие“. Дискриминацията, като юридически факт представлява проявата на неблагоприятно третиране на едно лице въз основа на някой от посочените в закона признаци. Дискриминационното отношение по своята същност представлява и увреждащо действие на извъндоговорно основание (генерален деликт по смисъла на чл. 45 от Закона за задълженията и договорите (ЗЗД)) и е основание за възникване на облигационно правоотношение и претендиране на обезщетение от претърпелия дискриминация срещу делинквента (извършителя на непозволеното увреждане), тъй като съгласно общия принцип на непозволеното увреждане, залегнал в разпоредбата на чл. 45 от ЗЗД „Всеки е длъжен да поправи вредите, които виновно е причинил другиму“. На обезщетение от дискриминационно отношение подлежат всички видове вреди, както имуществените, така и неимуществените вреди.

2. Правна регламентация

Забраната за дискриминация е регламентирана в основния закон на Република България, както и в множество други международни правни актове. Разпоредбата на чл. 6 от Конституцията на Република България гласи, че всички хора се раждат свободни и равни по достойнство и права. Всички граждани са равни пред закона. Не се допускат никакви ограничения на правата или привилегии, основани на раса, народност, етническа принадлежност, пол, произход, религия, образование, убеждения, политическа принадлежност, лично и обществено положение или имуществено състояние. Принципът за забрана за дискриминация е доразработен и намира отражение в специалния Закон за защита от дискриминация.

Целта на специалния закон е посочена в разпоредбата на чл. 2 от ЗЗДискр. а именно да се осигури равенство пред закона; равенство в третирането и във възможностите за участие в обществения живот и ефективна защита срещу дискриминацията.

3. Форми на дискриминация

Законът различава няколко форми на дискриминация. Първата форма на дискриминация е пряката дискриминация, чиято легална дефиниция е посочена в разпоредбата на чл. 4, ал. 2 от ЗЗДискр. – всяко по-неблагоприятно третиране на лице на основата на някой от посочените признаци (забранена е всяка пряка или непряка дискриминация, основана на пол, раса, народност, етническа принадлежност, човешки геном, гражданство, произход, религия или вяра, образование, убеждения, политическа принадлежност, лично или

обществено положение, увреждане, възраст, сексуална ориентация, семейно положение, имуществено състояние или на всякакви други признаци, установени в закон или в международен договор, по който Република България е страна), отколкото се третира, било е третирано или би било третирано друго лице при сравними сходни обстоятелства. Тук за установяване на пряката дискриминация е нужно да има сравнителен критерий – друго лице, което е било третирано по-неблагоприятно от заявителя.

Втората форма на дискриминация е непряката дискриминация, чиято легална дефиниция е определена в разпоредбата на чл. 4, ал. 3 от ЗЗДискр. – поставянето на лице или лица, носители на признак по чл. 4, ал. 1, или на лица, които, без да са носители на такъв признак, съвместно с първите търпят по-малко благоприятно третиране или са поставени в особено неблагоприятно положение, произтичащо от привидно неутрални разпоредба, критерий или практика, освен ако разпоредбата, критерият или практиката са обективно оправдани с оглед на законова цел и средствата за постигане на целта са подходящи и необходими.

Тормозът по смисъла на чл. 5 от ЗЗДискр. като форма на дискриминация има легална дефиниция в § 1, т. 1 от Допълнителните разпоредби на ЗЗДискр., съгласно която тормоз е всяко нежелано поведение на основата на признаците по чл. 4, ал. 1, изразено физически, словесно или по друг начин, което има за цел или резултат нахърняване достойнството на лицето и създаване на враждебна, принизяваща, унижителна, обидна или застрашителна среда.

Сексуалният тормоз по смисъла на чл. 5 от ЗЗДискр. като форма на дискриминация има легална дефиниция в § 1, т. 2 от Допълнителните разпоредби на ЗЗДискр., съгласно която „Сексуален тормоз“ е всяко нежелано поведение от сексуално естество, изразено физически, словесно или по друг начин, с което се нахърняват достойнството и честта и се създава враждебна, принизяваща, обидна, унижителна или застрашителна среда и в частност, когато отказът да се приеме подобно поведение или принудата към него може да повлияе на вземането на решения, засягащи лицето.

Подбуждането към дискриминация по смисъла на чл. 5 от ЗЗДискр. като форма на дискриминация има легална дефиниция в § 1, т. 5 от Допълнителните разпоредби на ЗЗДискр., съгласно която „Подбуждане към дискриминация“ е пряко и умишлено насърчаване, даване на указание, оказване на натиск или склоняване към извършване на дискриминация.

Преследване по смисъла на чл. 5 от ЗЗДискр. като форма на дискриминация има легална дефиниция в § 1, т. 3 от Допълнителните разпоредби на ЗЗДискр., съгласно която преследването е: по-неблагоприятно третиране на лице, което е предприело или се предполага, че е предприело или ще предприеме действие за защита от дискриминация; по-неблагоприятно третиране

на лице, когато свързано с него лице е предприело или се предполага, че е предприело или ще предприеме действия за защита от дискриминация; по-неблагоприятно третиране на лице, отказало да дискриминира.

Расова сегрегация по смисъла на чл. 5 от ЗЗДискр. като форма на дискриминация има легална дефиниция в § 1, т. 6 от Допълнителните разпоредби на ЗЗДискр., съгласно която: „Расова сегрегация“ е издаването на акт, извършването на действие или бездействие, което води до принудително разделяне, обособяване или отделяне на лице на основата на неговата раса, етническа принадлежност или цвят на кожата.

Изграждането и поддържането на архитектурна среда, която затруднява достъпа на лица с увреждания до публични места, също се смята за дискриминация.

В Решение № 8105 постановено по адм. д. № 8708/2010 г., VII о., на ВАС¹ е посочено, че пряката дискриминация и тормозът по смисъла на чл. 5 ЗЗДискр., са две различни, самостоятелни форми на дискриминация. Фактическите им състави разкриват съществени разлики и прилики. Разликата е, че пряката дискриминация е различно третиране, докато за тормоза различното третиране е ирелевантно. Поради това пряката дискриминация изисква сравнител, а за тормоза той не е необходим. За тормоза релевантна е специалната цел или резултат на поведението, визирани в § 1, т. 1 ДР ЗЗДискр – накърняване достойнството на лицето и създаване на враждебна, обидна или застрашителна среда. За пряката дискриминация и за резултатния състав на тормоза умишълът е ирелевантен, докато за формалния състав на тормоза – той е елемент на фактическия състав. И двете форми на дискриминация обаче се основават на защитен признак по смисъла на чл. 4, ал. 1 ЗЗДискр. Именно обусловеността от защитения признак, а не самото деяние, без оглед на характеристиката, която е негово основание, го прави дискриминация, закононарушение по Закона за защита от дискриминация.

Не всяко лошо третиране, а само такова, основано на защитен признак, е дискриминация. Само на него законодателят е дал засилената законова защита.

В Решение № 586/27.07.2009 г. на ВКС по гр. д. № 1770/2008 г. на ВКС² е посочено, че не всички несполуки в живота на един човек могат да се обяснят с дискриминационно отношение към него. Критериите за защита по ЗЗДискр. са очертани в чл. 4 от него.

¹ Решение № 8105, постановено по адм. д. № 8708/2010 г., VII о., на ВАС.

² Решение № 586/27.07.2009 г. на ВКС по гр. д. № 1770/2008 г. на ВКС.

4. Видове защита от дискриминация – съдебна, извънсъдебна и наказателна защита

Съгласно разпоредбата на чл. 3 от ЗЗДискр., със защита по Закона за защита от дискриминацията се ползват всички физически лица на територията на Република България. Според ЗЗДискр. има два вида защита от дискриминация: съдебна, която се реализира чрез предявяване на иск пред районния съд и извънсъдебна (административна процедура) – чрез подаване на жалба или сигнал до Комисията за защита от дискриминация. Коя от двете форми на защита ще избере засегнатото от дискриминация лице за своята защита, зависи от него, като следва да се посочи, че съгласно разпоредбата на чл. 53 от ЗЗДискр., за производството пред комисията не се събират държавни такси и направените в хода на производството разноски са за сметка на бюджета на комисията. Също така на основание чл. 75, ал. 2 от ЗЗДискр. за производствата пред съда не се събират държавни такси, а разноските са за сметка на бюджета на съда. И двете процедури, както съдебната, така и извънсъдебната за предоставяне на защита от дискриминация са безплатни.

В Закона за защита от дискриминация са уредени две алтернативни възможности за установяване на нарушения в равенството на третирането. Едната е уредена в чл. 50 и следващите от ЗЗДискр. и се развива пред Комисията за защита от дискриминация, а другата е по реда на чл. 71 и следващите от ЗЗДискр. и се установява по съдебен ред. Право на всеки гражданин е да избере една от двете предоставени му от закона възможности да защити правата си. Установяването на дискриминационно действие в конкретния случай е основание за претендираните вреди. Поради това вземането на обезщетение за вреди от това действие става изискуемо след влизане в сила на решението, с което се установява дискриминационното действие. ЗЗДискр. въвежда специален ред за установяване на дискриминационно третиране и вземането за вреди става изискуемо след установяването по съответния ред на това третиране³.

Следва да бъде отбелязано, че Комисията за защита от дискриминация няма право да пререшава въпроси, вече разрешени със сила на присъдено нещо от съд. Влезлите в сила решения на съд са задължителни за всички държавни органи⁴.

Извън обхвата на ЗЗДискр. остава наказателноправната защита, която съответно е регламентирана в разпоредбите на наказателния кодекс и регулира обществените отношения, свързани със защита от дискриминация, когато същата осъществява и състава на престъпление по смисъла на разпоредбите в Глава трета „Престъпления против правата на гражданите“,

³ Решение № 13663/14.12.2016 г. на ВАС по адм. д. № 14346/2015 г.

⁴ Решение № 222/8.09.2013 г. на КЗД по преписка № 4/2013 г.

Раздел I „Престъпления против равенството на гражданите“; Раздел II „Престъпления против изповеданията“.

5. Съдебно производство по чл. 71 от ЗЗДискр.

Съдебното производство по дела по ЗЗДискр. е уредено в Глава четвърта, Раздел II от ЗЗДискр., озаглавен „Съдебно производство“, като съгласно разпоредбата на чл. 75, ал. 1 от ЗЗДискр. по въпросите, които не са уредени, в раздела се прилагат разпоредбите на Гражданския процесуален кодекс. Както беше посочено, същото е безплатно, за него не се дължи държавна такса, а разноските са за сметка на съда.

Исковете по чл. 71 от ЗЗДискр. следва да бъдат предявени винаги пред районния съд по постоянния адрес или седалището на ответника съгласно разпоредбата на чл. 105 от ГПК, регламентираща общата местна подсъдност по граждански дела. Съгласно разпоредбата на чл. 71, ал. 1 от ЗЗДискр. всяко лице, чиито права по ЗЗДискр. или по други закони, уреждащи равенство в третирането са нарушени, може да предяви иск пред районния съд с който да иска: установяване на нарушението; осъждане на ответника да преустанови нарушението и да възстанови положението преди нарушението, да се въздържа в бъдеще от по-нататъшни нарушения, както и обезщетение за вреди.

6. Процесуална легитимация на страните в процеса

Активно процесуално легитимиран (ищец по делата за дискриминация) да предяви иск по реда на чл. 71 от ЗЗДискр. е всяко лице, по отношение на което е била осъществена дискриминация в която и да е от формите на дискриминация. На основание чл. 71, ал. 2 от ЗЗДискр. процесуално легитимирани да предявят иск от името на лицата, чиито права са нарушени, по тяхно изрично искане са и синдикалните организации и юридическите лица с нестопанска цел за осъществяване на общественополезна дейност.

В случаите на дискриминация, когато са нарушени правата на множество лица, синдикалните организации и юридическите лица с нестопанска цел за осъществяване на общественополезна дейност могат да предявят и самостоятелен иск. В този случай непосредствено пострадалите от дискриминация лица имат право да встъпят като заинтересувана страна във висиящия процес съгласно разпоредбата на чл. 72, ал. 3 от ЗЗДискр.

Когато искът е предявен, на основание чл. 71, ал. 2 от ЗЗДискр. от името на лицата, чиито права са нарушени, по тяхно изрично искане, от синдикалните организации и юридическите лица с нестопанска цел за осъществяване на общественополезна дейност е налице процесуално застъпничество по смисъла на чл. 26, ал. 2, тъй като съответните синдикални организации или юридически лица с нестопанска цел за осъществяване на общественополезна

дейност предявяват от свое име чужди права. Това е изключение от общия принцип, че никой не може да предявява от свое име чужди права пред съд. В тези случаи, на основание чл. 26, ал. 4 от ГПК съдът следва да призове като страна и лицето, чието право е предявено, като те стават необходими другари по смисъла на чл. 216, ал. 2 от ГПК.

При постановяване на решение по реда на чл. 71, ал. 1, т. 3 от ЗЗДискр. обезщетението за вреди следва да бъде присъдено в полза на лицето, което е претърпяло вреди от дискриминацията, а не на синдикалната организация или на юридическото лице с нестопанска цел.

Пасивно процесуално легитимирани (ответник по делата за дискриминация) са лицата или органите и организациите, които са причинили вредите.

7. Начало на производството по защита от дискриминация пред съда

Началото на исковото производство на основание чл. 125 от ГПК се слага с постъпването на исковата молба в съда, като това може да се осъществи по три начина: чрез подаване на исковата молба в деловодството на съда; чрез изпращането на исковата молба по пощата чрез лицензиран пощенски оператор и чрез подаването на исковата молба по електронна поща. Исковата молба следва да бъде написана на български език и да има необходимото съдържание, посочено в разпоредбата на чл. 127 от ГПК: посочване на съда; името и адреса на ищеца и ответника, на техните законни представители или пълномощници, ако имат такива, електронен адрес за връчване при условията и заявление дали желае връчване на посочения електронен адрес, както и телефонен номер на ищеца и неговите представители или пълномощници, единния граждански номер на ищеца и номера на факса и телекса, ако има такива; цената на иска, когато той е оценяем; изложение на обстоятелствата, на които се основава искът; в какво се състои искането; подпис на лицето, което подава молбата. В исковата молба ищецът е длъжен да посочи доказателствата и конкретните обстоятелства, които ще доказва с тях, и да представи заедно с нея всички писмени доказателства. Ако подателят на молбата не знае или не може да я подпише, тя се подписва от лицето, на което той е възложил това, като се посочва причината, поради която сам не е подписал. По осъдителен иск за парично вземане ищецът посочва банкова сметка или друг начин за плащане. Към исковата молба се представят: пълномощното, когато молбата се подава от пълномощник и преписи от исковата молба и от приложенията към нея според броя на ответниците.

Проблем в практиката представляват случаи, когато исковата молба е подадена от лица, които изтърпяват наказание „лишаване от свобода“, чрез

администрацията на съответното пенитенциарно заведение. Обикновено в тези случаи исковата молба е написана на ръка, в много от случаите нечетливо и неграмотно и няма необходимото съдържание. Съдът в такива случаи е длъжен да даде указания на ищеца в едноседмичен срок да отстрани допуснатите нередовности, както и възможността да ползва правна помощ, ако има необходимост и право на това.

В случаи, когато е необходимо многократно даване на указания за отстраняване на нередовности в подадената искова молба, следва да се има предвид практиката на ВКС, посочена в Решение № 315/07.12.2010 г. постановено по гр. дело № 3555/2008 г. на 4-то гр. отделение на ВКС⁵, че оказването на съдействие на страните трябва да има адресат и двете страни по спора, а не едната да е в привилегировано положение спрямо противната. С многократните си указания за отстраняване на нередовности на исковата молба на практика съдът се превръща в помощник само на едната страна по делото, което накърнява изискването за равни възможности за упражняване на предоставените права.

В такива случаи е правилно на страната изрично да бъде разяснена възможността да ползва правна помощ и да бъде назначен адвокат, който да я представлява в процеса.

Пострадалото от дискриминация лице има възможност да предяви три иска: установителен иск, с който се иска от съда да установи в отношенията между страните, че спрямо ищеца е извършено нарушение, изразяващо се в дискриминация; осъдителен иск, с който се иска от съда да осъди ответника да преустанови нарушението и да възстанови положението преди нарушението, както и да се въздържа в бъдеще от по-нататъшни нарушения, и осъдителен иск, с който се иска съдът да осъди ответника да заплати на ищеца определена сума, представляваща обезщетение за претърпените от ищеца вреди вследствие на осъществената спрямо него дискриминация. Следва да бъде посочено, че съгласно чл. 51 от ЗЗД на обезщетение подлежат всички вреди – както имуществени, така и неимуществени (болка, страдание, морални вреди, стрес, срам, негативни емоционални преживявания), които са пряка и непосредствена последица от увреждането. Обезщетението за неимуществените вреди се определя от съда по справедливост на основание чл. 52 от ЗЗД. Съгласно Постановление № 4 от 23.12.1968 г. на Пленум на ВС⁶. Размерът на обезщетенията за неимуществени вреди се определя от съда по справедливост. Понятието „справедливост“ по смисъла на чл. 52 ЗЗД не е абстрактно понятие. То е свързано с преценката на редица конкретни

⁵ Решение № 315/7.12.2010 г., постановено по гр. дело № 3555/2008 г. на ВКС.

⁶ Постановление № 4/23.12.1969 г. на Пленум на ВС.

обективно съществуващи обстоятелства, които трябва да се имат предвид от съда при определяне на размера на обезщетението.

Всеки един от посочените искове може да бъде предявен както самостоятелно, така и в условията на обективно кумулативно съединяване. При извършения анализ на съдебната практика по дела, образувани по 33Дискр., прави впечатление, че обикновено търсената от съда защита е чрез обективно кумулативно съединяване на трите иска по чл. 71, ал. 1 от 33ДиВ Решение № 1301/22.01.2009 г. на ВКС по гр. д. № 5117/2007 г. на ВКС⁷ е посочено, че исковете, уредени с разпоредбата на чл. 71, ал. 1 от 33Дискр., са самостоятелни и предявяването на иск по т. 2, съответно по т. 3, не е обусловено от предявяване на иска по т. 1 – за установяване на нарушението, тъй като установяването на факта на нарушението се съдържа имплицитно (без да е казано изрично, се подразбира) във фактическия състав на другите два иска.

В закрито заседание съдът на основание чл. 140 от ГПК, след като провери редовността и допустимостта на предявените искове, както и другите искания и възражения на страните, се произнася с определение по всички предварителни въпроси и по допускане на доказателствата. Когато в отговора на исковата молба са предявени насрещни искания, съдът може да се произнесе по тях и по допускането на някои от доказателствата в първото заседание по делото. Съдът насрочва делото в открито заседание, за което призовава страните. Съдът може да съобщи на страните и проекта си за доклад по делото, както и да ги напъти към медиация или друг способ за доброволно уреждане на спора.

Съдът прави доклад по делото, който съдържа обстоятелствата, от които произтичат претендираните права и възражения; правната квалификация на правата, претендирани от ищеца, на насрещните права и възраженията на ответника; кои права и кои обстоятелства се признават; кои обстоятелства не се нуждаят от доказване; как се разпределя доказателствената тежест за подлежащите на доказване факти. Съдът указва на страните за кои от твърденията от тях факти не сочат доказателства.

Доказателствената тежест в производството по 33Дискр. за установяване на факта на упражнено спрямо ищеца дискриминационно отношение е на самия ищец. В разпоредбата на чл. 9 от 33Дискр. е посочено, че в производството за защита от дискриминация след като страната, която твърди, че е дискриминирана, представи факти, въз основа на които може да се направи предположение, че е налице дискриминация, ответната страна трябва да докаже, че принципът на равно третиране не е нарушен.

⁷ Решение № 1301/22.01.2009 г. на ВКС по гр. д. № 5117/2007 г. на ВКС.

В Решение № 511 постановено по гр. д. № 587/2009 г., III г. о., ГК, на ВКС⁸ е посочено, че с разпоредбата на чл. 9 на ЗЗДискр. е създадена изрична уредба относно доказателствената тежест в съдебното производство за защита срещу дискриминация. Законодателно е възприет принципът на разделяне на доказателствената тежест между ищеца и ответника. Основната доказателствена тежест е възложена на ищеца. Той е длъжен да докаже фактите, въз основа на които може основателно да се предположи, че е жертва на дискриминация. Само в този случай законът възлага доказателствената тежест на ответника да установи обратното, а именно, че правото на равно третиране на ищеца в конкретния случай не е нарушено. Неизпълнението от страна на ищеца на възложената му от закона доказателствена тежест е достатъчно основание за постановяване на отхвърлителен резултат по предявения иск. В същия смисъл е константната и актуална съдебна практика на ВКС. В Решение № 1432/8.01.2008 г. на ВКС по гр. д. № 1405/2006 г. на ВКС⁹ е посочено, че разпоредбата на чл. 9 от ЗЗДискр. представлява особено процесуално правило, установяващо специфично разпределяне на доказателствената тежест в процеса. Ако ищецът твърди, че са налице факти, които обуславят вероятност от дискриминационно третиране и ответникът ги оспорва, ищецът следва да докаже тези свои фактически твърдения. След доказване на твърденията, от които може да се направи извод, че е налице дискриминация, доказателствената тежест се прехвърля у ответника. За ответника възниква задължение да опровергае при условията на пълно доказване вероятността.

В Решение № 153 постановено по гр. д. № 6/2009 г., III г. о., ГК, на ВКС¹⁰ е посочено, че от значение за установяването на дискриминация е обективно съществуващ недопустим правен резултат при упражняване на дейността, проявен в очертаните от ЗЗДискр. форми на нежелано или по-неблагоприятно третиране, независимо дали при осъществяване на тази дейност са спазени съответните нормативни изисквания. ЗЗДискр. цели уеднаквяване и санкциониране на всяко поставяне в неравностойно положение според признаците, изброени в разпоредбата на чл. 4, ал. 1 ЗЗДискр., или на всякакви други признаци, установени в закон или в международен договор, по който Република България е страна. Това по-неблагоприятно третиране на лице въз основа на признаците по чл. 4, ал. 1 ЗЗДискр. следва да се преценява в сравнение с начина, по който се третира, било е третирано или би било третирано друго лице при сравними сходни обстоятелства, поради което оплаквания, произтичащи от приложението на разпоредби,

⁸ Решение № 511 постановено по гр. д. № 587/2009 г., на ВКС.

⁹ Решение № 1432/8.01.2008 г. на ВКС по гр. д. № 1405/2006 г. на ВКС.

¹⁰ Решение № 153, постановено по гр. д. № 6/2009 г. на ВКС.

предвидени в специални закони, по същество са неотносими към предмета на спора по ЗЗДискр.

След като съдът разгледа делото в открито съдебно заседание, следва да се произнесе с решение в едномесечния инструктивен срок, с което да реши със силата на пресъдено нещо спора между страните (в зависимост от предмета на спора) – установено ли е нарушение, представляващо дискриминация, и осъжда ли ответника да преустанови нарушението и да възстанови положението преди нарушението, както и да се въздържа в бъдеще от по-нататъшни нарушения; както и дали осъжда ответника да заплати на ищеца обезщетение за претърпени вреди. Решенията на районните съдилища, на основание чл. 258 от ГПК, подлежат на обжалване пред окръжните съдилища, в двуседмичен срок от връчването им на страните по делото. Решенията на окръжните съдилища подлежат на касационно обжалване при наличие на предпоставките на чл. 280 от ГПК.

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Защита от дискриминация по исков ред

Мария Чочова*

В Закона за защита от дискриминация са установени две форми на защита – по административен ред пред Комисията за защита от дискриминация и по съдебен ред. Изложението е посветено на втората форма на защита от дискриминация чрез инициране на исково производство пред съда. Направен е анализ на правната уредба и достъпната съдебна практика.

Ключови думи: дискриминация, защита от дискриминация, съдебно производство



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Protection against Discrimination by way of claim

Maria Chochova

The Protection against Discrimination Act establishes two forms of protection – administratively before the Commission for Protection against Discrimination and judicially. The study is devoted to the second form of protection against discrimination, by initiating a claim procedure before the court. An analysis of the legal framework and the available judicial practice was made.

Keywords: *discrimination, protection from discrimination, legal proceedings*



Действащото законодателство регламентира три начина за защита от дискриминация – по наказателноправен, по административноправен и по гражданскоправен ред. В правната теория задължението за защита от дискриминация в дейността на съдебната власт се разглежда в два аспекта – позитивен и негативен.¹ „Негативният аспект на задължението за защита от дискриминация в дейността на съдебната власт се изразява в това, че при осъществяване на правораздавателната си функция съдебните органи не трябва да допускат дискриминация по отношение на участниците и страните в съдебното производство.“² Позитивният аспект се изразява чрез правораздавателната функция на съдилищата и „съдебната защита може да бъде подразделена на по отраслов признак на административна, гражданскоправна и наказателна.“³

Настоящото съчинение, без претенция за изчерпателност, е посветено на гражданскоправния ред за защита от неравно третиране, който Законът за защита от дискриминация (ЗЗДискр.) установява чрез разпоредбите на чл. 71 и следващи.

Правната регламентация на правото на равно третиране

Международното право и правото на Европейския съюз⁴ прогласяват защитата на правото на равенство пред закона и установяват забрана за каквато и де е дискриминация както и подбуждането към прояви на дискриминация.⁵

¹ Вж. Митрева, П. – В: Чернева, Б., П. Митрева, 2023. *Абсолютна забрана за дискриминация. Равенство в разнообразието и престъпления от омраза*. С.: Сиела, с. 176.

² Пак там, с. 176.

³ Пак там.

⁴ Вж. чл. 7 от Всеобщата декларация за правата на човека, 1948; Чл. 14 от Европейската конвенция за правата на човека; Чл. 21 от Хартата на основните права на Европейския съюз; Чл. 26 от Международен пакт за граждански и политически права; Международна конвенция за премахване на всички форми на расова дискриминация; Конвенция за премахване на всички форми на дискриминация по отношение на жените; Международна конвенция за защита на правата на всички работници мигранти и членовете на техните семейства; Конвенция относно дискриминацията в заетостта и професията; Конвенция № 111 на МОТ относно дискриминацията в областта на труда и професиите от 1958 г.; Конвенция № 100 на МОТ за равенството в заплащането на мъжете и жените за равен труд от 1951 г.; Директива 2000/43/ЕО на Съвета от 29 юни 2000 година относно прилагане на принципа на равно третиране на лица без разлика на расата или етническия произход; Директива 2000/78/ЕО на Съвета от 27 ноември 2000 година за създаване на основна рамка за равно третиране в областта на заетостта и професиите; Рамкова конвенция за защита на националните малцинства; Европейска харта за регионалните или малцинствените езици.

⁵ Подробно по въпроса за историческото развитие на правната уредба в универсалните международноправни актове на забрана за и защитата от дискриминация при

Конституцията на Република България установява, че всички хора се раждат свободни и равни по достойнство и права и че всички граждани са равни пред закона. Не се допускат никакви ограничения на правата или привилегии, основани на раса, народност, етническа принадлежност, пол, произход, религия, образование, убеждения, политическа принадлежност, лично и обществено положение или имуществено състояние (чл. 6 Конст.). В определени аспекти на забраната за дискриминация в областта на трудовите отношения, са били обсъждани в редица решения на Конституционния съд.⁶

Като продължение на конституционноустановения принцип за недискриминация Законът за защита от дискриминация забранява всяка пряка или непряка дискриминация по някой от установените в чл. 4, ал. 1 ЗЗДискр. признаци. Законът приравнява на дискриминация и тормозът на основа на някой от признаците по чл. 4, ал. 1 ЗЗДискр. (чл. 5 ЗЗДискр). Действието на законовата защита се простира върху всички физически лица на територията на Република България без оглед на тяхното гражданство (чл. 3, ал. 1 ЗЗДискр.).

Ясното разграничение между това едно лице да бъде поставено в по-неблагоприятно положение спрямо други лица и действителни актове на дискриминация е от съществено значение не само за теоретичното разглеждане на този въпрос, но и от практическа гледна точка. В съдебната практика е прието, че единствено поставянето на едно лице в по-неблагоприятно положение от другите само по себе си не може да се смята за дискриминация, тъй като смисълът на защитата от дискриминация е различното третиране да е съпоставимо с друго лице или група лица в сходно положение (Решение № 263 от 29.11.2019 г. по гр. д. № 1177/2019 г. на Върховен касационен съд, 4-то гр. отделение).

Съгласно чл. 71, ал. 1 ЗЗДискр извън административното производство пред Комисията за защита от дискриминация (КЗД), всяко лице, чиито права

упражняване на правото на труд вж. Стайков, Ив., 2018. *Уредба на забраната за дискриминация в универсалните международноправни актове*. – В: Сборник с доклади от международна научна конференция на тема „Ролята и значението на международното и наднационалното право в съвременния свят“, организирана по повод 90-годишнината на проф. д-р Иван Владимиров, 27.10.2017 г. София: Издат. комплекс – УНСС, 499–509.

⁶ Реш. № 1 от 1993 г. по конст. дело № 23 от 1992 г. (ДВ, бр. 14 от 1993 г.); Реш. № 2 от 1998 г. по конст. дело № 15 от 1997 г. (ДВ, бр. 22 от 1998 г.); Реш. № 2 от 1999 г. по конст. дело № 33 от 1998 г. (ДВ, бр. 8 от 1999 г.). Вж. и Неновски, Н., 2000. *Конституционният съд на Република България и закрилата на основните права*. – Юридически свят, № 2, с. 185–191; Гочев, Д., 2001. *Равенството пред закона и практиката на Конституционния съд*. – Правата на човека, № 1, с. 49–51; Стайков, Ив., 2010. *Прилагането на конвенциите на Международната организация на труда в практиката на Конституционния съд на Република България*. – Съвременно право, № 6, с. 27–54; Делиев, Бл., 2022. *Развитие на принципа на равенство в практиката на Конституционния съд на Република България*. – STUDIA IURIS, № 2, с. 56–78.

за равенство в третирането са нарушени, може да предяви иск пред районния съд, с който да поиска установяване на нарушението, осъждане на ответника да преустанови нарушението и да възстанови положението преди нарушението, както и да се въздържа в бъдеще от по-нататъшни нарушения и обезщетение за вреди. Тази правна възможност е в съответствие с обособеното в Конст. право на защита, установено в чл. 56 Конст. Правото на защита е възприето в правната теория като универсално, отбранително, процесуално право⁷.

Правото на иск

Разпоредбата на чл. 71, ал. 1 ЗЗДискр очертава възможностите за предявяване на три иска, които могат да бъдат предявени всеки един самостоятелно или при условията на кумулативното им обективно съединяване. Преценката е на ищеца. „Провежданата пред районния съд съдебна защита по чл. 71 от Закона за защита от дискриминация и защитата в административното производство по Раздел I, Глава IV пред Комисията за защита от дискриминация са алтернативи, които засегнатите от дискриминационно третиране лица могат самостоятелно да изберат. И двете процедури важат за всички случаи на дискриминация срещу всички субекти, като целят установяване и санкциониране на установената дискриминация“⁸. Разпоредбата на чл. 52, ал. 2 ЗЗДискр., предвиждаща, че когато по същия спор има заведено дело пред съд КЗД не образува производство. В цитираната разпоредба е визирано именно съдебно производство по чл. 71 от ЗЗДискр. за установяване нарушение по ЗЗДискр. или други закони, уреждащи равенство в третирането, осъждане на ответника да преустанови нарушението и да възстанови положението преди нарушението, както и да се въздържа в бъдеще от по-нататъшни нарушения. Върховният административен съд (ВАС) приема, че трудовият спор не е от категорията на исковите по чл. 71 от ЗЗДискр. и не е основание за прекратяване на производството пред комисията (Решение № 728 от 16.01.2009 г. на ВАС по адм. д. № 13269/2008 г., докладчик съдията Павлина Найденова).

Въпросът за подсъдността на исковите по Закона за защита от дискриминация е разрешен с Тълкувателно постановление № 1 от 16.01.2019 г. по дело № 1/2016 г. на Върховен касационен съд и Върховен административен съд. Съгласно направеното тълкуване исковите с правна квалификация чл. 71, ал. 1, т. 1 и т. 2 ЗЗДискр. за установяване на нарушението по този закон, респективно за осъждане на ответника да преустанови нарушението и да възстанови положението преди нарушението, както и да се въздържа в

⁷ Вж. Друмева, Ем., 2013). *Конституционно право*. Четвърто допълнено и преработено издание. С.: Сиела, с. 679.

⁸ Съгласно Тълкувателно постановление № 1 от 16.01.2019 г. по дело № 1/2016 г. на Върховен касационен съд и Върховен административен съд.

бъдеще от по-нататъшни нарушения, са подсъдни на районния съд. Искът с правна квалификация чл. 71 ал. 1 т. 3 от Закона за защита от дискриминация е подсъден на районния съд.

Искът по чл. 71, ал. 1, т. 1 ЗЗДискр. е установителен, тъй като чрез предявяването му се цели установяване на конкретното нарушение на законоустановената забрана за осъществяване на пряка или непряка дискриминация, основана на някой от признаците по чл. 4 ЗЗДискр. В правната теория е прието, че „установителен иск е този, чиито петитум се ограничава с искането да се разреши граждански спор със силата на пресъдено нещо. Търсената с него защита се изчерпва в силата на пресъдено нещо, с която спорното право (правоотношение) се потвърждава или отрича. Затова установителният иск изразява в най-чист вид същността на исковия процес.“⁹

Законът регламентира възможност и за предявяване на два осъдителни иска, като чрез предявяването на иск по чл. 71, ал. 1, т. 2 ЗЗДискр се цели осъждане на ответника да преустанови нарушението и да възстанови положението преди нарушението, както и да се въздържа в бъдеще от по-нататъшни нарушения, а с този по чл. 71, ал. 1, т. 3 ЗЗДискр. осъждане на ответника да заплати обезщетение за вредите, причинени от съответните дискриминационни актове. „Защитата, която се търси с осъдителния иск, включва в себе си защитата, която се търси с установителния иск, но не се изчерпва с нея.“¹⁰ Характерът на вредите може да бъде както имуществен, така и неимуществен. Само засегнатото от дискриминационните действия лице може да претендира обезщетение за вреди, но не и лицата, активно процесуално легитимирани по чл. 71, ал. 2 и ал. 3 ЗЗДискр.

Върховният касационен съд отчита, че Комисията за защита от дискриминация може да установи какво е нарушението, кои са нарушителят и засегнатото лице, да наложи санкция и да приложи принудителни административни мерки. Но този орган няма правомощия да присъжда обезщетения при установено нарушение, свързано с неравенство в третирането, затова чл. 74 ал. 1 ЗЗДискр. дава възможност лицето, претърпяло вреди, да предяви иск за обезщетяването им по общия ред срещу лицата и органите, които са ги причинили (Определение № 58 от 30.12.2009 г. по гр. д. № 43/2009 г. на Върховен касационен съд).

От друга страна, съгласно практиката на Върховния административен съд, административните съдилища са компетентни да се произнасят по осъдителни иски за заплащане на обезщетение за вреди, причинени от неравно третиране тогава, когато фактическият състав на отговорността включва вре-

⁹ Иванова, Р. – В: Сталев, Ж., Ан. Мингова, О. Стамболиев, В. Попова, Р. Иванова, 2012. *Българско гражданско процесуално право*. Девото преработено и допълнено издание. Първо по действащия ГПК. С.: Сиела, с. 182.

¹⁰ Пак там, с. 190.

ди, причинени от незаконни актове, действия или бездействия на държавни органи и длъжностни лица, и е налице влязло в сила решение на Комисията за защита от дискриминация, с което се установява неравно третиране. Искът, съгласно чл. 74, ал. 2 ЗЗДискр., се предявява за разглеждане по реда на Закона за отговорността на държавата за вреди. Върховният административен съд приема също така, че исковете за присъждане на обезщетение за вреди от дискриминация извън фактическия състав на чл. 74, ал. 2 ЗЗДискр. са подсъдни на общите съдилища и се допускат за разглеждане, съединени с иск за установяване на нарушение от дискриминация (чл. 71, т. 1 и т. 3 ЗЗДискр.) или самостоятелно, ако има предварително установяване на нарушението от Комисията за защита от дискриминация (Решение № 1104 от 28.01.2021 г. по адм. д. № 7836/2020 г. на Върховния административен съд).

В случаите, когато дискриминационното действие е установено от Комисията за защита от дискриминация, съдът не установява повторно осъществена ли е дискриминация, от кого и срещу кого, а преценява единствено има ли причинени на пострадалото лице вреди, какви са те, пряка последици ли са от дискриминационното нарушение и какъв е размерът на обезщетението (Решение № 112 от 5.05.2016 г. по гр. д. № 6128/2015 г. на Върховен касационен съд, 3-то гр. отделение).

В съответствие с чл. 7 от Директива 2000/43/ЕО на Съвета от 29 юни 2000 година относно прилагане на принципа на равно третиране на лица без разлика на расата или етническия произход разпоредбата на чл. 71, ал. 3 ЗЗДискр. предвижда възможността в случаите на дискриминация, когато са нарушени правата на множество лица синдикалните организации и техните подразделения, както и юридическите лица с нестопанска цел за осъществяване на общественополезна дейност да предявят и самостоятелен иск. Лицата, чиито права са нарушени, могат да встъпят в процеса като подпомагаща страна по чл. 218 от Гражданския процесуален кодекс (ГПК). Върховният касационен съд приема, че за разлика от третото лице помагач, заинтересуваната страна по смисъла на чл. 71, ал. 2, изречение второ ЗЗДискр. не разполага с правата по чл. 177, ал. 1 ГПК. Тя следва да бъде призовавана и да бъдат изслушвани становищата ѝ (Определение № 620 от 8.11.2005 г. по ч. гр. д. № 467/2005 г., III г. о. на ВКС). В теорията се приема, че „тъй като въздейства със своите процесуални действия върху съдържанието на решението, като е даже възможно то да се гради само на тях, встъпилото лице е обвързано от силата на пресъдено нещо и може да се позове на нея в отношенията си с противната страна (чл. 223, ал. 1). В това отношение няма разлика между него и подпомаганата страна.“¹¹

¹¹ Попова, В. – В: Сталев, Ж., Ан. Мингова, О. Стамболиев, В. Попова, Р. Иванова, 2012. *Българско гражданско процесуално право*. Девето преработено и допълнено издание. Първо по действащия ГПК. С.: Сиела, с. 402.

Тежест на доказване

Съгласно Директива 2000/43/ЕО оценяването на фактите, от които може да се предположи, че е налице пряка или непряка дискриминация, се извършва от националните съдебни или други компетентни органи в съответствие с правилата на националното законодателство или практика. Такива правила могат да предвиждат, в частност, непряката дискриминация да се установява с всички средства, включително въз основа на статистически данни. Правилата за тежестта на доказване трябва да бъдат адаптирани, когато е налице *prima facie* случай на дискриминация и за да се приложи ефективно принципът на равно третиране, тежестта на доказване трябва да се премести върху ответника, когато се представят доказателства за такава дискриминация.

Разпоредбата на чл. 8 от Директива 2000/43/ЕО установява, че държавите членки следва да предприемат необходимите мерки в съответствие с техните национални правни системи, за да гарантират, че когато лица, които считат себе си за засегнати поради неприлагането спрямо тях на принципа за равно третиране, представят пред съда или друга компетентна власт факти, от които може да бъде заключено, че е налице пряка или непряка дискриминация, че ответникът следва да докаже, че няма нарушение на принципа за равно третиране. Изключение от приложението на тази разпоредба е допустимо към производства, при които съдът или компетентния орган разследват фактите по случая.

Директива 97/80/ЕО на Съвета от 15 декември 1997 година относно тежестта на доказване в случаите на дискриминация, основана на пола, в чл. 4 регламентира задължение за държавите-членки съгласно техните съдебни системи да вземат необходимите мерки така, че когато едно лице се счита засегнато поради неприлагането спрямо него на принципа на равно третиране и докаже пред съда или друг компетентен орган факти, които позволяват да се допусне съществуването на пряка или непряка дискриминация, ответникът следва да докаже, че не е имало нарушение на принципа на равно третиране.

В съответствие със законодателството на Европейския съюз Законът за защита от дискриминация регламентира специални правила досежно тежестта на доказване в чл. 9 ЗЗДискр., установявайки, че в производство за защита от дискриминация, след като страната, която твърди, че е дискриминирана, представи факти, въз основа на които може да се направи предположение, че е налице дискриминация, ответната страна трябва да докаже, че принципът на равно третиране не е нарушен. „Законодателят е предвидил, че за лицето, което е жертва на дискриминация, ще е много по-трудно да установи всички факти, които са от значение за определяне на

дадени действия или бездействия като дискриминация.¹² Извън установеното специално правило относно доказването в производството за защита от дискриминация, чл. 75, ал. 1 ЗЗДискр. регламентира, че по въпросите, които не са уредени в раздел втори на глава четвърта, се прилагат разпоредбите на Гражданския процесуален кодекс. В исковото производство, съгласно чл. 153 ГПК предмет на доказване са спорните факти от значение за решаване на делото и връзките между тях. Законът установява и правила при разпределянето на доказателствената тежест, като принципът е, че всяка страна е длъжна да установи фактите, на които основава своите искания или възражения (чл. 154, ал. 1 ГПК). Не е необходимо да се доказват факти, за които съществува установено от закон предположение. Оборване на такива предположения се допуска във всички случаи, освен когато закон забранява това (чл. 154, ал. 2 ГПК). „Правилото на чл. 9 ЗЗДискр. означава, че доказателствената тежест на страната – молител, в производството за защита от дискриминация включва доказване на юридически факт, от който произтича дискриминация, но не и нарушено право на равно третиране.“¹³

Върховният касационен съд приема, че основната доказателствена тежест е възложена на ищеца, като ищецът е длъжен да докаже фактите, въз основа на които може основателно да се предположи, че той е жертва на дискриминация, а ответникът да установи обратното – че правото на равно третиране на ищеца в конкретния случай не е нарушено. Неизпълнението от страна на ищеца на възложената му от закона доказателствена тежест е достатъчно основание за постановяване на отхвърлителен резултат по предявения иск (Решение № 85 от 13.09.2016 г. по гр. д. № 4328/2015 г. на Върховен касационен съд, 4-то гр. отделение).

Обезщетението за вреди

Чл. 15 от Директива 2000/43/ЕО установя, че държавите членки определят режима на санкции, приложими при нарушаване на националните разпоредби, приети в съответствие с настоящата директива, и приемат всички мерки, необходими, за да гарантират тяхното прилагане. Санкциите, които могат да включат изплащане на обезщетение на жертвата, трябва да бъдат ефективни, пропорционални и убедителни.

Аналогично е съдържанието на чл. 17 от Директива 2000/78/ЕО от 27 ноември 2000 година за създаване на основна рамка за равно третиране в областта на заетостта и професиите, според което санкциите, които могат да

¹² Иванов, Ат., 2015. *Актуални въпроси на доказването в гражданския процес*. С.: Нова звезда, с. 41.

¹³ Пак там, с. 42.

включат изплащане на обезщетение на жертвата, следва да бъдат ефективни, пропорционални и убедителни.

Когато дискриминационното действие е установено в производство по Гл. IV, Раздел I от ЗЗДискр. от Комисията за защита от дискриминация, претенцията за обезщетение за вреди от установеното дискриминационно действие се квалифицира по чл. 74 ЗЗДискр. Облигационният иск е от компетентността съответно на общите или от административните съдилища (чл. 74, ал. 1 и ал. 2 ЗЗДискр.), в зависимост от вида на отношенията, по повод на които е осъществено дискриминационното третиране – дали са отношения на равнопоставеност или на власти и подчинение (Определение № 12/15.02.2013 г. на смесен петчленен състав на Върховния административен съд и Върховния касационен съд по адм. д. № 2/2013 г.).

Относно вида на вредите, вследствие на причиняването на които е възникнало право на обезщетение, и относно отговорността на работодателя за дискриминация при упражняване на правото на труд Върховният касационен съд, в Решение № 109 от 25.06.2014 г. по гр. д. № 5663/2013 г. приема, че „проявата на дискриминация е деликтно деяние, но при действащи специални разпоредби в ЗЗДискр. общите по Закона за задълженията и договорите (ЗЗД) се прилагат субсидиарно. Отговорността на работодателя за дискриминация при упражняване правото на труд не е идентична с тази по чл. 49 ЗЗД, както е приел въззивният съд. Съгласно чл. 18 и чл. 19 ЗЗДискр. работодателят е длъжен да предприеме ефективни мерки за предотвратяване на всички форми на дискриминация на работното място и при неизпълнение носи отговорност по този закон за актове на дискриминация, извършени на работното място от негов работник или служител. Подобно на хипотезата по чл. 49 ЗЗД е уредена отговорност за вреди от чужди действия, но отговорността на работодателя по чл. 19 ЗЗДискр. е лична, като по характера си е близка с тази по чл. 47 и чл. 48 ЗЗД. Работодаателят, при нарушение на общото правило по чл. 18 ЗЗДискр., няма право на регресен иск против преките извършители, защото не отговаря вместо тях. Увреденият може по избор да предяви иска за обезщетение срещу работодателя и/или лицата, които са проявили дискриминация – чл. 74, ал. 1 ЗЗДискр. Отговорността на ответниците с оглед естеството на задължението им е солидарна“.

Такси и разноски в производството

Съгласно чл. 75, ал. 2 от ЗЗДискр. за производствата пред съд не се събират държавни такси, а разноските са за сметка на бюджета на съда. Разпоредбата е проявление на правото на ефективни правни средства за защита, установено в актовете на Европейския съюз. В съдебната практика тази разпоредба е възприета като процесуална, отчита се и че националното законодателство предвижда възможност за правна помощ по Закона за

правната помощ (Решение № 5733 от 18.05.2020 г. по адм. д. № 6405/2019 на Върховния административен съд). Тълкувайки разпоредбата, съдът приема, че за да упражни правото си на съдебна защита с подаване на жалба до съд, жалбоподателят не дължи държавна такса и не заплаща други разноски за провеждане на съдебното производство, но и че разпоредбата не урежда отговорността за разноски, които са направени от противната страна в съдебния спор, в който е привлечена, без да дава повод за него (Решение № 5733 от 18.05.2020 г. по адм. д. № 6405/2019 на Върховния административен съд; Решение № 6847 от 26.05.2010 г. на Върховния административен съд по адм. д. № 1765/2010 г.).

Подобно е и разрешението, дадено от Върховния касационен съд по повод разноските в исковото производство по чл. 71 ЗДискр., като по отхвърлени искове с правно основание чл. 71, ал. 1, т. 1 и т. 2 от Закона за защита от дискриминация, касационният жалбоподател не дължи заплащането на държавна такса за касационното производство предвид разпоредбата на чл. 75 от Закона за защита от дискриминацията (Определение № 3226 от 5.03.2009 г. по гр. д. № 3493/2008 г., III г. о. на ВКС).

В заключение в Закона за защита от дискриминация са установени две форми на защита – по административен ред пред Комисията за защита от дискриминация и по съдебен ред. Съответствието на националното законодателство и практика с установените стандарти, заложили в законодателството на Европейския съюз, може да обоснове заключението, че е постигната една от основните цели за осигуряването на ефективни правни средства за защита при всеки случай на нарушение на правото на равно третиране.

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Особености на престъпленията по българския Наказателен кодекс, извършвани с дискриминационен мотив

Красимир Манов*

В българския Наказателен кодекс са уредени няколко престъпления с оглед изрично посочен дискриминационен мотив, с който трябва да действа извършителят. Като тяхна основна особеност традиционно се отбелязва само субективният елемент – особенният мотив. В доклада те се анализират от специфична гледна точка. В основата си това са деяния, при които се осъществява престъпно психично въздействие. Това разкрива особености, на които обикновено не се обръща внимание в юриспруденцията. Някои от тях имат характер на скрити елементи – престъпен резултат, специфики на изпълнителното деяние и др.

Ключови думи: Престъпление, мотив, дискриминация, психично въздействие, скрити признаци на престъпния състав



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Peculiarities of Crimes under the Bulgarian Penal Code Committed with a Discriminatory Motive

Krasimir Manov

In the Bulgarian Penal Code, several crimes are regulated in view of an explicitly stated discriminatory motive, with which the perpetrator must act. Traditionally, only the subjective element – the special motive – is noted as their main feature. The report analyzes them from a specific perspective. Basically, these are acts in which a criminal mental impact is carried out. This reveals features that are usually overlooked in jurisprudence. Some of them have the character of hidden elements – criminal result, specifics of the executive act, etc.

Keywords: *Crime, motive, discrimination, mental impact, hidden elements of the crime*



Пълноценната правна защита от дискриминация безспорно трябва да включва и наказателноправна защита. Наказателното право има универсална правозащитна функция, доколкото е призвано да регламентира отношенията по повод престъпни посегателства срещу всяко правно защитено благо. Българският Наказателен кодекс понастоящем урежда не много на брой престъпни състави, описващи деяния, извършени с дискриминационен мотив, но все пак те имат характер на една разгърната наказателноправна уредба.

Подходът на законодателя е комплексен. От една страна са криминализирани общо деяния, мотивиращи към дискриминация – проповядване и подбуждане към дискриминация, извършване на насилствени действия с дискриминационен мотив, участие, образуване и ръководене на ОПГ или друго престъпно сдружение с такива мотиви.¹ Условно по-нататък тези състави ще наричам **първия компонент** на наказателноправната уредба на дискриминационните престъпления. От друга страна в системата от състави на различни престъпления са предвидени квалифицирани състави с оглед съответни дискриминационни подбуди.² Те представляват условно наречен тук **втория компонент** или аспект на тази нормативна уредба.

Именно във връзка с втория аспект на съществуващата наказателноправна уредба през 2023 г. законодателят предприе изменение и допълнение в НК с идеята за разширяване на кръга от престъпления, за които се предвижда засилена защита при дискриминационен мотив за извършването им, както и за допълване на каталога от защитени признаци, с оглед на които дискриминационното деяние да се счита за по-тежко наказуемо престъпление. Изменението на НК стана факт с обнародването на ЗИДНК в ДВ, бр. 67 от 4.08.2023 г. Отбелязвам това изменение тук поради факта, че наред с идеята за синхронизиране на законодателната техника при всички упоменати квалифицирани състави законодателят успя да постигне и съществено разминаване като се получи две групи състави с оглед релевираните защитени признаци. Това понастоящем определя една особеност на съставите на престъпления, които са обект на настоящото изследване.

За по-голяма яснота следва съвсем накратко да се проследи развитието на законодателната идея с включването на защитените критерии като субективни признаци от съставите на някои престъпления. До 2011 г. антидискриминационната наказателноправна защита се заключава един-

¹ Вж. чл. 162, 163, 164 от НК.

² Вж. чл. 116, ал. 1, т. 11, чл. 131, ал. 1, т. 12, чл. 142, ал. 2, т. 9, чл. 142а, ал. 3, т. 3, чл. 143, ал. 2, т. 2, чл. 144, ал. 3, т. 4, чл. 144а, ал. 3, чл. 148, ал. 1, т. 5, чл. 164, ал. 3, чл. 172, ал. 1, чл. 216, ал. 5, т. 4, чл. 320, ал. 3, чл. 330, ал. 2, т. 6.

ствено в няколкото състава по чл. 162–164 НК от първия компонент, описан по-горе. Към този момент в чл. 116 и чл. 131 съществуват квалифицирани състави на убийство, съответно на телесни повреди, извършени по хулигански подбуди. Именно по този модел на квалифициращо обстоятелство от субективната страна, свързано с подбудите, през 2011 г.³ законодателят ни за пръв път въвежда две нови обстоятелства – защитени признаци и то именно като субективни признаци на съставите – особени подбуди – съответно расистки и ксенофобски наред с хулиганските подбуди. Изменението, разбира се, веднага е възприето като положителна крачка в антидискриминационната защита, но почти веднага започват и критиките за непълнотата на „каталога“ от защитени признаци и особено свързаните със сексуалната ориентация, доколкото придобиха известност и привлякоха общественото внимание поредица от случаи, при които се установи или поне имаше съмнения за именно такива подбуди на извършителите. Допълването на съответните текстове като че ли беше неминуемо и това се случи през 2023 г. като 7 законопроекта са обединени в един общ в Народното събрание и разглеждани общо като предложения. В основата лежи законопроектът на Министерския съвет,⁴ разработен в Министерството на правосъдието както е редът. Съгласно проекта се разширява кръгът от престъпления, за които се предвиждат подобни квалифицирани състави с оглед особените дискриминационни подбуди, а именно: расистки или ксенофобски. Така всички посочени квалифицирани състави имат почти унифициран вид от гледна точка на законодателна техника.

Любопитното е, че между първо и второ четене на законопроекта се появяват предложения от група народни представители,⁵ с които се предвижда за всички описани състави – и съществуващите вече, и новоприетите, да се добави и признакът „подбуди, свързани със сексуалната ориентация“. Мотивите са свързани именно с нашумелите съдебни дела. В приетия в крайна сметка ЗИДНК такова допълнение фигурира в някои от изменените състави, но не и в тези по чл. 143, ал. 2, т. 2, чл. 144, ал. 3, т. 4, чл. 144а, ал. 3, чл. 148, ал. 1, т. 5, чл. 164, ал. 3, чл. 330, ал. 2, т. 6 и чл. 419а НК. От изказванията в Комисията по правни въпроси и в пленарната зала при второто гласуване не може да се извлече особена правна аргументация защо в посочените няколко състава този признак не е релевантен, а в останалите е. Във всички случаи обаче остават въпроси за законотворческия процес –

³ ЗИДНК, ДВ, бр. 33 от 26.04.2011 г.

⁴ Вж. законопроект със сигнатура МС – 49–302–01–2/13.4.2023.

⁵ Вж. предложения от Надежда Йорданова, Петър Кьосев и Стою Стоев със сигнатура 49-354-04-26/9.6.2023 г.

как той се случва в съвременния ни законодателен орган, как се раждат законопроектите, как и колко те се обсъждат, доколко са резултат от правни и криминологични изследвания и аргументи и редица други въпроси. За момента те ще си останат повече във вид на реторични въпроси и тук няма да се опитвам да им дам отговор. Посоченото разминаване обаче създава усещането за недовършеност и необмисленост на правната уредба.

По-важната част от изследването ми е свързано с особеността на разглежданите състави като съвкупност от обективни и субективни признаци и специфичният им начин на взаимодействие и отражения един върху друг.

При съставите от първия компонент на наказателноправната уредба на дискриминационните престъпления основен интерес представляват различните форми на изпълнителни деяния и най-вече проповядването и подбуждането към омраза или дискриминация. Обикновено те се разглеждат съвсем повърхностно в рамките на общ преглед или коментар на съответните състави и като цяло остава недоизяснена същността и отликата на тези понятия. Затова изясняването на посочените понятия и особено проповядването като изпълнително деяние са били обект на отделно изследване⁶ и тук то няма да бъде възпроизвеждано. При тези престъпления няма никакво съмнение, че се касае за престъпно психично въздействие.

Що се отнася до втория компонент на наказателноправната уредба на разглежданите престъпления, на пръв поглед всичко е ясно. Става въпрос за престъпления, чиито основни състави са изяснени в правната доктрина и съдебната практика и въвеждането на един особен признак от субективна страна, който не променя нищо друго. По-задълбоченият анализ обаче според мен води до по-различни изводи и поставя някои въпроси. Същността на особения субективен признак – дискриминационният мотив, подбудите, с които се извършват тези престъпления, оказва пряко въздействие върху особеностите от обективна страна на посочените състави.

На първо място следва да се постави въпросът: Как се проявява в обективната действителност чрез престъпното деяние този дискриминационен мотив? Става въпрос за деяния, с които се засягат различни аспекти на личността на пострадалия или имуществени негови права. Деецът е мотивиран от принадлежността или поне съмнение за принадлежност на пострадалия към определена група, която е обект на омраза или друго дискриминационно отношение от страна на дееца поради етническа, религиозна или друга при-

⁶ Вж. Манов, К., 2021. *Проповядването като изпълнително деяние на престъпления по българския наказателен кодекс*. – В: Научни четения на тема „Право и религия“. Сборник доклади. С.: УИ „Св. Климент Охридски“, 360–371.

надлежност, сексуална ориентация или по друг някакъв признак. Обобщено може да се говори за ксенофобски (в широк смисъл) мотиви или подбуди, доколкото се отнася до омраза към различните, независимо от признака, а не само към чужденците.⁷ Няма друг мотив, т.е. деянието цели да изрази омразата на дееца към представителите на съответната група и в частност към пострадалия като такъв представител поне според мнението на самия деец. Обективната принадлежност на пострадалия към група според съответния защитен признак не е изискване на нито един състав. Възможно е тази принадлежност да е само предполагаема от дееца. Как последният изразява тази своя омраза? Възможностите са две – или пред самия пострадал, като върху него се въздейства и психически, тъй че да възприеме и осъзнае, че е обект на нападение именно поради съответния дискриминационен признак (защото е различен от извършителя), или като престъпното деяние или резултатът от него се демонстрират пред обществото, тъй че да стане ясно с какъв мотив е извършено престъплението. И в двата случая се изисква определена демонстративност на деянието или резултатът от него, изисква се някой да е възприел освен самия факт на деянието, но също и мотивите за него.

Престъпленията от тази група условно могат да бъдат наречени **демонстративни престъпления**. При тях не е задължително самото деяние да бъде афиширано пред определена аудитория, но е необходимо да бъде афиширан причиненият резултат, тъй като по този начин се изразява намерението на дееца, неговите особени подбуди. Тази особеност най-пълно е разкрита при хулиганството⁸. Тя обаче не е чужда и за престъпленията, извършвани по ксенофобски подбуди с оглед определен дискриминационен мотив – омраза към хората с различна расова, етническа, религиозна, политическа или др. принадлежност, сексуална ориентация или др.

Показателен е фактът, че преди приемането на квалифицирани състави с оглед конкретни дискриминационни признаци – расистки, ксенофобски

⁷ Вж. относно съдържанието на понятието „ксенофобия“ и в светлината на правото на ЕС в Панайотов, П., 2012. *Наказателното право на Европейския съюз и българското наказателно право*. С.: Сиби, с. 208 и сл. Относно тези престъпления се използва и терминът „престъпления от омраза“, макар да се спори дали омразата е задължителен мотив при извършването им или определяща е само принадлежността на жертвата към съответна малцинствена група. Вж. по-подробно Neil Chakraborti and Jon Garland, 2009. *Hate Crime. Impact, Causes and Responses*. SAGE Publications, Los Angeles/London/ New Delhi/ Singapore/ Washington DC, 1–17.

⁸ Вж. Хинова, Т., 1976. *Престъпни посегателства против обществеността* ред. С.: Изд. на БАН, с. 53 и сл.; Колектив под научната ред. на проф. К. Лютов, 1987. *Наказателно право на НРБ (Особена част)*. Т. 2. С.: Висш ин-т на МВР, с. 22.

или свързани със сексуалната ориентация подбуди, практиката приемаше най-често, че деяния, извършени по такива подбуди, следва да се квалифицират като по хулигански подбуди, доколкото във всички случаи не се открива друг личен мотив за дееца, а по същността си деянието демонстрира явно неуважение към обществото и правовия ред. С приемането на новите състави очевидно законодателят придава самостоятелно значение на подбудите, общо наричани тук ксенофобски в широк смисъл. Поставя се въпросът: ако бъде извършено престъпление по такива подбуди, за което обаче няма предвиден специален състав с оглед подбудите на дееца, то би ли могло такова деяние да се квалифицира като хулиганство (самостоятелно или като съвкупност с друг вид престъпление)? Вярно е, че възможностите за такова друго деяние понастоящем не са много, но не могат да бъдат напълно изключени. Струва ми се, че разумният подход е да не се изключва такава възможност и хулиганските подбуди да се преценяват като общо понятие за мотиви, целящи демонстрация на явно неуважение към обществото, общоприетите ценности и порядки, правовия ред и т.н. Омразата към хора с друга националност, етнически произход, гражданство, религия и т.н. може да представлява конкретна хипотеза на такъв мотив, а не се явява нещо различно и несъвместимо с хулиганските подбуди.

При хулиганството разглежданата демонстративност винаги е съществена характеристика на деянието. По естеството си хулиганското действие следва грубо да нарушава обществения ред и да изразява явно неуважение на обществото, което предполага на обществеността да стане явен този израз. При ксенофобските престъпления от тази група това не е задължително, или поне не е задължително да е пред широка публика. Струва ми се обаче, че за да бъде изразен съответният ксенофобски, дискриминационен мотив, се изисква деянието или неговият резултат да бъдат афиширани пред съответните жертви. Ксенофобът желае да демонстрира, че изразява не обикновено престъпно намерение, а именно омраза към различния.

При разкриването на същността на престъпленията от посочената група съществена роля имат психичните преживявания и на дееца, и на жертвата. За правилната квалификация на деянията е определящо установяването на мотивите и подбудите на дееца. За пълното разкриване на социалната същност на престъплението обаче винаги ще са от значение преживяванията на жертвата. В определени случаи това е явно отчетено от законодателя – когато предвижда квалифицирани състави с оглед особен резултат, стоящ в причинно-следствена връзка с деянието, но представляващ продукт на психичните преживявания на жертвата. Този резултат може да се изразява и в действия, предприети от пострадалия – напр. ако деянието

е довело до самоубийство или опит за самоубийство при блудството, при изнасилването. Най-явно законодателната идея за отчитане на преживяванията на жертвата можем да открием в квалифицираните състави на убийство и телесни повреди, извършени по особено мъчителен за жертвата начин.

За да се прояви дискриминационният мотив (ксенофобските подбуди), деянието трябва да предизвика определени психични процеси у възприемачите както у пострадалия, така и у обществеността – мисли, страхове, одобрение или неодобрение, омраза към различния или поне познание, че деецът е изпитвал такава омраза и т.н. С други думи, дори когато става въпрос за престъпление, чието изпълнително деяние принципно се осъществява чрез чисто физическо въздействие като убийство, телесна повреда, унищожаване или повреждане на чужда вещ и т. н., наличието на конкретните подбуди придава **характер на деянията в тези случаи и на престъпно психично въздействие**. То би било **пряко**, когато на самия пострадал се въздейства, така че да осъзнае дискриминационния мотив, да преживее извършването на деянието и физическото въздействие със знанието защо то се извършва, да се почувства обект на омразата на дееца и т.н. В случаите, когато се въздейства на обществеността чрез демонстриране на резултата от престъплението, така че да стане ясно, че извършеното е поради омраза към съответната дискриминирана група, ще става въпрос за **индиректно престъпно психично въздействие**.⁹ Особено показателно е, че при посегателства върху имуществените отношения такъв състав е предвиден само за унищожаването или повреждането на чужди вещи по чл. 216 НК, но не и за кражба например. И съвсем основателно. Деянието, което може да изрази омразата към пострадалия, е именно увреждането на имуществото на пострадалия, а не отнемането му, което говори повече за користна цел.

Изводът е, че съставите привидно изискват изпълнително деяние, което се извършва чрез физическо въздействие, но всъщност характеристиката на разглежданите квалифицирани състави се концентрира в психичното въздействие, което се осъществява наред с него. В случаи, когато за съставомерността на деянието или за индивидуализацията на наказателната отговорност пряко или косвено имат значение волята на пострадалия, поведението или определени вътрешни преживявания на пострадалия или на друго лице по време на или след извършване на престъплението, при което

⁹ Вж. относно престъпното психично въздействие и различните видове такова въздействие, вкл. пряко и непряко (индиректно), мотивиращо към определено поведение и целящо предизвикването на други психични процеси и т. н. в Манов, К., 2022. *Престъпно психично въздействие*. С.: Фондация за българска литература, 12–15.

е използвана сила или друга форма на физическо въздействие, можем да приемем, че всъщност се касае и за психично въздействие. Можем да го наречем **скрито психично въздействие**.¹⁰

Престъпленията, които са обединени в т. нар. втори компонент на правната уредба, са относително разнообразни като обект на посегателство, а оттам и като отделни признаци от обективна страна, поради което могат да бъдат класифицирани по различни начини с оглед на отделните критерии, макар че ги обединява проявлението на престъпно психично въздействие. Както вече стана ясно, те могат да спадат към групата на престъпленията, свързани с **пряко (директно) психично въздействие** или към тези, оказващи **непряко (индиректно) психично въздействие**, според това дали пряко се въздейства върху пострадалия при извършването им или чрез демонстриране на резултата от деянието се въздейства върху обществеността. Следва да се отбележи, че поради естеството на мотивите, с които действа извършителят на такова престъпление, почти във всички случаи ще се касае за пряко престъпно психично въздействие върху пострадалия, като е възможно едновременно с това да се постига и някакъв демонстративен елемент на резултата, така че да се въздейства индиректно и върху трети лица. Разбира се, не е изключена хипотеза, в която да не е осъществено пряко психично въздействие върху пострадалия, а да се демонстрира единствено резултатът на деянието, като се въздейства индиректно на други лица. Такъв би бил случай на убийство по ксенофобски подбуди, при което смъртта на жертвата е причинена бързо и изненадващо, без обяснения защо се върши деянието, но тялото е оставено на публично достъпно място заедно с някакви надписи, символи или друг начин на демонстриране на принадлежността му към определена група, обект на омраза от страна на извършителите, така че да стане ясно какъв е бил мотивът за престъплението. По-вероятно е такава хипотеза да се осъществи не при физическо въздействие върху самия пострадад (убийство, телесна повреда, отвличане и т. н.), когато извършителят едва ли би се въздържал от някаква словесна изява по отношение на самия пострадад, а при посегателство върху имущество, напр. разбиване на витрината на търговски обект на чужденец, повреждане на вещите в обекта в отсъствие на пострадалия и оставяне на определени надписи с характерни изрази или символи, разкриващи омразата към съответната дискриминирана група.

С оглед целта на оказаното психично въздействие престъпленията могат да бъдат **мотивиращи към определено поведение** на адресата на

¹⁰ Пак там, 27–28.

психичното въздействие или такива, целящи **предизвикване на определени психични или физиологични състояния или преживявания**¹¹. Към първата група определено спада съставът на принуда по чл. 143, ал. 3, т. 2 НК. Тук както при всяка принуда се цели пострадалият да бъде принуден да извърши, да не извърши или да претърпи нещо противно на волята му, т.е. да има определено поведение, желано от извършителя, за което самият пострадал не е формирал собствена воля.

Във всички случаи обаче разглежданите престъпления ще се отнасят към втората група, извършени с цел да предизвикат определени психични преживявания у пострадалия. В тази група разглеждам онези престъпления, при които психичното въздействие се осъществява спрямо едно лице, не с цел то да бъде мотивирано да извърши определено последващо поведение, а предизвиква определени психични процеси у възприемащия въздействието – мисли, емоции, чувства,¹² състояния и т.н. Те могат да бъдат краткотрайни или да оказат трайно въздействие върху психиката на човека, върху когото е оказано въздействието. Възможно е да са свързани с прояви на психични разстройства или други особености, напр. проява у жертвата на престъплението на различни психични механизми на защита, които да повлияят на личностните характеристики и поведението.¹³ Най-малкото тук се цели пострадалият да узнае, че е мразен заради принадлежността си към определена група – етническа, религиозна, национална, с определена сексуална ориентация или др., да се почувства унижен заради това, да осъзнае, че според дееца той е с по-ниска стойност като личност или др.

При повечето от разглежданата група престъпления, като изключим принудата, не е изключено предприемането на определени поведенчески актове във връзка с оказаното психично въздействие, но те не са задължителна последица от него, не са цел на деянието, чрез което се оказва психичното въздействие и може да нямат наказателноправно значение или да имат ограничено такова.

¹¹ Вж. по-подробно Манов, К., 2022. *Престъпно психично въздействие...*, с. 143 и сл.

¹² Дефинирането на емоциите, чувствата, афекти и т.н. психични явления продължава да е дискусивно в психологическите науки. Някои описват до 78 базисни чувства и емоции. Вж. Маринов, П., 2017. *Върху физиологичния афект: анализ на литературата и серия експертни казуси*. МУ „Проф. д-р Параскев Стоянов“, Варна, с. 16.

¹³ Такива механизми на защита са напр. потискането, отричането, проекцията – неосъзнато прехвърляне на собствени мисли и чувства към друго лице, регресията – неосъзнато приемане на поведенчески схеми, характерни за по-ранни етапи от развитието на човека и др. Вж. по-подробно в Попов, Г., 2010. *Обща и клинична психопатология*. СТЕНО, с. 119 и сл.

На следващо място интерес представлява анализът на обективната страна на разглежданите състави на престъпления от гледна точка на **престъпния резултат**. При съставите на престъпления, свързани с психично въздействие, каквито са разглежданите дискриминационни престъпления, възникват въпроси относно престъпния резултат в две групи случаи, които подлежат на изясняване.

На първо място съществуват състави, в които привидно е посочено само изпълнителното деяние, напр. проповядване или подбуждане към омраза или дискриминация (чл. 162, ал. 1, чл. 164, ал. 1 НК). Често тези престъпления се определят като формални. Същественото тук е, че посочените форми на изпълнително деяние имплицитно съдържат цел, с която се извършва деянието, а именно да се мотивират лицата, предмет на съответното престъпление, да предприемат определено поведение или да се съгласят с определени пропагандирани виждания. Постигането на тази цел е невъзможно без извършеното от субекта на престъплението да бъде възприето и въз основа на така възприетото деяние се достигне до решение и предприемане на съответно поведение или убедеността в проповядваната кауза. Всъщност изпълнителното деяние не е посочено конкретно чрез описване на определени действия на дееца, а по-общо чрез посочване на понятие, описващо една резултатна дейност. „Проповядва“ или „подбужда“ не отразяват конкретното действие, което следва да се извърши. Това вероятно най-често би било възможно чрез казване на определени реплики – чрез говорене. Те обаче ще могат да се окачествят като „проповядване“ или „подбуждане“, а не просто като „казване“, когато казаното се възприеме от адресатите (аудиторията) и осмислянето му може да доведе до желаните мисловни процеси, убеждения или решение за действие. Използването на подобни понятия, които описват дадена дейност, характеризираща се с постигането на определен резултат за посочване на изпълнителното деяние на дадено престъпление, е често срещана законодателна техника и това е съвсем естествено. То отговаря на абстрактното мислене на човека, до който законовият текст трябва да достигне, а помага и за по-лесното и кратко формулиране на разпоредбите в закона и тяхното разбиране. Това обаче често води до проблеми при анализирането на съответните състави на престъпления, тъй като затруднява отделянето на двата признака от обективна страна – изпълнителното деяние и престъпния резултат, които са посочени в една дума или израз общо. Най-вече проблем възниква с разпознаването на престъпния резултат, който имплицитно е заложен в употребеното понятие, с което е описано изпълнителното деяние, без формално в състава да е посочен като отделен признак.

Трябва да се отбележи, че в подобни случаи, дори когато в резултат на престъпното деяние жертвата или друго лице – предмет на престъплението, предприемат определено поведение, посочено като престъпен резултат в състава на престъплението, преди да се стигне до обективизиране на съответния поведенчески акт чрез конкретни действия, неминуемо в обективната реалност се реализират най-малко още няколко факта, които могат да имат своето относително самостоятелно значение. Това са възприемането на престъпното деяние от лицето – предмет на престъплението, както и вземането на решение за извършване на съответното деяние, провокирано от престъплението. Разбира се могат да се посочат и други етапи от механизма на деянието, които се случват преди вземане на решението – осъзнаване на необходимост, обсъждането на мотиви за и против извършване на съответното деяние и т.н.¹⁴ Тук обаче намирам за необходимо да акцентирам само върху възприемането и вземането на решение, тъй като те могат да имат относително самостоятелно значение във връзка с разглеждания проблем за общественотоопасните последици на престъпното деяние. Те са част от механизма на деянието в неговия психичен, субективен елемент, който намира битието си в психичния мир на човека, но се случват реално и представляват обективни факти от действителността. Затова тук тяхното значение се определя именно от това обстоятелство.

Изводът е, че съставите на престъпления, свързани с престъпно психично въздействие, каквито са разглежданите дискриминационни престъпления, не могат да бъдат формални. Ако в съответния състав на престъпление привидно не е изрично посочен някакъв резултат, то следва да се приеме, че неминуемо се изисква извършеното деяние да бъде възприето от пострадалия или друго лице, предмет на престъплението. Ако в съответния състав е предвидено предприемането на определено поведение от страна на пострадалия или друго лице, то освен това обстоятелство като допълнителен престъпен резултат следва да се приема още и фактът на възприемане от страна на лицето или лицата, предмет на престъплението, на осъществено психично въздействие, както и вземането на решение за предприемането на последващото поведение.

На второ място следва да се обърне специално внимание и на групата престъпления, извършвани принципно чрез физическо въздействие, независимо дали върху пострадалия или върху негови вещи или др. Както бе обосновано по-горе, в разглежданата категория престъпни състави се касае за

¹⁴ Вж. подробно за механизма на деянието Михайлов, Д., 1967. *Особености на деянието при усложнена престъпна дейност*. С.: Наука и изкуство, 16–40.

т. нар. **скрито психично въздействие**, следователно, казаното по-горе важи и тук. Убийството и телесните повреди, например, извършени по расистки или ксенофобски подбуди не са престъпления, при които просто деецът въздейства физически върху телесната неприкосновеност на пострадалия, но той също оказва и психично въздействие, с което обективира омразата си, предизвиква определени емоционални състояния и преживявания у жертвата и т. н. Следователно, дори и да има посочен изричен престъпен резултат в състава на такова престъпление, задължително следва да се отчита като допълнителен резултат и фактът на възприемане от страна на лицето, предмет на престъплението, на осъщественото психично въздействие и съответните психични преживявания и процеси, които това възприятие предизвиква.

Изложените до тук съображения за наличието на обстоятелства, които задължително следва да се съобразяват при квалификацията на престъпленията, извършвани с дискриминационен мотив като група престъпления, свързани с осъществяване на престъпно психично въздействие, ми дават основание да обсъждам понятието за **„скрити признаци от състава на престъплението“**. Става въпрос за признаци, които на пръв поглед не са изрично посочени в съответната особена наказателноправна разпоредба, описваща състава на престъплението, но за да се разкрие и изясни същността на съответното престъпление се оказва необходимо тези признаци да бъдат осъществени от едно конкретно деяние, за да бъде то квалифицирано по съответния състав. Това могат да бъдат преди всичко особености на изпълнителното деяние, на престъпния резултат, на особената цел, с която се извършва деянието.

Правилното разбиране на тези състави и пълноценното правоприлагане изискват не буквален (формален) подход при тълкуването на нормите на НК, а един по-гъвкав подход, който съответства на принципното разбиране, че правораздаването е творчески, мисловен процес и дейност на съда и другите правораздавателни органи.

Въвеждането на понятието за скритите признаци на състава на престъплението не противоречи на принципа на законоустановеност на престъпленията. Тези признаци са там – в съответните състави. Въпрос на отговорно отношение към правораздавателната и тълкувателната дейност е те да бъдат разкрити, въпреки липсата на изрични думи или изрази в текста на съответната разпоредба.

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За престъпленията с дискриминационен елемент

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Защитата от дискриминация е гарантирана както от вътрешни, така и от редица международни правни актове. Някои от тези актове са Хартата за основните права на Европейския съюз, Рамковото решение от 2008 г. относно борбата с определени форми и прояви на расизъм и ксенофобия посредством наказателното право, Европейската конвенция за правата на човека и основните свободи и много други. Въпреки наличието на тази всеобхватна регламентация защитата от дискриминация остава винаги актуален и общ проблем на цялото общество. Актуалността на проблема поставя въпроса за необходимостта от адекватни решения, които отговарят на все по-често случващото се в действителността. Наказателното право е правният отрасъл, който може да гарантира пълна защита от подобно поведение.

***Ключови думи:** дискриминационен елемент, лично достойнство, статус на жертвата, защитени признаци*



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On crimes with discriminatory element

Nikoleta Puleva

Protection against discrimination is guaranteed by both domestic and a number of international legal acts. Some of these acts are the Charter of Fundamental Rights of the European Union, the 2008 Framework Decision on combating certain forms and manifestations of racism and xenophobia through criminal law, the European Convention on Human Rights and Fundamental Freedoms, and many others. Despite the existence of this comprehensive regulation, protection against discrimination remains an ever-present and common problem of the whole society. The topicality of the problem raises the question of the need for adequate solutions that correspond to what is happening more and more often in reality. Criminal law is the branch of law that can guarantee full protection against such behavior.

Keywords: *discriminatory element, personal dignity, victim status, protected signs*



Престъпленията, които съдържат в състава си дискриминационен елемент, са една неголяма част от съдържанието на българския наказателен кодекс. В същото време на тези престъпни състави следва да се обръща изключително внимание, тъй като тяхното осъществяване може да застраши от едно лице до цели групи и общности от хора с идентична принадлежност, а дори и цели държави. Обект на тези посегателства могат да са не само хора, които принадлежат към определена група и притежават определени белези, а също и такива хора, за които деецът само предполага, че споделят подобни „различия“. Тези хора могат да са от раса, различна от тази на дееца, да изповядват религия, която не изповядва деецът, да споделят политически възгледи, които са противоположни на възгледите на дееца. Най-общо казано жертвите са „различните“.

Освен защитените признаци в НК, които очертават дискриминационната същност на тези престъпни състави, в чл. 4 от Закона за защита от дискриминацията са изброени още 11 такива признака. А за да не остане пропуск, изрично се посочва, че по отношение на неизброените признаци важи посоченото в международни договори, по които България е страна. Твърде широкият обхват на дискриминационните признаци е също от голяма важност за необходимостта от специално внимание по отношение на тези престъпни състави. Многообразието на защитените признаци води дори до възможността за тяхното групиране в различни категории. Така например съществуват признаци, свързани с културно-биологичната принадлежност на лицата – такива са раса, националност, народност, признаци, свързани с идентичността на лицата – пол, полова ориентация, сексуална ориентация, признаци, свързани с ценностната система – религия, политически убеждения и други¹. Признаците също така се делят на такива, които съществуват от минали времена – раса, етническа принадлежност, национална принадлежност, и такива, които се създават вследствие от развиващата се обществена среда – политически убеждения, сексуална ориентация и други.

В действащия НК няма легална дефиниция за дискриминация или дори обяснение кога едно престъпление е извършено с дискриминационен мотив. Това обаче не означава, че наказателното ни законодателство не приема насериозно този вид престъпност. Нещо повече, в наказателните закони преди действащия сега НК също са съществували текстове, които обособяват престъпленията с дискриминационен елемент. Такива са били например

¹ Подробна класификация на защитените признаци, както и обяснение за същността на понятието „защитен признак“, е разгледана в публикацията на д-р Ива Пушкарлова и Петя Попова на тема „Защитени признаци и дискриминация по асоциация“.

текстовете на чл. 173, ал. 2 от НЗ от 1896 г. и чл. 272 от НК от 1951 г., в които се посочват деяния, нарушаващи равенството между лицата, употребата на насилие или повреда на имущество поради народност, раса, религия или поради политически убеждения. Тези текстове са доказателство, че дори и в по-старото ни законодателство са защитавани редица признаци на различие. Държавата винаги се е грижела за различно третираните лица и цели общности. Прави впечатление единствено различното систематично място в нормативния акт на тези състави. А именно текстовете в НЗ от 1896 г. и в НК от 1951 г. на престъпленията с дискриминационен елемент се съдържат в глава Престъпления против обществения ред. Докато в актуалния НК тези престъпни състави се съдържат в главата Престъпления против правата на гражданите. Смятам, че старото законодателство е поставило текстовете на логически по-правилно място, доколкото тези деяния застрашават освен права на лицата, също така и пречат за нормалното функциониране на цялостния обществен ред.

България е държава членка на редица международни договори, конвенции и други нормативни актове, по които страната ни е задължена да приведе националното си законодателство в съответствие с предвиденото в тях. Така например с Рамково решение 2008/913/ПВР на Съвета от 28.11.2008 г. относно борбата с определени форми и прояви на расизъм и ксенофобия посредством наказателното право всички държави членки на ЕС се задължават да въведат наказателни санкции по отношение на актове, подбуждащи към насилие или омраза на основата на раса, цвят на кожата, произход, религия или убеждения, национална или етническа принадлежност, както и разпространяване на материали, изразяващи расизъм или ксенофобия. Според Международна конвенция за ликвидиране на всички форми на расова дискриминация страните членки се задължават да провеждат с всички уместни средства и без отлагане политика на премахване на расовата дискриминация във всичките ѝ форми и да подпомагат за разбирателство между всички раси. В текста на Конвенцията терминът „расова дискриминация“ е обяснен като всяко различие, изключване, ограничение или предпочитание на основата на раса, цвят, потекло или национален или етнически произход, което има за цел или резултат да унищожи или навреди на признаването, ползването или упражняването на равна основа на правата на човека и основните свободи в политическата, икономическата, социалната, културната или която и да е друга област на обществения живот. Член 4 от Конвенцията посочва, че „Държавите страни осъждат всяка пропаганда и всички организации, които се основават на идеите или теориите за превъзходство на една раса или група лица от един цвят или етнически произход, или които се опитват

да оправдаят или подпомагат расовата омраза и дискриминация в каквато и да било форма, и се задължават да предприемат незабавни и положителни мерки, предназначени да изкоренят всякакво подбуждане към или прояви на такава дискриминация“. Приетата от ЕС на 7 декември 2000 г. Харта на основните права забранява всяка дискриминация, основана на пол, раса, цвят, етнически или социален произход, генетични белези, език, религия или убеждения, политическо или друго мнение, принадлежност към национално малцинство, имуществено, рождение, увреждане, възраст или сексуална ориентация. На последно място ще посоча текста на Директива 2000/43/ЕО на Съвета от 29 юни 2000 година относно прилагане на принципа на равно третиране на лица без разлика на расата или етническия произход, която поставя цел да се осигури развитие на демократични и толерантни общества, които позволяват участието на всички лица независимо от тяхната раса или етнически произход. За постигането на тази цел в т. 13 е посочено, че всяка пряка и непряка дискриминация, основана на расов признак или на етнически произход в областите, обхванати в директивата, трябва да бъде забранена в Общността. Принципът на равно третиране според текста на Директивата означава отсъствие на пряка или непряка дискриминация, основана на расов признак или етнически произход. А пряка дискриминация има, когато едно лице е, било е, или би било третирано по-малко благоприятно от друго в сравнима ситуация въз основа на расов признак или етнически произход. Непряка пък е дискриминацията, когато видимо неутрална разпоредба, критерий или практика биха поставили лицата от дадена раса или етнически произход в особено неблагоприятно положение в сравнение с други лица, освен ако това е обективно оправдано от законната си цел и средствата за постигане на тази цел са подходящи и необходими. Без да изброявам повече международни източници, ще обобща само, че с всеки един международен акт, по който България е страна, е създадено задължението за последваща конкретизация във вътрешното законодателство чрез създаване на пряко приложима правна норма, в частност наказателноправна норма.

В следващите редове ще посоча накратко някои от белезите, по които се отличават престъпленията с дискриминационен мотив от останалите престъпления в НК. Основна характеристика на престъпленията с дискриминационен елемент е обстоятелството, че дискриминационният мотив за извършване на деянието е част от неговата субективна страна, а не е обективен признак. Това означава, че деецът извършва престъпното деяние воден не от обективно случващото се, а изцяло от едно специфично психично преживяване, както и до негови лични виждания и нравствени разбирания. Интересното при този вид престъпления е, че потенциалните жертви могат

въобще да нямат представа, че са обект на подобни престъпни деяния поради тяхно „различие“. И точно обратното – групи и цели общности, споделящи идентични виждания и защитени признаци, могат да са напълно наясно, че биха могли да станат жертви поради дискриминирането им. За жалост втората хипотеза е по-често срещана, което пък от своя страна осигурява необходимостта от защита на подобни лица, а тогава се намесва работата на Комисията за защита от дискриминация и други институции, натоварени с тази отговорна задача.

Престъпленията с дискриминационен елемент се характеризират също така и с обстоятелството, че тези престъпни състави притежават различно значение в зависимост от различното време на извършването им. Това е напълно оправдано да е така, и между другото се среща и в характеристиката на други престъпни състави от НК. Тук дори различия могат да се наблюдават и се наблюдават в различните правни системи, които възприемат признаците, очертаващи дискриминирането по различен начин. Всичко това се дължи на динамиката на развитие на обществото и на различните разбирания за защитими ценности между различните социални прослойки. Тези промени могат да се дължат дори и на смяна на политическата власт, при която има различни разбирания от досегашните.

Степента на обществена опасност при престъпленията с дискриминационен елемент е друга важна черта на тези престъпни състави. Поради твърде широкия обхват на правнозащитените признаци, които могат да бъдат застрашени или увредени от тези престъпни посегателства, и обществената опасност от тях се разпростира много широко. Престъпленията с дискриминационен елемент могат да засегнат на първо място живота, като ценност от най-висш порядък. В чл. 116, ал. 1, т. 11 от НК се предвижда наказание лишаване от свобода от 15 до 20 години, доживотен затвор или доживотен затвор без замяна за убийство, извършено по хулигански, расистки, ксенофобски² или свързани със сексуалната ориентация подбуди. Това деяние засяга основното благо на всеки – човешкия живот, именно поради тази причина и предвидените наказания са най-тежките. Общото, което свързва всички дискриминационни признаци, е изпитващата омраза от дееца към групата от хора или общности с тези характеристики. Рамково решение

² Рамково решение 2008/913/ПВР на Съвета от 28 ноември 2008 година относно борбата с определени форми и прояви на расизъм и ксенофобия посредством наказателното право определя расизма и ксенофобията като преки нарушения на принципите на свобода, демокрация, зачитане на човешки права и основни свободи, както и принципа на правовата държава, на които се основава ЕС и които са общоприети от държавите членки.

2008/913/ПВР на Съвета на ЕС посочва, че терминът „омраза“ се отнася до такава омраза, която се основава на раса, цвят на кожата, религия, произход, национална или етническа принадлежност. Поради тази своя особеност тези престъпления се срещат още и като престъпления от омраза³, престъпления на нетърпимостта. Извършителят на такова престъпление е воден основано от силна неприязън, негативно възприемане и отрицателна оценка по отношение на някои от изброените признаци. Формата на изпълнително деяние тук е същата като на умишленото убийство по чл. 115 от НК – отнемане на човешки живот. Разликата е изцяло в допълнително посочените защитени признаци, конкретно в разглеждания случай наличието на дискриминационен белег.

След това тези деяния могат да окажат въздействие и върху здравето и физическата цялост на пострадалия, затова разбираме от престъпния състав на чл. 131, ал. 1, т. 12 от НК. Съставът посочва същите признаци като разглеждания чл. 116, ал. 1, т. 11 от НК като предвиденото наказание зависи от степента на засягане на човешката цялост, съответно от кой вид ще е телесната повреда.

В глава III престъпления против правата на гражданите, в раздел I и раздел II се съдържат две групи деяния, които са престъпни заради наличието на дискриминационен елемент. За разлика от досега разглежданите престъпни състави тук, ако дискриминационният признак липсва, то няма извършено престъпление. Липсата на признака води до несъставомерност на деянието поради фактическа грешка. Още нещо, в тези престъпни състави целта на дееца може да е не само един човек или група от хора, а и тяхно имущество⁴. Тук деецът може да насочи противоправното поведение или към „различното“ лице, или към неговото имущество, а също така и към двата обекта.

³ Това обаче не е съвсем правилно да се поставя равенство между тези деяния, като детайлна разлика между престъпленията от омраза и тези против правата на гражданите в частност с наличието на дискриминационен мотив е изложена в дисертационния труд на Мария Петрова „Престъпления против правата на гражданите“ – <https://kr.uni-ruse.bg/index.php?r=file/download&id=7394>.

⁴ Чл. 162, ал. 2 НК – Който употреби насилие срещу друго или повреди имота му поради неговата раса, цвят на кожата, произход, народност, етническа принадлежност, религия, политически убеждения или сексуална ориентация, се наказва с лишаване от свобода от една до четири години и с глоба от пет хиляди до десет хиляди лева, както и с обществено порицание.

Чл. 164, ал. 2 – Който оскверни, унищожи или повреди религиозен храм, молитвен дом, светилище или прилежаща към тях сграда, техни символи, гробове или надгробни паметници, се наказва с лишаване от свобода до три години или с пробация, както и с глоба от три хиляди до десет хиляди лева.

Престъпният състав на чл. 162, ал. 1 от НК предвижда две форми на изпълнително деяние, чрез които може да се реализира. Първата от тях е проповядването, което е възприето в теорията като психическо въздействие върху едно или няколко лица, което е от естество и цели да внуши у адресатите отрицателно отношение към представителите на друга нация или раса⁵. Другата предвидена форма е подбуждането към дискриминация, което е възприемано като психично въздействие върху едно или няколко лица, което е от естество и цели да мотивира адресатите към противозаконни враждебни действия срещу едно или няколко лица от друга раса или националност⁶. Втората форма на изпълнителното деяние е по-силно изразена, доколкото при нея се наблюдава конкретно мотивиране на лице да извърши престъпление. Важно е да се отбележи, че не е необходимо мотивираното лице да е извършило престъплението, за да е налице реализиране на престъпния състав. Това е така поради обстоятелството, че престъплението е от вида на формалните престъпления, при които не е необходимо настъпване на престъпен резултат освен простото извършване на изпълнителното деяние⁷. В Закона за защита от дискриминацията е обяснено какво по смисъла на този нормативен акт е подбуждането към дискриминация, а именно – *пряко и умишлено насърчаване, даване на указание, оказване на натиск или склоняване към извършване на дискриминация*.

В чл. 162, ал. 2 НК изпълнителното деяние отново се изразява в две форми – употреба на насилие и повреждане на имот. Тук употребата на насилие вече е не въздействие върху психиката на лицето, а конкретно физическо въздействие. Употребата на насилие обаче не задължава да е настъпило реално увреждане на здравето или живота на пострадалия. Повреждането на имот също се отнася до конкретни действия, свързани с целостта на имота и неговото пряко засягане и увреждане⁸. Тук отново се наблюдава всеобхватната защита на възможните дискриминационни действия, а именно както извършени чрез психическо въздействие, така и чрез физическо такова⁹. Обектът на престъплението по чл. 162, ал. 2 НК е комплексен, тъй като включва както засягането на обществени отношения

⁵ Стойнов, А., 2003. *Наказателно право. Особена част. Престъпления против правата на човека*. С.: Сиела, с. 180.

⁶ Стойнов, А. Цит. съч., с. 180.

⁷ Среща се и обратното виждане, според което това престъпление е резултатно.

⁸ Стойнов, А. Цит. съч., с. 182.

⁹ Чл. 162, ал. 3 и ал. 4 и чл. 163 от НК няма да бъдат разглеждани подробно, тъй като те разкриват особености повече по отношение на формата на изпълнително деяние, а не по отношение на защитения непосредствен обект, който не се различава с този по чл. 162, ал. 1 и ал. 2 от НК.

по равно третиране на всички хора и групи от хора, така също и отношения по осигуряване на неприкосновеност на имуществото на тези лица.

Следващата група престъпни деяния са тези, насочени против свободата на изповедание – чл. 164–166 от НК. При тези престъпления защитеният признак е избраната от жертвата религия. Макар и не много и по тези престъпни състави има съдебна практика. Така например в Решение № 71 от 28.07.2016 г. по н. д. № 123/2016г., н. к., II н. о. на ВКС посочва, че *„в обхвата на престъплението по чл. 164, ал. 1 могат да попаднат не само отделни религиозни течения, ереси (секти), но и всяка световна религия, а дори и отдавна непрактикувани вярвания или такива с малобройни последователи. Достатъчно е изпълнителното деяние „проповядване на омраза“ да се корени в религиозни вярвания, да се опира на религиозни догми и постулати, за да е осъществен престъпният състав“*. Обществената опасност от тези престъпни състави засяга особен признак, поради което и при реализирането им трябва да се обръща специално внимание.

Последният престъпен състав, който ще разгледам и който съдържа в себе си наличие на дискриминационен елемент, е този по чл. 172, ал. 1 от НК, уреден в раздел VI престъпления против трудовите права на гражданите. Обектът на този престъпен състав е смесен, тъй като се засягат редица лични права и свободи на лицата. Текстът изброява правата, които са под защита, а именно народност, етническа принадлежност, раса, цвят на кожата, религия, социален произход, сексуална ориентация, членуване или нечленуване в синдикална или друга организация или политическа партия, а също така и поради лични или на близки на жертвата политически или други убеждения. Основната цел на този текст е защита и гарантиране на трудовите права на всички лица без значение на техните различия. Жертва на това престъпно деяние може да бъде само лице в трудоспособна възраст, което притежава някой от изброените правнозащитени признаци. Това прави и субекта на престъплението специфичен. Изпълнителното деяние се изразява в две форми – попречване на лицето да постъпи на работа или принуждаване на лицето да напусне работа. Първата от двете форми се отнася до реално настъпили пречки, без наличието на които жертвата е щяла да започне работа. А втората форма на изпълнителното деяние – принуждаването за напускане, се отнася до оказване на определено въздействие върху жертвата, без което същата ще остане на работното си място и ще продължи да изпълнява трудовите си задължения.

Признаците, които посочват възможността за оказване на дискриминационно поведение срещу едно лице, са, както вече посочих, немалко. Това води понякога до смесване на характерните белези на един признак с тези на друг такъв. Подобни проявления се наблюдават предимно в признаците,

които съществуват отдавна. Така например един от най-старите защитени признаци е расата. Съществуват изследвания по отношение на разграничаване на белезите на расата от тези на етническия произход, националност, народност, принадлежност към малцинство и други. Това смесване на признаците се получава поради сходните обстоятелства, които ги характеризират, но в същото време е необходимо те да бъдат добре разграничени. Обяснения за понятието раса има в редица нормативни актове, повечето от които международни. Без намерение за прецизност мога да посоча, че тук расата като защитен признак може да се разглежда като комбинация на хора в големи групи или общности, които са обединени от конкретни особености и принадлежности и така се разграничават една от друга. Всички останали защитени признаци също съдържат в себе си определени характеристики, по които се различават, но техните особености са в по-малко количество, което води до по-лесното им разграничение.

С така динамично променящата се обществена действителност се наблюдават все повече предложения за въвеждане и на нови престъпни състави, които да осигуряват защита по отношение на нововъзникнали обстоятелства и регулиране на обществени отношения. Това обаче е далеч нелек процес, който отнема немалко време и усилия от страна на редица хора и институции. Така например с изменение на Наказателния кодекс през 2011 г. се съставят квалифицираните състави на убийството и телесните повреди, извършени по расистки или ксенофобски подбуди. А след много дълга борба за уредба на сексуалната ориентация като защитен признак в наказателния кодекс, това се случва едва на заседание на Народното събрание, проведено на 28 юли 2023 г. С приетия Закон за изменение и допълнение на Наказателния кодекс се предвиждат по-тежки наказания за престъпленията, които са извършени с основен мотив сексуалната ориентация на пострадалото лице¹⁰. С приемане на тези изменения са напълно въведени в националното законодателство разпоредбите на Рамково решение 2008/913/

¹⁰ Престъпните състави, които са изменени в тази връзка са – убийство по чл. 116, ал. 1, т. 11, телесна повреда по чл. 131, ал. 1, т. 12, отвличане по чл. 142, ал. 2, т. 9, противозаконно лишаване от свобода по чл. 142а, ал. 3, т. 3, проповядване или подбуждане към дискриминация, насилие или омраза чрез средствата за масова информация по чл. 162, ал. 1, употребата на насилие срещу друго или повреда на имота му по чл. 162, ал. 2, участието в тълпа, събрана за нападение на групи от населението, отделни граждани или техни имоти по чл. 163, ал. 1, попречване на някого да постъпи на работа или принуждаването да напусне работа по чл. 172, ал. 1, противозаконно унищожаване на чужди движими или недвижими вещи по чл. 216, ал. 5, т. 4 и явното подбуждане към извършване на престъпление чрез проповед пред множество хора чрез разпространяване на печатни произведения или по друг подобен начин по чл. 320, ал. 3 от НК.

ПВР на Съвета от 28 ноември 2008 г. относно борбата с определени форми и прояви на расизъм и ксенофобия посредством наказателното право, които до този момент са били неправилно транспонирани. В заключение искам да отбележа изключителната важност на тези престъпни състави, която е породена от всеобхватните признаци и тяхното приложение в различни сфери на общественения живот. Уредбата на престъпления с дискриминационен елемент съществува, за да отговори на необходимостта от защита на основни права както на отделния индивид, така и на определени групи и общности, които са уязвими в някаква степен. Както вече отбелязах тези престъпни състави засягат от правото на живот, телесната неприкосновеност, националност и расово равенство, свобода на избор на вероизповедание до правото на равно третиране при осъществяване на трудови правоотношения. Най-общо казано наказателното ни законодателство се е опитало да осигури максимална защита на възможно най-много правозащитими признаци, водещи до някоя от формите на пряка или непряка форма на дискриминация. Законодателят не престава да се стреми да осигури необходимото, за да бъдат защитени възможно в най-голяма степен „различните“. Разбира се, не може изцяло тази защита да се остави на наказателното право, а заедно с него трябва да функционират и институции, които гарантират опазване на лица, подложени или потенциално застрашени от дискриминиране.

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ТРУДОВОПРАВНИ И
ОСИГУРИТЕЛНОПРАВНИ
АСПЕКТИ НА
ДИСКРИМИНАЦИЯТА



Някои дискриминационни разпоредби при пенсиите за осигурителен стаж и възраст

Райна Койчева*¹

В правната уредба на пенсиите за осигурителен стаж и възраст по българското законодателство се наблюдават някои дискриминационни разпоредби, които водят до неравенство между осигурените лица. Първата разпоредба, която се анализира в доклада, е тази на чл. 33, ал. 5, т. 13 КСО, която предвижда уведомяване на лицата не по-късно от 6 месеца, преди да навършат възрастта по чл. 68, ал. 1, за условията, при които могат да се пенсионират. Извън обхвата на тази разпоредба остават всички осигурени лица, които се пенсионират по чл. 68, ал. 3, чл. 68а, чл. 69, чл. 69а, чл. 69б, чл. 69в КСО, което ги поставя в неравностойно положение. На следващо място се анализира разпоредбата на чл. 68а КСО, която предвижда пожизнено намаляване на пенсиите на лицата, които се пенсионират до 1 година по-рано от навършване на възрастта по чл. 68, ал. 1 КСО. Въз основа на направените изводи се дават предложения de lege ferenda.

Ключова думи: Кодекс за социално осигуряване, пенсионна възраст, ранно пенсиониране, пожизнено намаляване на пенсиите



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Certain discriminatory provisions in retirement pensions

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In the legal regulation of retirement pensions under Bulgarian law, there are some discriminatory provisions that lead to inequality between insured persons. The first provision analysed in this study is that of Article 33(5)(13) of the Social Security Code, which provides for the notification of persons not later than 6 months before they reach the age of entitlement to a retirement pension under Article 68(1) of the Social Security Code about the conditions under which they may retire. Outside the scope of this provision remain all insured persons who retire under Art. 68 (3), Art. 68a, Art. 69, Art. 69a, Art. 69b, Art. 69c of the Social Security Code, which puts them at a disadvantage. Next, the provision of Article 68a of the Social Security Code is analysed, which provides for a lifetime reduction of the pensions of persons who retire up to 1 year earlier than the age referred to in Article 68(1) of the Social Security Code. Based on the conclusions drawn, proposals de lege ferenda are given.

Keywords: *Social Security Code, retirement age, early retirement, lifetime reduction of the pensions*



Увод

В Конституцията на Република България тя се определя като социална и правова държава. Социална държава е тази, която се стреми да осигури социална сигурност на своите граждани. Това е сигурността, че ще бъдат задоволени техните основни жизнени потребности – материални и духовни¹. Един от основните инструменти за постигане на социална сигурност е социалното осигуряване², а пенсията за осигурителен стаж и възраст е може би най-важният институт на социалното осигуряване. В този смисъл няма да бъде пресилено, ако се каже, че едно от най-важните проявления на социалната държава е именно пенсията за осигурителен стаж и възраст.

Правова държава е тази, която гарантира и защитава правата на гражданите, а правото на пенсия за осигурителен стаж и възраст е едно от тях. То обаче се оказва недостатъчно гарантирано и защитено поради наличието на някои дискриминационни разпоредби в правната уредба на пенсиите за осигурителен стаж и възраст, които водят до неравенство между осигурените лица. Желателно е тези разпоредби да бъдат коригирани, за да могат всички осигурени лица да имат равен достъп до това изключително важно осигурително право – правото на пенсия за осигурителен стаж и възраст. В този смисъл са и направените по-долу предложения *de lege ferenda*.

Разпоредбата на чл. 33, ал. 5, т. 13 КСО

Първата разпоредба, която смятам за дискриминационна, е тази на чл. 33, ал. 5, т. 13 КСО, която предвижда уведомяване на лицата не по-късно от 6 месеца, преди да навършат възрастта по чл. 68, ал. 1, за условията, при които могат да се пенсионира. Идеята на цитираната разпоредба сама по себе си е добра, тъй като при цялостната електронизация на информацията за осигурените лица в регистрите на НОИ, за осигурителния орган едва ли би представлявало особена трудност да прави това. В същото време за осигурените лица това уведомяване е от съществено значение, тъй като далеч не всички от тях са детайлно запознати с изискванията за придобиване на право на пенсия за осигурителен стаж и възраст, още повече, че тези изисквания се променят от първи януари на всяка следваща календарна година и така ще бъде още известно време. Така осигурените лица рискуват да пропуснат

¹ Мръчков, В., 2019. *Осигурително право*. Седмо преработено и допълнено издание. С.: Сиби, с. 50.

² Средкова, Кр., 2016. *Осигурително право*. Пето преработено и допълнено издание. С.: Сиби, с. 61.

възможностите за пенсиониране поради незнание и да се пенсионира по-късно, отколкото е било допустимо по закон. Уведомяването от страна на НОИ цели да ги информира за възможностите за предстоящо пенсиониране, за да се избегне тяхното пропускане. Странно защо обаче законодателят е изпуснал от погледа си всички онези лица, които придобиват право на пенсия за осигурителен стаж и възраст на основание на други разпоредби на КСО, извън хипотезата на чл. 68, ал. 1 КСО. Извън обхвата на разпоредбата на чл. 33, ал. 5, т. 13 КСО, предвиждаща уведомяване на лицата за условията, при които могат да се пенсионира, остават всички осигурени лица, които се пенсионира по чл. 68, ал. 3 (намалена пенсия за осигурителен стаж и възраст поради недостатъчно стаж), чл. 68а (намалената пенсия за осигурителен стаж и възраст поради недостигане до 1 година до възрастта), чл. 69 (държавните служители във военизираните ведомства – военни, полицаи, разузнавачи и т.н.), чл. 69а (балерини, балетисти и танцьори), чл. 69б (работещите при условията на първа и втора категория труд), чл. 69в (педагогическите специалисти – учители и възпитатели). Всички тези лица не се уведомяват от НОИ за възможностите за предстоящо пенсиониране и могат поради незнание да ги пропуснат, което ги поставя в неравностойно положение спрямо лицата, които се пенсионира на основание чл. 68, ал. 1 КСО. Ето защо би било добре законодателят да предвиди задължението на НОИ за уведомяване да обхваща всички лица, придобиващи право на пенсия за осигурителен стаж и възраст, независимо от законовото основание. Предлагам разпоредбата на чл. 33, ал. 5, т. 13 КСО да се редактира, като от нея отпаднат думите „чл. 68, ал. 1 КСО“, като по този начин ще се обхванат всички предвидени в закона основания за придобиване право на пенсия за осигурителен стаж и възраст.

Смятам също така, че трябва да отпаднат и думите „през следващата календарна година“, тъй като е напълно възможна хипотезата, при която лицето придобива право на пенсия за осигурителен стаж и възраст през същата календарна година на уведомлението.

Що се отнася до думите „на които не е отпусната пенсия за осигурителен стаж и възраст“, те биха имали смисъл, когато на лицата е отпусната такава пенсия за осигурителен стаж и възраст, която е алтернативна на пенсията по чл. 68, ал. 1 КСО и следователно несъвместима с нея. Кодексът за социално осигуряване регламентира различни хипотези, при които правото на пенсия се придобива по-рано от предвидената в чл. 68, ал. 1 възраст. При някои от тях се отпуска срочна пенсия за ранно пенсиониране, която се получава до навършване на възрастта по чл. 68, ал. 1 КСО, след което лицето ще има право на пенсия по тази разпоредба, така че следва то да бъде

уведомено. Такива са пенсиите за осигурителен стаж и възраст, отпуснати на основание чл. 69б (работещите при условията на първа и втора категория труд) или чл. 69в (педагогическите специалисти). При други хипотези лицата нямат право на пенсия по чл. 68, ал. 1 КСО след навършване на възрастта, предвидена в тази разпоредба. Такива са случаите на намалена пенсия по чл. 68а, пенсия за осигурителен стаж и възраст по чл. 69 (държавните служители във военизираните ведомства) и по чл. 69а (балерини, балетисти и танцьори). Само в тези случаи, а не винаги, когато лицето получава пенсия за осигурителен стаж и възраст на друго основание, то няма да има право на пенсия по чл. 68, ал. 1 КСО. Ето защо смятам, че текстът трябва да се прецизира, като се използва формулировката: „на които не е отпусната пенсия за осигурителен стаж и възраст по чл. 68а, чл. 69 и чл. 69а КСО“.

С оглед на гореизложеното предлагам текстът на разпоредбата на чл. 33, ал. 5, т. 13 КСО да придобие следния вид: *„Националният осигурителен институт уведомява лицата не по-късно от 6 месеца, преди да навършат възрастта за придобиване право на пенсия за осигурителен стаж и възраст, на които не е отпусната пенсия за осигурителен стаж и възраст по чл. 68а, чл. 69 и чл. 69а КСО, за условията, при които могат да се пенсионират.“*

Разпоредбата на чл. 68а КСО

Разпоредбата на чл. 68а, ал. 1 КСО предвижда лицата, които имат изискуемия осигурителен стаж по чл. 68, ал. 2 КСО, да могат по тяхно желание да се пенсионират до една година по-рано от навършване на възрастта по чл. 68, ал. 1 КСО, като в този случай пенсията се изплаща в намален размер пожизнено. В ал. 2 на същия член законодателят предвижда, че лицата, които са се възползвали от правото, дадено им в ал. 1, нямат право на пенсия по чл. 68, ал. 1, 2 и 3 КСО³.

Като цяло заслужава одобрение възможността за ранно пенсиониране на лицата, които имат изискуемия осигурителен стаж по чл. 68, ал. 2 КСО, но не им достигат няколко месеца (до една година) до навършване на възрастта по чл. 68, ал. 1 КСО. Това обикновено са лица, които достатъчно дълго са работили и са участвали в натрупването на средствата по фонд „Пенсии“ посредством внасяните за тях осигурителни вноски, но поради стечението на неблагоприятни житейски обстоятелства не могат

³ Койчева, Р., 2020. *Осигурително право. Част I. Държавно обществено осигуряване*. С.: ИК на УНСС, с. 197–198.

да продължат трудовата си дейност до навършване на предвидената в закона пенсионна възраст. Ето защо е справедливо и в духа на социалната държава те да имат възможност да получат пенсия за осигурителен стаж и възраст малко по-рано. Справедливо е също така тази пенсия да бъде в намален размер, тъй като не са изпълнили едно от условията за придобиване право на такава пенсия – не са навършили възрастта по чл. 68, ал. 1 КСО. Намалението обаче следва да бъде само временно – до навършване на изискуемата от закона възраст, а не пожизнено. След навършването ѝ лицата вече ще отговарят напълно на предвидените в закона изисквания за придобиване право на пенсия за осигурителен стаж и възраст и би трябвало да получат такава в пълен размер.

Пожизненото намаление на пенсията за осигурителен стаж и възраст на лицата, които са избрали да се пенсионират по-рано, е несправедливо и дискриминиращо, защото тези лица са изпълнили изискването на закона за стаж, т.е. за тях са внасяни осигурителни вноски също толкова време, както и за лицата, навършили възрастта по чл. 68, ал. 1 КСО. По този начин те са участвали в натрупването на средствата по фонд „Пенсии“ не по-малко от лицата, навършили възрастта по чл. 68, ал. 1 КСО. Нещо повече, напълно е възможна хипотезата, при която тези лица ще имат по-голям осигурителен стаж от други лица, отговарящи и на двете изисквания на закона – за стаж и за възраст. Следва да се има предвид и фактът, че обикновено те правят този избор не за да живеят „на гърба на държавата и обществото“, а защото са принудени от обстоятелствата. Най-често тези обстоятелства са свързани с влошено здравословно състояние или невъзможност да намерят подходяща работа поради възрастта си. Посочената норма дискриминира лицата, избрали да се пенсионират до една година по-рано от навършване на общата пенсионна възраст, като ги поставя в неравностойно положение спрямо лицата, имащи същия осигурителен стаж, но пенсионирали се след навършване на възрастта по чл. 68, ал. 1 КСО. Неравенството се състои в това, че след навършване на пенсионна възраст тези лица ще продължават да получават намалена пенсия. Така при еднакво изпълнени изисквания за стаж и възраст едни лица ще получават пълна пенсия, а други – намалена.

Неравенството на лицата, пенсионирали се по чл. 68а КСО с останалите осигурени лица има и друг аспект – спрямо едната категория лица се прилага контрибутивният принцип, а спрямо другата – не. При всички останали осигурени лица размерът на пенсията зависи от размера на осигурителния доход, върху който са правени осигурителни вноски, докато в хипотезата на чл. 68а КСО се игнорира връзката между размера на осигурителния доход и размера на пенсията за осигурителен стаж и възраст,

като се предвижда тя да се получава в намален размер пожизнено. Това е несправедливо и дискриминационно.

Разбирам отчасти съображенията на законодателя за въвеждането на това законодателно решение, които са свързани с опасенията му за възможни злоупотреби с правото по чл. 68а КСО. Най-вероятно мотивите му са били да се предотврати ситуация, при която голям брой осигурени лица биха се възползвали от предоставената им от чл. 68а КСО възможност, което би довело до по-голямо натоварване на фонд „Пенсии“. Ето защо законодателят е решил да възпре лицата да се възползват от правото, дадено им в чл. 68а КСО под страх, че намалението на пенсията им ще бъде пожизнено.

На тези опасения на законодателя могат да се противопоставят няколко аргумента. На първо място едва ли са толкова много лицата, които още преди навършване на общата пенсионна възраст (възрастта по чл. 68, ал. 1 КСО) са успели да придобият целия изискуем стаж. А и щом го имат, значи са внасяни достатъчно дълго осигурителни вноски за тях.

На второ място подобен подход на законодателя не може да бъде споделен, тъй като противоречи на принципа на правовата държава. Не могат лицата да бъдат възпирани да упражнят едно дадено им от закона право под страх, че ще загубят друго свое право.

На трето място лесно биха могли да се предотвратят злоупотребите с предвиденото в чл. 68а КСО право, както и допълнителното натоварване на фонд „Пенсии“ като се предвиди, че пенсията по чл. 68а КСО е несъвместима с доходи от трудова дейност. Тогава не всички, а само лицата, които по обективни причини нямат възможност да работят, биха се възползвали от правото, дадено им в чл. 68а КСО.

На четвърто място, за да не се натоварва фонд „Пенсии“, би могло намалението на пенсията по чл. 68а КСО да е по-голямо от предвиденото в чл. 70, ал. 14 КСО – 0,4% за всеки недостигащ месец до навършване на пенсионна възраст, например 1%, 2% или дори 3% за всеки недостигащ месец до навършване на пенсионна възраст, но с навършване на тази възраст лицето да има право да му се отпусне пенсия при общите условия по чл. 68, ал. 1 КСО.

С оглед на гореизложеното предлагам ал. 2 и ал. 3 на чл. 68а КСО да отпаднат, а текстът на разпоредбата на ал. 1 да бъде променен, като отпадне думата „пожизнено“ и формулировката стане следната: „Лицата, които имат изискуемия осигурителен стаж по чл. 68, ал. 2, могат по тяхно желание да се пенсионират до една година по-рано от възрастта им по чл. 68, ал. 1.

Пенсията се отпуска от датата на заявлението и се изплаща в намален размер съгласно чл. 70, ал. 14 КСО“.

Заклучение

Посочените по-горе примери на дискриминационни разпоредби в областта на пенсиите за осигурителен стаж и възраст, за съжаление, не са единствените. Но те ясно показват, че всяка една думичка в законовия текст може да има съществено значение за съдбите на стотици хиляди хора. Затова отговорността на законодателя пред държавата и обществото е голяма. Той трябва прецизно да формулира правните норми, така че да не се допуска неравенство и дискриминация на определени групи лица спрямо други. С още по-голяма сила това важи за правния институт на пенсиите за осигурителен стаж и възраст. Това е изключително важен институт на осигурителното право, тъй като засяга огромно множество граждани – всеки човек старее. Така несправедливият и дискриминационен резултат от прилагането на анализираните правни норми се мултиплицира хиляди пъти в съдбите на засегнатите граждани.

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Гаранции за правото на труд на работници и служители с психически увреждания

Андрей Александров*

Когато в българската трудовоправна литература и в практиката се говори за различни форми на закрила на лица с увреждания, обикновено се имат предвид основно физически увреждания. Значително по-рядко внимание е привличал изследваният тук въпрос: как лицата с психически увреждания да бъдат ефективно защитени от дискриминация на работното място, приобщени в трудовия колектив и да бъде гарантирано правото им на труд – разбира се, доколкото тяхното състояние позволява да полагат такъв и доколкото те желаят да работят.

Ключови думи: *Лица с увреждания, психически увреждания, дискриминация, тормоз, защита*



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Guarantees for the right to work for employees with mental disabilities

Andrey Aleksandrov

When the Bulgarian labor law literature and the practice discuss different forms of protection for persons with disabilities, they usually refer mainly to physical disabilities. Considerably less attention has been attracted to the question studied here: how to effectively protect persons with mental disabilities from discrimination in the workplace, to integrate them into the workforce and to guarantee their right to work – of course, as far as their condition allows them to do so and as far as they are willing to work.

Keywords: *Persons with disabilities, mental disabilities, discrimination, harassment, protection*



I. Въведение

Конституцията на Република България прогласява принципа, че държавата създава условия за осъществяване на правото на труд на лицата с физически и психически увреждания (чл. 48, ал. 2 КРБ). Той намира проявление в редица разпоредби на Кодекса на труда, Закона за защита от дискриминация и др. Общата законодателна логика е, че основен източник на доходи и за тези лица би трябвало да е осъществяването на лична трудова дейност, когато и доколкото това е възможно. Ако конкретният вид и степента на увреждане на здравето не позволяват това, липсата на трудов доход се замества от плащания от общественото осигуряване и/или социалното подпомагане. Различни други, предимно финансови облекчения целят да компенсират увеличените разходи на тези лица, обусловени от здравословното им състояние.

Тук нито е възможно, нито проследяването на всички специални правила, съдържащи се в българското законодателство, които засягат хората с увреждания. Те са пръснати в трудовото, осигурителното, данъчното и административното ни право и в своята съвкупност представляват комплекс от норми с ясно изразен социално-закрилен характер. Целта на настоящото изложение е много по-ограничена: да предложи някои разсъждения по въпросите еднакво ефективна ли е трудовоправната закрила спрямо работниците и служителите с физически и с психически увреждания; какви задължения имат работодателите по отношение на тези две групи по-уязвими лица и дали някои проявления на закрилата на работниците и служителите с психически увреждания не биха се оказали „нож с две остриета“ – в смисъл, че невъзможността да преодолее предварителната закрила при уволнение например може да обезсърчи потенциалния работодател изобщо да встъпи в трудово правоотношение с такова лице.

Следва да се отбележи, че поставените въпроси имат особено голяма практическа значимост и предизвикват оживени дискусии на европейско и глобално ниво, пред които дебатите по темата у нас значително бледнеят. Отчита се, че психическите разстройства не включват само тежки патологични състояния, а и по-леки форми на отклонение от нормалното психическо състояние на здравия човек като депресии, тревожност, „бърнаут“ синдром и т. н., които могат да бъдат преодолені, ако се третират правилно. Предоставянето на подкрепа на засегнатите работници и служители, за да могат да запазят работата си или да се върнат на работа, ако са ползвали отпуск, е много по-добро решение, отколкото трайното им изключване от работната среда. Приема се, че около 20 на сто от населението в трудоспособна

възраст може да бъде засегнато от психично разстройство във всеки един момент, т.е. рискът от преживяване на психично заболяване е много висок. Същевременно обществените нагласи често стигматизират лицата с психически увреждания, което ги кара да се срамуват и/или да крият състоянието си. Вероятността лица с психически заболявания да останат дългосрочно безработни е 2–3 пъти по-голяма спрямо лицата без такива разстройства.¹

Всичко това налага много повече да се говори за приобщаването на лицата с психически разстройства и създаването на условия на труд, които да са адекватни на състоянието им, т.е. да са съобразени с индивидуалната оценка на потребностите им. *„Принципите, на които трябва да се гради една разумна държавна политика относно правата на „инвалидите“ (както беше обозначавана тази група лица в по-старото законодателство и правна литература), са отдавна формулирани: ярко изразено хуманно начало, социално-закрилен характер, социална справедливост и интеграционна насоченост.“*² Без съмнение казаното важи с пълна сила и за лицата с психически увреждания.

II. Етапи в развитието на индивидуалното трудово правоотношение, при които могат да се разкрият различни проявни форми на закрилата на работници и служители с психически увреждания

В настоящото изложение е избран подход към анализирането на проблема, който не се отличава с особена оригиналност, доколкото е използван и преди в правната ни литература. Към него се придържа например проф. Нина Гевренова в монографията си от 2013 г. *„Специална закрила на работниците и служителите с намалена работоспособност“*³. Тя изследва темпорално развитието на трудовото правоотношение от неговото възникване (гл. I от цитираната монография), съществуване (гл. II) и прекратяване (гл. III), за да проследи какви специални правила е предвидил законодателят, когато страна по трудовото правоотношение е работник или служител с намалена

¹ *Mental ill-health at the workplace: Don't let stigma be our guide*. По данни от Интернет-страницата на МОТ [https://www.ilo.org/global/about-the-ilo/mission-and-objectives/features/WCMS_316838/lang--en/index.htm], достъпна на 18.04.2024 г.

² Янев, Ив., 2009, *По някои спорни въпроси от правната уредба на инвалидите*. – В: Актуални проблеми на трудовото и осигурителното право, т. 3, С.: УИ „Св. Климент Охридски“, с. 144.

³ Гевренова, Н., 2013, *Специална закрила на работниците и служителите с намалена работоспособност*. С.: Сиби.

работоспособност. Впрочем в анализа на авторката също ясно проличава, че се имат предвид основно лицата с физически увреждания – напр. когато се говори за невъзможност или затруднения за работника или служителя да достигне или да престоява на работното си място. Проблематиката, свързана с лицата с психически увреждания е толкова по-специфична и многопластова, че е дала повод на проф. Гевренова да участва в съставянето на отделна монография по тази тема.⁴

1. Специална закрила при възникване на трудовото правоотношение

А) Трудовото ни законодателство съдържа редица специални правила относно труда на лицата с увреждания на здравето. Целта им е да отчетат отклоненията от нормалното здравно състояние на човека, за да се създадат условия за пълноценно използване на неговата остатъчна работоспособност за извършване на подходяща трудова дейност. *„Дълбокото философско-правно обяснение на законодателното регламентиране на тази специална и засилена правна закрила се корени именно в това, че ако тя липсва, ще се стигне до фактическо положение на неравно третиране на тези категории лица поради престирането на работната им сила при еднакви условия на труд с другите работници. Със законодателното въвеждане на тази закрила се постига правният резултат на равното третиране на въпросните лица при нееднаквите условия на труд. Личностните качества на тези категории работници налагат нееднаквост на условията на труд спрямо всички останали работници и служители в предприятието, за да се постигне равно третиране във възможностите им да полагат труд.“*⁵

Б) Законът предвижда не само задължения за работодателите по съществуващи трудови правоотношения с лица с увреждания, а се стреми да гарантира, че такива лица действително ще бъдат назначени и ще могат да полагат труд.⁶ Едно отдавна възприето правило в Кодекса на труда предвижда, че работодател с повече от 50 работници и служители е длъжен да определя ежегодно работни места, подходящи за трудоустрояване от 4 до

⁴ Зиновиева, Д., Н. Гевренова, 2012. *Правен режим относно лицата с психически увреждания*. С.: Сиела.

⁵ Стайков, Ив., 2005, *Забраната за дискриминация и задължението на работодателя да осигурява равни условия на труд* (чл. 13, ал. 1 от Закона за защита срещу дискриминацията) – онлайн архив публикации на НБУ – <http://eprints.nbu.bg/1187/> (достъп на 18.04.2024 г.).

⁶ Вж. по-подробно Александров, А., П. Класа, 2019. *Доколко ефективна е закрилата, предоставяна от българското трудово законодателство на хората с увреждания*. – Съвременен право, № 3, 40–52.

10 процента от общия брой на работниците и служителите в зависимост от икономическата дейност (чл. 315 КТ, чл. 2 и чл. 9 от Наредбата за трудоустрояване; вж. също Наредба № РД-07-1 от 02.02.2012 г. за определяне на работните места, подходящи за трудоустрояване на лица с намалена работоспособност).

В края на 2018 г. беше обнародван Законът за хората с увреждания (ЗХУ). Разпоредбата на чл. 38, ал. 1 ЗХУ въвежда задължение за работодателите да назначат лица с трайни увреждания с цел гарантиране на заетостта на хората с трайни увреждания в обичайна работна среда.⁷ По-конкретно, работодатели с 50 до 99 работници и служители следва да назначат едно лице с трайни увреждания, а работодатели със 100 и над 100 работници и служители следва да назначат две на сто от средносписъчния си състав. Работните места, определени по реда на чл. 315 КТ (т.е. местата за трудоустрояване), не се взимат предвид при отчитане на изпълнението на квотата (чл. 38, ал. 2 ЗХУ).

Работодателите могат да се освободят от задължението за назначаване на лица с трайни увреждания до края на съответната календарна година при: (1) наличие на специфични фактори в работната среда, възпрепятстващи наемане на хора с трайни увреждания; (2) липса на хора с трайни увреждания, насочени от дирекции „Бюро по труда“ или от трудови посредници с издадено удостоверение за регистрация за извършване на посредническа дейност по наемане на работа. Тези обстоятелства се удостоверяват от Изпълнителна агенция „Главна инспекция по труда“. Вън от това работодателите, които прилагат алтернативни мерки за заетост на хора с трайни увреждания, определени с правилника за прилагането на закона, също се освобождават от задължението.⁸

⁷ „Хора с трайни увреждания“ са лица с трайна физическа, психическа, интелектуална и сетивна недостатъчност, която при взаимодействие с обкръжаващата ги среда би могла да възпрепятства тяхното пълноценно и ефективно участие в обществения живот, и на които медицинската експертиза е установила вид и степен на увреждане или степен на трайно намалена работоспособност 50 и над 50 на сто (§ 1, т. 2 ДР на ЗХУ).

⁸ Алтернативните мерки са предвидени в чл. 30–32 ППЗХУ: (1) Закупуване от специализирани предприятия или кооперации на хората с увреждания на произвежданите или търгуваните от тях стоки или предоставяните от тях услуги за периода на неизпълнение на квотата. Месечният размер на средствата за закупуване на стоките или за ползване на услугите не следва да бъде по-малък от двукратния месечен размер на минималната работна заплата, установена за страната за съответната календарна година, за всяко незаето работно място за човек с трайно увреждане до момента на изпълнение на квотата; (2) Закупуване директно от хора с увреждания, осъществяващи самостоятелна стопанска дейност, на произвежданите или търгуваните от тях

Ако работодателят не изпълни задължението си да назначи лица с трайни увреждания и не е налице основание за освобождаване от това задължение, той дължи ежемесечно компенсационна вноска в размер 30 на сто от минималната работна заплата за страната за всяко незаето работно място за човек с трайно увреждане.

Защо тук се отделя толкова внимание на квотите за лица с трайни увреждания по Закона за хората с увреждания? Защото той промени законодателната концепция, съществувала до момента. Преди приемането му работодателите с повече от 50 работници и служители имаха задължение да определят работни места за трудоустрояване в съответствие с процента за съответната икономическа дейност и това задължение се запази. Наред с него се въведе и задължението за назначаване на лица с трайни увреждания съгласно определената в ЗХУ квота, като тези лица не могат да са едни и същи. Никога по-рано в правната литература и съдебната практика не е било поставяно под съмнение, че работодателите, задължени да определят процент работни места за трудоустрояване, не са длъжни да назначат на тях лице, което кандидатства за съответната позиция и е с намалена работоспособност. Местата за трудоустрояване се определят, за да може при необходимост от трудоустрояване на лице, което вече е назначено, да се осигури подходяща работа. Това обаче не означава, че работодателят трябва целенасочено да търси и да назначи работник или служител с намалена работоспособност, когото да трудоустрои. Същата логика може да се открие при основанието за прекратяване на трудовото правоотношение по чл. 325, ал. 1, т. 6 КТ – когато длъжността е определена за заемане от бременна жена или трудоустроен работник или служител и се яви кандидат, който има право да я заеме. „Явяването на кандидат, който има право да я заеме“ тук означава наличието на работник или служител от същото предприятие, който при трудоустрояването следва да бъде преместен на друга длъжност⁹.

Законът за хората с увреждания регламентира задължението по различен начин: квотата се изпълнява от работодателя с назначаване на работници

стоки или предоставяните от тях услуги за периода на неизпълнение на квотата; (3) Закупуване от социални предприятия клас А, които отговарят на условията по чл. 7, т. 1, 2 и 4 от Закона за предприятията на социалната и солидарна икономика и/или от социални предприятия клас А+, регистрирани по реда на чл. 8, т. 1 и 3 от същия закон, произвежданите или търгуваните от тях стоки, или предоставяните от тях услуги, за периода на неизпълнение на квотата. Минималният размер на средствата е същият.

⁹ Мръчков, В. – В: Мръчков, В., Кр. Средкова, Ат. Василев, Е. Мингов., 2021. *Коментар на Кодекса на труда*. 13 изд. С.: Сиби, с. 947.

в предприятието на други работни места, извън местата за трудоустроени. Изпълнението на квотите не може да бъде поставено в зависимост от наличието на свободни щатни бройки при съответен работодател.

Нещо повече, съгласно чл. 40 ЗХУ работодателят е длъжен да пригоди работното място към нуждите на човека с увреждане при неговото наемане при необходимост в зависимост от вида и степента на увреждането. В правната литература е изразявано становището, че целта на разпоредбата е да даде възможност на работодателя да подбере работник или служител в изпълнение на квотата не по вида на увреждането му, а по притежаваната от него квалификация и професионални умения.¹⁰ Такава оценка не може да бъде споделена: работодателят би се съобразил преди всичко с вида и степента на увреждането на потенциалния работник или служител, за да планира разходите си по преустройството на работното място. Ако те са прекалено високи, по-вероятно е съответният кандидат за позицията да не бъде назначен, макар и да има нужните квалификация и професионални умения за работа.

Подобно правило впрочем съдържа и разпоредбата на чл. 16 ЗЗДискр.: „Работодаателят е длъжен да пригоди работното място към нуждите на лице с увреждания при неговото наемане или когато увреждането на лицето настъпи след наемането му на работа, освен когато разходите за това са необосновано големи и биха затруднили сериозно работодателя“. Разликата обаче е съществена – Законът за защита от дискриминация не обвързва работодателя със задължението да назначи лицето, ако разходите за преустройство на работното място са неоправдани¹¹.

В) На фона на вече съществуващата в трудовото ни законодателство концепция, че работодателят не може свободно да преценява дали иска или не да встъпи в трудови правоотношение с работници и служители с увреждания, заслужава внимание и въпросът каква ще е разликата в зависимост от вида на увреждането – физическо или психическо. Като че ли ясни индикации в тази насока в закона липсват. С право проф. Гевренова говори за липсата на последователен законодателен подход в една необосновано многобройна и с множество вътрешни противоречия правна уредба. „Това,

¹⁰ Дичева, Т., 2019. *На 2 юли изтича гратисният срок, в който работодателите следва да предприемат действия за осигуряване на заетост по Закона за хората с увреждания*. – Труд и осигуряване, № 7 (174), с. 22.

¹¹ Вж. по-подробно Александров, А., 2018. *За защитата от дискриминация при упражняване на правото на труд и тормоза на работното място*. – В: *Защита срещу дискриминацията: правна уредба, проблеми и тенденции*. Сборник с доклади от национална научна конференция, 8 юни 2018 г., ИУ – Варна, 109–119.

което е по-важно – заключава авторката – е, че законодателят стеснява задължението на работодателя да приспособява условията на труд до задължение за приспособяване на работното място като пространствен параметър, независимо от това колко широко той се определя. Посоченото ограничаване изключва приспособяване на останалите параметри от условията на труд, които не позволяват, възпрепятстват, пречат или затрудняват лицата с намалена работоспособност да упражняват своите субективни права и задължения.“¹²

Засегнатият проблем е много широк и отново доказва тезата, че когато се говори за увреждания на здравето, акцентът у нас се поставя предимно върху физическото здраве. Чуждестранната теория и практика формулират понятието за „reasonable accommodation“, което включва създаването на условия за адаптация и интеграция в обществото на лица с физически и психически увреждания чрез преодоляване на съществуващите бариери пред тях. У нас тази идея се интерпретира през призмата на създаване на „достъпна архитектурна среда“¹³, т.е. законодателят ни се фокусира над интегрирането на лицата с физически увреждания. Как може работодателят (и има ли такова правно задължение) да адаптира условията на труд към нуждите на лица с психически увреждания? Очевидно е, че създаването на достъпна архитектурна среда за лице с двигателни увреждания означава изграждането например на рампа за инвалидна количка. Ако обаче уврежданията са психически, мислимо ли е от работодателя да се изисква търсене на механизми за ограничаване на стресовите ситуации, в т. ч. определяне на по-дълги срокове за приключване на служебните задачи, възлагане на по-малко отговорности, пространствено определяне на останалите работни места така, че да не се създава опасност от ескалация на напрежение и конфликти и пр.? Добрите чуждестранни практики говорят за провеждане на вътрешни обучения на съответните длъжностни лица, които да разпознават ранните симптоми на психически разстройства, да насърчават споделянето и решаването на проблеми, да противодействат на стигматизирането на заболяванията и пр.

При все това ми се струва очевидно, особено за българските реалности, че в общия случай работодателят няма нито капацитета да определи подходящите мерки за приспособяване на условията на труд, нито може да се обоснове наличието на юридическо задължение да го прави. А това поставя лицата с психически увреждания във фактическа невъзможност да бъдат

¹² Гевренова, Н. *Специална закрила на работниците и служителите с намалена работоспособност*, 78–79.

¹³ Съгласно чл. 5 ЗЗДискр. изграждането и поддържането на архитектурна среда, която затруднява достъпа на лица с увреждания до публични места, се смята за дискриминация.

назначени на работа – разбира се, ако към момента на встъпване в трудовото правоотношение работодателят знае за съществуващия проблем. Едва ли е изненадващо, че повечето кандидати за работа с психически увреждания ще се опитат да скрият диагнозата си, за да не рискуват потенциалното работно място.

2. Специална закрила по време на съществуването на трудовото правоотношение

А) Без съмнение основната проявна форма на специална закрила за работниците и служителите с намалена работоспособност е правото на трудоустройство. Както е известно трудоустройването се изразява в преместване на работник или служител на друга подходяща за здравословното му състояние работа или облекчаване на условията, при които полага труда си. То се прилага за бременни работнички или служителки, кърмачки, както и работнички и служителки в напреднал етап на лечение инвитро (чл. 309 КТ) и работници и служители, които поради болест или трудова злополука не могат да изпълняват възложената им работа, но без опасност за здравето си могат да изпълняват друга подходяща работа или същата работа при облекчени условия (чл. 314 КТ). Трудоустройването става по предписание на здравните органи, което работодателят е длъжен да изпълни.¹⁴

Следва да се отбележат и някои специфики в режима на работното време и отпуските на работниците и служителите с намалена работоспособност. Например облекчаването на условията на труда като форма на трудоустройство може да се изрази в намаляване на продължителността на работното време. Наредбата за определяне на видовете работи, за които се установява намалено работно време (НОВРУНПВ) също въвежда особени хипотези за лица с увреждания (вж. напр. чл. 4а НОВРУНПВ: Право на 7-часов работен ден имат работници и служители с пълна загуба на зрение независимо от вида на извършваната работа).

На трудоустроени работници и служители е забранено възлагането на нощен труд, извънреден труд, удължаване на работното време и т.н. Съгласно чл. 319 КТ работниците и служителите с трайно намалена работоспособност 50 и над 50 на сто имат право на основен платен годишен отпуск в размер не по-малко от 26 работни дни. Съгласно чл. 13, ал. 1 от Наредбата за трудоустройването, на трудоустроени работници или служители с 50 и над 50 на сто трайно намалена работоспособност, освен изработеното по трудови норми и разценки за здрави работници или служители се заплаща допълнително месечно възнаграждение, чийто размер зависи от степента на намалената работоспособност, както следва:

¹⁴ Средкова, Кр., 2011. *Трудово право. Специална част*. Дял I. Индивидуално трудово право. С.: УИ „Св. Климент Охридски“, 127–133.

1. с над 90 на сто трайно намалена работоспособност – от 40 до 60 на сто;
2. със 71 до 90 на сто трайно намалена работоспособност – от 30 до 50 на сто;
3. с 50 до 70,99 на сто трайно намалена работоспособност – до 30 на сто.

Б) От гледна точка на интересуващия ни тук проблем с работниците и служителите с психически увреждания ситуацията като че ли изглежда малко по-ясна. Трудоустройването се извършва от органите на медицинската експертиза, които притежават специалните знания, необходими за преценката дали лицето може да изпълнява друга подходяща работа или същата работа при облекчени условия. В предписанието за трудоустройство може да се предвиди например намаляване на работното време на съответния работник или служител.

Големият практически проблем тук е, че предписанията за трудоустройство много често съдържат общо формулирани противопоказания като „нервно-психическо натоварване“, а работодателят на практика не може да елиминира всяко психическо натоварване в процеса на работа. Препоръчително е практиката на органите на медицинската експертиза да се подобри в насока даване на точни, ясни и изпълними предписания за трудоустройство, съобразени с индивидуалната преценка на потребностите на трудоустройваното лице, които да не поставят работодателите в ситуация на объркване и несигурност как точно да изпълнят предписанието.

3. Закрила при прекратяване на трудовото правоотношение

А) Може би най-яркото проявление на социалнозакрилната функция на трудовото право е въвеждането на предварителна закрила при уволнение на определени основания за някои категории работници и служители.¹⁵ Това са полагащите наемен труд лица в по-уязвимо социално положение. Работодателите често се изкушават да се разделят именно с тях, за да си „спестят“ допълнителни разходи или да се „застраховат“ срещу по-честите им отсъствия. Затова трудоустроените работници и служители и тези, страдащи от заболявания, определени в Наредба № 5 от 1987 г., попадат в персоналният кръг на лицата с предварителна закрила по чл. 333 КТ. Процедурата, за която става дума тук, включва получаването на предварително

¹⁵ Вж. Гевренова, Н., 2011. *Въпроси на правната уредба на основанията за уволнение, при които се осъществява предварителна закрила*. – В: Актуални проблеми на трудовото и осигурителното право. Т. 5, С.: УИ „Св. Климент Охридски“, 169–184; Филипова, Т., 2000. *Кого закриля предварителната закрила при уволнение по чл. 333 от Кодекса на труда?* – В: Научни трудове на Пловдивския университет „Паисий Хилендарски“, Т. 1, кн. 7, 199–215.

разрешение за планирано уволнение на основание чл. 328, ал. 1, точки 2, 3, 5 и 11 и чл. 330, ал. 2, т. 6 КТ. За трудоустроените и страдащи от определени заболявания работници и служители разрешението се издава от Инспекцията по труда като задължително се взема и мнението на ТЕЛК.

В случаите, когато за извършване на уволнението се изисква предварителното съгласие на инспекцията по труда или на синдикален орган и такова съгласие не е било искано или не е било дадено преди уволнението, съдът отменя заповедта за уволнение като незаконна само на това основание, без да разглежда трудовия спор по същество (чл. 344, ал. 3 КТ).

Б) Наредба № 5 от 1987 г. изрично включва психическите заболявания сред болестите, при които работникът или служителят ползва предварителна закрила при уволнение. Намирам това законодателно решение за неоправдано и то не защото лицата с психически увреждания нямат нужда от закрила (тъкмо напротив), а заради изключително несъвършената законодателна уредба на тази закрила.

На първо място Наредбата не конкретизира кои психически заболявания попадат в обхвата на закрилата. Това прави персоналният кръг на защитените работници и служители изключително широк – от лица с леки нервни разстройства до тежки психически заболявания като шизофрения.

Съдебната практика показва множество „лутания“ по темата кога едно заболяване попада в понятието „психически заболявания“ по смисъла на чл. 1, ал. 1, т. 5 от Наредба № 5 от 1987 г. Така например според Решение № 521 от 9.01.2012 г. на ВКС по гр. д. № 208/2011 г., IV г. о., ГК *„преценката дали проявите форми на заболяване епилепсия за всеки отделен случай (боледуващ човек) следва да се извършва от лекари със съответните медицински специалности по психиатрия и/или неврология, евентуално и други и следователно само те могат да определят дали конкретните прояви форми на заболяването „епилепсия“ представляват психично заболяване или съдържат прояви форми на такова по смисъла на чл. 1, ал. 1, т. 5 от Наредба № 5/20.02.1987 г. Следователно при данни за заболяване „епилепсия“ в случаите по чл. 328, ал. 1, точки 2, 3, 5, 11 и чл. 330, ал. 2, т. 6 КТ (визирани в хипотезиса на чл. 330, ал. 1 КТ) работодателят следва да спазва процедурата, предвидена в разпоредбата на чл. 333, ал. 1 и ал. 2 КТ.“* Според Решение № 50201 от 11.01.2023 г. на ВКС по гр. д. № 4891/2021 г., IV г. о. смесеното тревожно-депресивното разстройство не следва да се включва в заболяванията по Наредба № 5 от 20.02.1987 г. *„В чл. 1, ал. 1, т. 5 са посочени психичните заболявания, но психичните разстройства, наричани също психични заболявания, са поведенчески или умствени състояния, които предизвикват съществени страдания и непълноценност на функционирането на личността, като тези състояния може да са трайни, периодично повтарящи се или еднократни, като в Наредба № 3 от 28.02.1987 г. за*

задължителните предварителни и периодични медицински прегледи на работниците е посочено, че под „психични заболявания“ да се разбират психози (шизофрения, афективни психози и параноидни състояния), които са в декомпенсирано състояние, без трайни ремисии и възможност за добра социална адаптация в условията на трудовия колектив и производството“.

Изброяването на различни психически заболявания и тяхното интерпретиране от различни съдебни състави може да продължи, но и посоченото е достатъчно, за да обоснове, че уредбата е прекалено обща и неясна. Така работодателят може да се окаже в ситуация, в която самото присъствие на лицето на територията на предприятието да създава опасност за него и за околните, но да не може да предприеме законосъобразно уволнение докато не премине през процедурата по преодоляване на предварителната закрила – напр. при биполарно афективно разстройство (Решение № 146 от 25.05.2015 г. на ОС Ловеч по в. гр. д. № 214/2015 г.), кататонната шизофрения (Решение № 242 от 12.02.2013 г. на ОС Пловдив по в. гр. д. № 79/2013 г.), параноидна шизофрения (Решение № 383 от 23.09.2022 г. на ОС Велико Търново по в. гр. д. № 618/2022 г.) и т. н.

На второ място константната съдебна практика приема, че *„закрилата по чл. 333 от КТ има обективен характер и цели да запази работника от неблагоприятните последици на уволнението по социални и хуманни критерии. Ето защо за нейното приложение има единствено значение дали към датата на връчване на заповедта за уволнение работникът е страдал от заболяване, посочено в чл. 1 от Наредбата. Практиката допуска само едно изключение от принципа, че закрилата има обективен характер и то е, когато работникът умишлено е въвел работодателя в заблуждение, че не страда от заболяване, за което се предвижда закрила. Във всички други случаи неизпълнението на задълженията на работника да уведоми работодателя за заболяването или да представи документи за него няма правно значение за действието на закрилата по чл. 333, ал. 1, т. 3 от КТ.“* (така напр. Решение № 355 от 2010 г. на ВКС по гр. д. № 477 от 2010 г., IV г. о.) Казано с други думи, работодателят може да е „неприятно изненадан“, когато едва при прекратяване на трудовото правоотношение бъде уведомен за наличие на психическо заболяване, за което до момента не е разполагал с никаква информация.¹⁶ Както беше посочено, работниците и служителите обикновено не разкриват наличието на евентуални психически заболявания поради неудобство, страх да не загубят работата си и други подобни съображения. Считам, че не само за психическите заболявания, а

¹⁶ Александров, А., 2017. *Чие е задължението за предоставяне на информация относно обстоятелствата, при които се ползва предварителна закрила при уволнение.* – В: Актуални проблеми на трудовото и осигурителното право. Т. 9. С.: УИ „Св. Кл. Охридски“, 144–152.

за всички заболявания по Наредба № 5 от 1987 г. следва да се въведе изрично задължение за уведомяване на работодателя, подобно на задължението по чл. 313а КТ. Неясно е по каква логика бременността или напредналият стадий на лечение инвитро придобиват правно значение в отношенията с работодателя след уведомяване с надлежна медицинска документация, а за заболяванията, предвидени в Наредбата, работодателят е длъжен да се информира по собствена инициатива от съответния работник или служител. Едва ако се докаже, че последният умишлено го е въвел в заблуждение, уволнението може да издържи съдебна проверка.

На трето място самата процедура в разглежданите случаи е до голяма степен обезсмислена. Мнението на ТЕЛК е необвързващо за Инспекцията по труда, но е задължителен елемент от фактическия състав на процедурата, съответно липсата му прави уволнението незаконно само на това основание. Същевременно смисълът от даването на това мнение е да се направи професионална преценка как фактът на уволнението ще се отрази на засегнатото лице. Очевидно е, че всяко едностранно прекратяване на трудовото правоотношение от работодателя (особено ако става дума за дисциплинарно уволнение) е от естество да породи напрежение и стрес, а такова състояние няма как да не се отрази негативно на лице с психическо разстройство. В този смисъл съдържанието на мнението на ТЕЛК е до голяма степен „предизвестено“ и изискването му се явява само формалност и фактор, водещ до забавянето на процедурата.

На следващо място получаването на предварително разрешение за уволнение от Инспекцията по труда, както е уредено в момента, е нито повече, нито по-малко от един легализиран административен произвол. Инспекцията няма задължение да мотивира разрешенията, респ. отказите си, и същите не подлежат на обжалване по съдебен ред. Така работодателите са принудени да участват в една процедура с „хазартен“ характер – колкото и детайлно да представят пред компетентните длъжностни лица в инспекцията причините, поради които желаят да упражнят правото си на уволнение, липсва всякаква предвидимост какво ще е крайното решение. Действително, в случай на отказ няма пречка да се поиска отново разрешение като се представят допълнителни документи и мотиви от страна на работодателя. Доколкото обаче работодателят не знае по каква причина му е било отказано да извърши уволнението при първоначалното искане, той е силно затруднен в преценката си какво да коригира, за да получи разрешение. Междувременно може да се достигне до ситуация, при която работникът или служителят не може да бъде допускан до работа (например защото поведението му е агресивно и създава заплаха за себе си и за околните), а в опитите си да получи предварително разрешение за уволнението му от Инспекцията по труда работодателят все пак трябва да намери някакво моментно решение. Обикновено в такива случаи служителите се поставят в престои не по тя-

хна вина и получават трудовите си възнаграждения, докато се изясни дали ще е възможно законосъобразното им уволнение (и се осигурят нормални условия на труд за останалата част от персонала). Очевидно е, че подобна „процедура“ не държи сметка за легитимния интерес на работодателя да получава престация на работна сила в замяна на плащаното трудовото възнаграждение.

III. Заключение

Горните редове далеч нямат претенцията за изчерпателност в анализа на проблемите, свързани със специалната закрила на работниците и служителите с психически увреждания у нас. Те целят по-скоро да привлекат внимание към един сериозен проблем: че в законодателството ни все още липсват реални стимули за привличане и задържане на такива лица на работа, липсват и ясно уредени задължения на работодателя при съобразяване на всички фактори на работната среда с техните нужди. Вместо това е предвидена една тромава и не особено логична процедура на предварителна закрила при уволнение, което изначално прави такива служители непривлекателни за работодателите и обяснява нежеланието им да встъпват в трудови правоотношения с тях. Макар на пръв поглед предварителната закрила при уволнение да изглежда като адекватна законова гаранция за правото на труд на лицата с увреждания и в частност – психически увреждания – тя често се оказва препятствие пред тях изобщо да получат възможността да полагат труд. Желателно е законодателят да се замисли и за този аспект от проблема, който (по всичко личи) константно убягва от вниманието му.

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Специалната закрила на бременните и на майките в трудовото право – дискриминация или не?

Атлиана Милева*

На пръв поглед отрицателният отговор на зададения въпрос по темата изглежда очевиден в контекста на изричната правна уредба в Кодекса на труда и в Закона за защита от дискриминация. В доклада на първо място е систематизирана същността на специалната закрила на труда на бременните и на майките през призмата на забраната за дискриминация в труда. Въз основа на критичен правен анализ на действащата правна уредба на второ място са направени правни изводи относно основателността или не на специалната закрила на посочените категории лица. Трето, направени са обобщени изводи и предложения за изменение на законодателството с оглед на спазването на принципа за равенство в труда и забраната за дискриминация.

Ключови думи: *специална закрила, бременност, майки, трудово право, равнопоставеност, дискриминация, основателност*



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The special protection of pregnant women and mothers in labour law – discrimination or not?

Atliana Mileva

At first glance, the answer to the question posed on the subject seems obvious in the context of the express legal provisions in the Bulgarian Labour Code and in the Protection against Discrimination Act. Firstly, the essence of the special labour protection of pregnant women and mothers is systematized in the report. Based on this, secondly, legal conclusions have been drawn regarding the rationale or not of the special protection of the specified categories of persons through the prism of the principle of equality and the prohibition of discrimination in employment. Thirdly, some controversial procedural rules regarding the application of this special protection in labour law have also been analyzed.

Keywords: *Special protection, pregnancy, mothers, labour law, equality, discrimination, rationale, procedure*



Общи бележки

На пръв поглед отговорът на зададения въпрос по темата изглежда очевиден в контекста на изричната правна уредба в Кодекса на труда (КТ) и в Закона за защита от дискриминация (ЗЗДискр.). Имам предвид по-общо нормите в КТ относно принципната забрана за дискриминация в труда съгласно чл. 8, ал. 3 КТ, а в ЗЗДискр., чиято 20-годишнина чествахме с проведената научна конференция и този научен сборник, визирам конкретно нормата на чл. 7, ал. 1, т. 7, в която е предвидено, че *„не представлява дискриминация ... специалната закрила за бременни жени, жени в напреднал етап на лечение ин-витро и майки, установена със закон, освен ако те не желаят да се ползват от тази закрила и са уведомили писмено за това работодателя“*.

Правна характеристика на специалната закрила на труда на бременните и на майките през призмата на забраната за дискриминация в труда

Белегът (признакът), по който се разграничава (диференцира) правният статут на субектите – работници и служители в това изложение, е полът, разбиран като биологична категория¹. Въпросът за дискриминацията, т.е. различното и по-неблагоприятно третиране на работниците и служителите е поставен на плоскостта на този признак за част от анализирания правни норми. Само женският пол като биологична категория може да стои в основата на понятието за *бременност* и *напреднал етап на лечение ин-витро*². Бременността като биологична категория е възможна към настоящия момент от човешкото развитие само при физическите лица от женски пол. Затова при настъпване на бременност само спрямо тях е налице обективно различно биологично състояние, което стои в основата на промяната в биологичния

¹ С решение № 15/26.10.2021 г. по к. д. № 6/2021 г. Конституционният съд (КС) на Република България извърши задължително тълкуване на понятието „пол“. Изяснявайки го в неговия цялостен конституционен контекст и при съобразяване на принципите и духа на Основния закон, КС прие, че според Основния закон то следва да се разбира само в биологичния му смисъл.

² Понятието „напреднал етап на лечение ин-витро“ е легално дефинирано в § 1, т. 13 ДР на КТ като „етап на лечение чрез методите на асистирана репродукция, включващ периода от фолликулярната пункция до ембриотрансфера, но не повече от 20 дни.“ Тъй като правният режим на закрила на бременните работнички или служителки и на работничките и служителките в напреднал етап на лечение ин-витро е еднакъв, с оглед на краткост на изложението по-долу в изложението навсякъде, където се реферира само до бременните работнички или служителки, ще се имат предвид и работничките и служителките в напреднал етап на лечение ин-витро.

и физическия им статус, и е правното основание за различното им правно третиране в индивидуалните трудови правоотношения. Само дотолкова, доколкото е налице това обективно биологично състояние, и само във времеви рамки, които са правнорелевантни според законодателството за това състояние, физическите лица от женски пол, наслагват върху „общото“ правното качество на „работник“ или „служител“ и присъщата за него обща трудовоправна закрила и *специалната трудовоправна закрила*, която законодателството съдържа за тази конкретна категория трудещи се. Следователно със самия факт на възникване на състоянието на бременността, което от биологична гледна точка е от *зачеването*, до определен момент след приключване на бременността *потенциално* е налице обективно основание за различното третиране на тези трудещи се по трудови правоотношения физически лица спрямо другите трудещи се, които не притежават тази обективна биологична характеристика към съответния момент. Тези други физически лица са, от една страна, мъжете – работници или служители, а от друга – жените – работнички или служителки, които не са бременни или в напреднал етап на лечение ин-витро. Спрямо тях няма обективно основание за прилагане на специална правна закрила в трудовите правоотношения. Специалната закрила е потенциална, тъй като нормата на чл. 313а КТ поставя като изискване за упражняване на правата, влизащи в обхвата ѝ, извършването на други допълнителни действия от субектите на закрилата, за да се приложи тя към тях. Обективното състояние на бременност или напреднал етап на лечение ин-витро само по себе си не е достатъчно от правна гледна точка.

Във връзка с ограничаването на правната същност на специалната закрила на труда на бременните и на майките³ следва да се направят някои разграничения във връзка с правната уредба на *насърчителните мерки* по

³ За правния режим и обхвата на специалната правна закрила на бременните работнички и служителки, вж. и Гевренова, Нина, 2013. *Специална закрила на работниците и служителите с намалена работоспособност*. С.: Сиби, 227–231, 244–246; Мръчков, Васил. *Трудово право*. 10 изд. С.: Сиби, 2018, 469–476, 667–668; Средкова, Красимира, 2011. *Трудово право. Специална част. Дял I. Индивидуално трудово право*. С.: УИ „Св. Кл. Охридски“, 275–283; Средкова, Красимира. – В: Мръчков, Васил, Красимира Средкова, Атанас Василев, Емил Мингов, 2021. *Коментар на Кодекса на труда*. 13 изд. С.: Сиби, 911–926; Недкова, Атлиана, 2009. *Специалната закрила на работещите бременни, родилки и кърмачки в българското трудово право в контекста на Директива 92/85/ЕИО*. – В: Актуални проблеми на трудово и осигурителното право. Том III. С.: УИ „Св. Климент Охридски“, 130–143; Милева, Атлиана 2018. *Граници на правото на отпуск поради бременност и раждане*. – Във: Вълчев, Даниел и Симеон Гройсман (ред.). *Право и граници*. С.: УИ „Св. Климент Охридски“, 469–482.

Закона за равнопоставеност на жените и мъжете (ЗРЖМ). Основната цел на този закон е да се насърчи постигането на равнопоставеност на жените и мъжете чрез предоставяне на равни възможности по смисъла на § 1, т. 2 ДР на ЗРЖМ за жените и мъжете във всички сфери на обществения и икономическия живот и чрез равно третиране на жените и мъжете и недопускане на дискриминация и насилие, основани на пола (чл. 1, ал. 2 вр. с чл. 2, т. 1 и т. 3 ЗРЖМ). Един от механизмите за постигане на тези законодателни цели са *временните насърчителни мерки* по смисъла на § 1, т. 6 ДР на ЗРЖМ, които съгласно изричната законодателна воля не представляват дискриминация по Закона за защита от дискриминация (по аргумент от чл. 4, ал. 2 ЗРЖМ и чл. 7, ал. 1, т. 20 ЗЗДискр.). С оглед на изричната диференцирана правна уредба на специалната закрила на жените по раздел II на глава XV на КТ и на временните насърчителни мерки по ЗРЖМ в отделни точки на чл. 7, ал. 1 ЗЗДискр. следва да се направи изводът, че законодателят счита, че това са две различни правни форми на постигане на един сходен резултат – *крайната цел е фактическата равнопоставеност*. При насърчителните мерки е налице фактическа неравнопоставеност, която се преодолява чрез фактически мерки, целящи постигане на фактическа и правна равнопоставеност⁴, докато при разглежданата специална трудовоправна закрила по КТ фактическата неравнопоставеност се преодолява чрез правни мерки – специални трудови права, предоставени на точно определени по полов белег субекти, но целяща ултимативно същия фактически и правен резултат – преодоляването на фактическото по-неблагоприятно третиране на тези лица. Това поне считам, че трябва да бъде правно издържаната цел с оглед на принципните съображения за равнопоставеност и забрана за дискриминация в труда по полов признак⁵.

⁴ Тук фактическото различно третиране на лицата от двата пола не е правно забранено, напротив изрично е уредено и законодателят дори го „приветства“ особено при т. нар. временни *насърчителни* мерки. Те са оправдани и пропорционални инициативи с временен характер, които целят премахване на пречки за балансирано представителство на жените и мъжете или за равностойно положение на представителите на единия пол или за пола, поставен в неравностойно положение (по арг. от § 1, т. 6 ДР на ЗРЖМ). Равнопоставеността на жените и мъжете е легално дефинирана като равни права и задължения, равни възможности за реализация и за преодоляване на пречки във всички области на обществения живот, като жените и мъжете са свободни да развиват своите лични способности и да правят избор без ограниченията на социалната роля на своя пол, а равните възможности представляват създаване на условия за реализиране на равни шансове и осигуряване на гаранции за достъп до всички сфери (области) на обществения живот и постигане на личностна и професионална реализация и развитие (по арг. от § 1, т. 1 и т. 2 ДР на ЗРЖМ).

⁵ Сравни и Стайков, Ивайло. *Забраната за дискриминация в трудовите отношения и*

Закрилата е *специална* на плоскостта на съпоставителния анализ с т.нар. *обща правна закрила* на труда на всички работници или служители⁶ – както тези от мъжки пол, така и тези от женски пол, които не са носители на правните белези на понятията „бременност“, „напреднал етап на лечение ин-витро“ и „майка“. Отделям темата от специалната закрила на труда на *жените* като обща категория, която предизвиква съществена еволюция, тръгвайки от уредбата в правото на ЕС, което впоследствие води до промяна и в международната трудовоправна уредба и в концепциите, които възприема и МОТ⁷.

Изхождайки от *биологичната уникалност* на жената да бъде майка, да износва дете, да дава и отглежда живот и да изпълнява майчински функции, приемам, че тази биологична уникалност предопределя основателността на специалната закрила в трудовото право на дадена жена с оглед на трудовите ѝ права *само до толкова, доколкото тя се намира в обективно различна изходна позиция* както спрямо мъжете, които се трудят, така и спрямо жените, които не разгръщат тази своя уникалност, било то в конкретния момент, било то въобще, при това независимо от причините за това – лично решение, съдбовна предопределеност или друго. Тези причини са правноирелевантни. Въпросът е за фактите – дадена жена бременна ли е в съответния момент или не; в напреднал етап на лечение ин-витро ли е или не? Тя намира ли се в това специфично, различно фактическо състояние, което обективно би обосновало различното ѝ третиране във връзка с този факт или не?

Затова и целта на това изложение е да се отговори на въпроса *дали всички правни норми от правния институт на специалната закрила по раздел II на глава XV на КТ отговарят на общите изисквания на антидискриминационното законодателство*. Специалната закрила е правно и фактически обоснована само ако в основата ѝ стои обективно фактическо различие между субектите по трудовото правоотношение, което следва да бъде преодоляно именно чрез допълнителната (специалната) правна закрила,

проблемът за равните възможности на жените и мъжете и на представителите на различни етнически групи. – Административно правосъдие, 2005, № 4, 31 – 52 и № 5, 28–34.

⁶ В това изложение думите „работници“ и „служители“ (съответно „работник“ и „служител“) ще се използват като взаимозаменяеми термини, които обозначават другата страна по трудовото правоотношение наред с работодателя.

⁷ За историческото развитие на правната уредба на специалната закрила на труда на жените вж. Мръчков, Васил. *Трудово право*, 2018., 10 изд., С.: Сиби, 469–471. Относно подхода на МОТ вж. у Мръчков, Васил, 2000. *Международно трудово право*. С.: Сиби, 170–174.

която получават само тези правни субекти, за които са налице конкретните фактически обективни различия, като така се цели постигането на фактическо и правно равно третиране на всички работници или служители. Ако не е налице обективно различие, което да стои в основата на и да обосновава различното правно третиране на разглежданата категория работнички или служителки чрез предоставянето им на допълнителен набор от конкретни специални трудови права, би било налице по-неблагоприятно третиране, която е забранено съгласно чл. 8, ал. 3 КТ във вр. с чл. 4 ЗЗДискр⁸.

Анализ на отделните права – елементи от специалната закрила на бременните и на майките през призмата на забраната за дискриминация в труда

Първо, считам, че нормите, които уреждат специална закрила в трудовото право само на *бременните и на жените в напреднал етап на лечение ин-витро*, не са дискриминационни, тъй като титулярите на тези специални права са носители на обективно различни фактически биологични характеристики, които дават основание и за различното им правно третиране както спрямо мъжете – работници или служители, така и спрямо жените – работнички или служителки, които не са носители в конкретния момент на посочените специфични фактически биологични характеристики. Такива специални правни норми се съдържат в чл. 140, ал. 4, т. 2 (*абсолютна забрана за полагане на нощен труд*), чл. 147, ал. 1, т. 2 (*абсолютна забрана за полагане на извънреден труд*), чл. 157, ал. 2 (*платен от работодателя целеви отпуск за медицински прегледи, когато е необходимо те да се извършват през работно време*), чл. 307 (*забрана за възлагане и извършване на работа, която излага на опасност или застрашава сигурността и здравето им*⁹), чл. 309 (правото и задължението за *трудоустройство*),

⁸ Вж. и Стайков, Ивайло. *Понятие за дискриминация в трудовите отношения*. – Правен преглед, 2005, № 1, 22–42; Стайков, Ивайло, 2004. *Защита от дискриминация при наемане на работа*. – В: *Актуални проблеми на трудовото и осигурителното право. Том I*. Сборник в памет на доц. Елисавета Христова. С.: УИ „Св. Кл. Охридски“, 128–149.

⁹ Списъкът на работите и условията на труд по чл. 307, ал. 1 КТ е уреден в *Наредба № РД-07-4 от 15.06.2015 г. за подобряване на условията на труд на бременни работнички и на работнички родилки или кърмачки (за краткост „Наредбата“)*. В приложение № 2 към тази наредба са изброени изрично и неизчерпателно рисковите фактори и условията на труд, за които е установена *абсолютна* забрана за излагането на бременни работнички или служителки (чл. 5, ал. 1 от Наредбата), а в приложение № 3 – рисковите фактори и условията на труд, за които е установена *абсолютна* забрана за излагането на работнички или служителки – *кърмачки* (чл. 5, ал. 2 от На-

чл. 310 (*относителната забрана за командироване само по отношение на бременна жена и на работничка и служителка в напреднал етап на лечение ин-витро*) и чл. 333, ал. 5 КТ (*забраните за едностранно прекратяване на трудовото правоотношение от работодателя на изрично посочените правни основания*).

Второ, въпросът за *нарушаване на принципа за равенство в труда* следва да се постави при анализа на тези правни норми, които уреждат специална закрила само на труда на *майките*, когато такива права не са предвидени за закрила на бащите или за другите физически лица, полагащи реални грижи за деца до определена в съответната правна норма възраст и същевременно полагащи труд по трудово правоотношение. Такива норми се съдържат в следните текстове на Кодекса на труда:

редбата). В приложение № 1 са изброени също неизчерпателно рисковите фактори, процесите и условията на труд, за които работодателят трябва да определи характера, степента и продължителността на въздействието им върху бременните работнички и работничките родилки или кърмачки с цел: 1. да се оцени всеки риск за безопасността или здравето и всеки възможен ефект върху бременността или кърменето; 2. да се планират подходящи мерки за предотвратяване на риска. Когато резултатите от оценката на риска по чл. 2 покажат риск за безопасността или здравето на бременните работнички и на работничките родилки или кърмачки или могат да се отразят на тяхната бременност или кърмене, работодателят предприема необходимите мерки за временно приспособяване на условията на труд на работното място и/или работното време за съответната работничка с оглед премахване на риска. Ако приспособяването на условията на труд на работното място и/или на работното време е технически и/или обективно неосъществимо или не е оправдано да се изисква поради основателни причини, работодателят предприема необходимите мерки за преместване на работничката или служителката на друга подходяща работа.

Друг интересен аспект тук са легалните дефиниции, които са дадени в § 1, т. 1, т. 2 и т. 3 ДР на Наредбата, съгласно които: 1. „*бременна работничка*“ е работничка или служителка с установена бременност, както и работничка или служителка в напреднал етап на лечение ин-витро по смисъла на § 1, т. 13 от допълнителните разпоредби на Кодекса на труда, която е уведомила работодателя за състоянието си с документ, издаден от компетентните здравни органи; 2. „*работничка родилка*“ е работничка или служителка, която се е върнала на работа преди 90-ия ден след раждането и е уведомила работодателя за състоянието си с документ, издаден от компетентните здравни органи; и т. 3. „*работничка кърмачка*“ е работничка или служителка, която сама кърми детето си и е уведомила работодателя за състоянието си с документ, издаден от компетентните здравни органи. В тях процедурата по уведомяване на работодателя по чл. 313а КТ е интегрирана като *конститутивен елемент* от фактическия състав на понятията за бременна, родилка или кърмачка, което стриктно следва изискванията на Директива 92/85/ЕИО на Съвета от 19 октомври 1992 г. за въвеждане на мерки за насърчаване подобряването на безопасността и здравето по време на работа на бременни работнички и на работнички родилки или кърмачки. Вж. подробно у Недкова, Атлиана. Специалната закрила на работещите бременни, родилки и кърмачки..., 130–143.

А) чл. 140, ал. 4, т. 3 КТ, съгласно който *нощният труд* е забранен за *майки с деца до 6-годишна възраст, както и майки, които се грижат за деца с увреждания независимо от възрастта им*, освен с тяхно писмено съгласие. Титуляр на правото за специална закрила са две групи майки, които са диференцирани само с оглед на детето, за което полагат грижи – дете до 6-годишна възраст или дете с увреждания. Тази закрила е относителна, т.е. може да бъде преодоляна с изричното писмено съгласие на титуляря на правото. Основанието за тази специална закрила е фактът, че майката полага грижи за определено дете. Обективно и фактически погледнато, обаче грижи за дете до 6-годишна възраст или за дете с увреждания може да се полагат не само от майка – родена или осиновителка, а и от всяко друго дееспособно физическо лице, на което на правно основание е възложено отглеждането на това дете. Това може да бъде самотен баща или друг роднина или близък, ако родителите на детето са починали или са лишени от родителски права. За да се избегне дублирането в закрилата наред с уведомлението по чл. 313а КТ е възможно да се уреди нормативно задължение за попълване на декларация, в която да се удостоверява фактът, че за определен период грижите за конкретното дете се полагат от работника или служителя, който попълва декларация и желае спрямо него да се прилага специалната закрила – по аналогия с отпуските по чл. 163 и чл. 164 КТ¹⁰. Тази специална закрила е с основание от една страна полагането на грижи – отглеждането на малко дете или на дете с увреждания, а от друга – съчетаването на полагането на тези грижи с реалната възможност за точно изпълнение на задълженията по трудовото правоотношение. Но няма нито житейска, нито правна логика титуляр на тази закрила да бъде само майката. Ако майката е починала или е лишена от родителски права, тогава се оказва, че лицето, което полага реални грижи за детето не се ползва от специалната правна закрила по чл. 140, ал. 1, т. 3 КТ. De lege lata работодателят има право да възлага полагането на нощен труд на всеки работник или служител, който реално и фактически полага грижи за дете до 6-годишна възраст или за дете с увреждания, *щом не е негова майка*, дори и когато детето може да няма майка или тя да не може реално и фактически да полага грижи за детето. В това се състои по-неблагоприятното третиране на тези работници или служители. При сравними сходни обстоятелства – полагането на грижи за дете до 6-годишна възраст

¹⁰ В чл. 164, ал. 4 КТ и в чл. 164б, ал. 7 КТ като титуляр на правото на отпуск е посочено и „лицето, което е поело отглеждането на детето“. Тази формула може да се използва и в останалите норми, в които титуляр на правата е само майката. Поради ограничения обем на изложението, в него няма да бъде анализирана богатата палитра от права на отпуски по чл. 163–168 КТ.

или за дете с увреждания, т.е. при едно и също фактическо състояние с работничка или служителка – майка, полагаща грижи за дете до 6-годишна възраст или дете с увреждания, всички останали работници или служители, които не са носители на качеството „майка“ спрямо децата, за които полагат грижите, са третираны различно по силата на законова норма, без да има обективно основание за това.

Б) чл. 147, ал. 1, т. 3 КТ, съгласно който не се разрешава полагане на *извънреден труд* от *майки с деца до 6-годишна възраст*, както и *майки, които се грижат за деца с увреждания независимо от възрастта им*, освен с тяхно писмено съгласие. Тук анализът е аналогичен на този относно нормата на чл. 140, ал. 4, т. 3 КТ. Субектът, който следва да може да се ползва от тази относителна специална правна закрила срещу полагането на извънреден труд, е всеки работник или служител, който полага грижи за дете до 6-годишна възраст или за деца с увреждания независимо от възрастта им. Възможността забраната да бъде преодоляна с предварителното писмено съгласие на титуляря на закрилата реално гарантира правото на избор на работника или служителя на кое да даде приоритет във всеки конкретен момент от съществуването на трудовото си правоотношение според личната си преценка и приоритети – на работата по трудовото правоотношение или на полагането на грижите за детето, т.е. реално се гарантира възможността за съвместяване на личния и професионалния живот. От подобно право са лишени всички други работници или служители, които реално и фактически полагат грижи за дете до 6-годишна възраст или за дете с увреждания, щом не са носители на качеството „майка“ спрямо децата, за които полагат грижите. Това по-неблагоприятно третиране не намира обективно основание и следва да бъде коригирано от законодателя.

Нещо повече, нормите и на чл. 140, ал. 4, т. 3, чл. 147, ал. 1, т. 3 и на чл. 333, ал. 1, т. 1 КТ никъде *не* поставят като изискване грижата да се полага от *самотна майка*. Следователно, ако съпоставим хипотезата на майка, която не е самотна, а полага грижи за детето си заедно със съпруга си, с хипотезата например на самотен баща или настойник (независимо от пола), който отглежда сам детето, то е видно неравноправното третиране на бащата или настойника във втората хипотеза спрямо майката от първия пример. Това не е обосновано по-неблагоприятно третиране. Уреждането му в нормативен акт от ранга на Кодекса на труда противоречи на принципа за равенството в труда и забраната на дискриминацията по признаците „пол“, „лично положение“ и „семеино положение“ – поотделно или кумулативно приложени в отделните хипотези. А това е *основен принцип на трудовото право* и като такъв трябва да бъде последователно проведен във всички

правни норми на правния отрасъл, поради което подлежат на критика анализираниите правни норми.

В) чл. 310 КТ, който урежда *забрана* за работодателя да *командирова майка на дете до 3-годишна възраст* без нейното писмено съгласие. Тук следва да се посочи и чл. 313 КТ, който дава право на *бащата* да ползва правата по чл. 310 и по чл. 312 КТ, когато майката не е в състояние да се ползва от тях. Аргументите относно това, че титуляр на правото да не бъде командирован в хипотезата на посочената правна норма следва да бъде *всеки работник или служител, реално полагащ грижи за дете до 3-годишна възраст*, а не само майката и бащата на детето, са аналогични на посочените вече по-горе, затова препращам към тях. Трудностите, пред които би бил изправен полагащият самостоятелни грижи за дете до 3-годишна възраст близък или роднина, работещ по трудово правоотношение, при когото е настанено за отглеждане детето, когато следва да изпълни заповедта на работодателя за едностранно изменение на мястото на работа по трудовото правоотношение по чл. 121 КТ, независимо от продължителността на командировката, не се различават от тези, които би имала майката, съответно бащата, грижещи се за дете до 3-годишна възраст.

Г) чл. 312 КТ, съгласно ал. 1 от който работничка или служителка – майка на малко дете, до навършване на 6-годишна възраст на детето има *право да работи надомно при същия или при друг работодател*. Това право се предоставя за работи и дейности, изпълнението на които може да бъде извършвано в дома на работничката или служителката¹¹. Работното място при надомната работа е място в помещение в дома на работника или служителя или в друго помещение по негов избор извън предприятието, където се извършва работата (по арг. от § 1, т. 4 ДР на КТ). Видът на работата може да е същият или друг – при същия работодател въз основа на допълнително споразумение или при друг работодател със сключването на допълнителен трудов договор¹², като във втората хипотеза работникът има и потестативно право на ползване на неплатен отпуск по арг. от чл. 312, ал. 3 КТ по основното трудово правоотношение. Бащата на дете до 6-годишна възраст също има правата по чл. чл. 312 КТ, когато майката не е в състояние да се ползва от тях. Но ако поставим като титуляр на тези права самотен настойник (независимо от пола) на дете до 6-годишна възраст, и поставим въпроса надомната работа би ли дала възможност на тези работници или служители да полагат по-ефективна и добра грижа за детето, ако имат право на надом-

¹¹ Така вж. Мръчков, Васил. *Трудово право*, с. 475.

¹² Вж. Средкова, Красимира. – В: *Коментар...*, 920–921.

на работа в същата хипотеза, ще видим, че липсва обективно фактическо различие между тези лица и майката и/или бащата, които полагат грижи за детето, още повече, ако съпоставяме не със самотна майка, а с майка, която отглежда детето си заедно със своя неработещ и пребиваващ в същия дом грижовен съпруг и баща. Липсва обективно основание за различното правно третиране относно правото на надомна работа по чл. 312 КТ на майката, съответно бащата, полагащи грижи за малко дете до 6-годишна възраст, и всеки друг работник или служител, който реално полага грижи за друго малко дете, ненавършило 6-годишна възраст при същите предпоставки, т.е. при тези сравними сходни обстоятелства. Тези аргументите се отнасят и до останалите алинеи на чл. 312 и предвидените трудови права в тях. Вярно е, че титуляр на закрилата е както родена майка, така и осиновителка, съответно баща или осиновител, но и в този случай не е обоснована специалната закрила само на *майките и бащите*, които полагат грижи за дете до 6-годишна възраст. *De lege lata* те са *изключителен титуляр* на правата по чл. 312 КТ, без фактически това да е обективно обосновано. Неоснователното неравноправно третиране на останалите работници или служители, които полагат грижи за деца до 6-годишна възраст и не са техни майка или баща, е дискриминация, която следва да бъде преодоляна чрез адекватна законодателна намеса.

Д) чл. 333, ал. 1, т. 1 КТ, съгласно който в случаите по чл. 328, ал. 1, точки 2, 3, 5, 11 и чл. 330, ал. 2, т. 6 работодателят може да уволни само с предварително разрешение на инспекцията по труда за всеки отделен случай работничка или служителка, която е майка на дете до 3-годишна възраст. Предварителната закрила при уволнение на посочените основания е една от най-силните правни гаранции за закрила на правото на труд на работниците и служителите¹³. Макар и относителна, тъй като може да бъде преодоляна с предварително разрешение на инспекцията по труда, интензитетът на правна закрила е изключително висок, тъй като без това разрешение потестативното право на уволнение на работодателя на изрично посочените правни основания реално не може да бъде упражнено законосъобразно. Субект на закрилата по т. 1 е само майка на дете до 3-годишна възраст. Нормата е специална спрямо общото право на уволнение по чл. 328 КТ и чл. 330 КТ, като въвежда съществено ограничение на това право на работодателя. Затова и тълкуването ѝ следва да бъде стриктно и ограничително. Както беше посочено по-горе, няма законодателно изискване майката да отглеж-

¹³ Вж. и Стайков, Ивайло, 2003. *Дискриминация при прекратяване на трудовото правоотношение*. – Съвременно право, № 6, 16–31.

да сама своето дете. Единствените правни белези, на които следва да бъде носител субектът по чл. 333, ал. 1, т. 1 КТ, е да е работник или служител и да е майка на дете до 3-годишна възраст. Няма разлика в правния режим на рождената майка и на осиновителката, но само лице от женски пол, което на правно основание се счита за майка на дадено дете може да бъде титуляр на правото на предварителна закрила при уволнение на посоченото основание. Бащата, независимо дали е самотен баща, или е баща, който фактически сам полага грижи за детето си поради това, че майката не може обективно да полага грижи за детето, не е сред субектите, които се ползват от закрилата по т. 1 на чл. 333, ал. 1 КТ. От тази закрила не може да се ползва и всяко друго физическо лице, което на правно основание полага реални грижи за дете до 3-годишна възраст, когато детето няма родители или те не полагат фактически грижи за детето поради обективна невъзможност и/или техните родителски права са отнети. Закрилата по отношение на запазването на трудовото правоотношение чрез забраната за прекратяването му по време на полагането на грижи за малко дете до 3-годишна възраст е пример за реална гаранция за съвместяване на професионалния и личния живот на трудещите се. Считам, че независимо дали тези трудещи се може да не са „майка“ на детето, за което се полагат грижите, те би следвало да имат същите права на предварителна закрила при уволнение като тези на майката по чл. 333, ал. 1, т. 1 КТ, тъй като се намират в сравними сходни обстоятелства, когато на тях е възложено и те реално полагат грижи за дете до 3-годишна възраст на съответно правно основание. В обобщение, желателно е или изцяло да бъде преосмислена концепцията за специалната закрила при уволнение на основание чл. 333, ал. 1, т. 1 КТ, или да бъде приложен адекватно принципът за равно третиране на закрилата на труда на всички работници или служители, които отглеждат деца до 3-годишна възраст, независимо от пола, личното и/или семейното им положение.

Е) Аналогични правни проблеми във връзка с неоснователно неравно третиране поставят нормите на: аа) *чл. 174 КТ* относно правото само на майки с деца до 7-годишна възраст да ползват платения си годишен отпуск през лятото, а по тяхно желание – и през друго време на годината, освен в случаите по чл. 173, ал. 4 КТ; и бб) *чл. 354, ал. 1, т. 6 КТ* относно времето, което се признава за трудов стаж, без да е съществувало трудово правоотношение, чиито титуляри са майката, бащата, осиновителката или осиновителят за периода, за който са се грижили за отглеждане на дете до навършване на 3-годишна възраст. Самата съпоставка на двете норми сочи максимално ограничения субектен състав на титулярите на правото по чл. 174 КТ. От друга страна и в двете норми не се отчита хипотезата,

когато грижата за децата до съответната възраст се полага поради обективни причини от друго физическо лице – работник или служител, което не е нито майка, нито баща на детето. То би следвало да има същия обем на трудовоправна закрила.

На следващо място заслужава специално внимание анализът на *заглавието* на раздел II от глава XV „Специална закрила на някои категории работници и служители“, което е „Специална закрила на жените“. Това заглавие не отразява актуалното съдържание на раздела. Аргументите за това са няколко. Най-яркото изражение на това несъответствие е нормата на чл. 313 КТ от същия раздел, съгласно която правата на майката по чл. 310 и 312 могат да се ползват от бащата, когато майката не е в състояние да се ползва от тях. Следователно в раздела е уредена и специална закрила за бащите, а не само за *жени*. На следващо място като титуляри на закрилата във всички норми от раздела субектите са бременни, кърмачки и работнички и служителки в напреднал етап на лечение ин-витро (чл. 307, чл. 309, чл. 313а във връзка с чл. чл. 140, ал. 4, т. 2, чл. 147, ал. 1, т. 2, чл. 157, ал. 2, чл. 307, 309, 310 и чл. 333, ал. 5 КТ), или майки на деца до определена възраст (чл. 310, чл. 312 КТ). Това са все физически лица, за закрилата на които не е достатъчно само да са лица от женски пол съгласно заглавието на раздела, но към това се наслагва изискването да са в активна фаза на упражняване на *майчинските си функции* – било през биологичната фаза на майчинството като бременни, кърмачки или в напреднал етап на лечение ин-витро, било чрез полагането на грижи за дете до определена възраст.

Единствената правна норма от раздела, по която титуляри на права са всички жени извън упражняването на майчинските им функции, е нормата на чл. 308 КТ, съгласно която работодател, при когото работят 20 и повече жени, е длъжен да обзаведе стаи за лична хигиена на жените. В тази част от нормата е уредено специално право само на жените – работнички или служителки, да ползват стаи за лична хигиена. Тази норма установява различно правно третиране спрямо две групи субекти – от една страна това са мъжете, които работят при този работодател, от друга страна това са жените, които работят при работодатели, при които работят 19 или по-малко жени. И двете групи работници или служители – и мъже, и жени, нямат право да ползват стая за лична хигиена. Очевидните въпроси тук са от една страна мъжете нямат ли нужда от лична хигиена, а от друга – различна ли е нуждата от лична хигиена на жените при работодатели с 20 и повече работнички или служителки от тази на жените, които работят при работодатели с 19 и по-малко работнички или служителки. Тези въпроси са реторични, но насочват към принципния въпрос за опазването на *правото на лично достойнство*

на работниците и служителите като част от който въпрос би могла да се разглежда и личната хигиена на трудещите се – както мъже, така и жени. На тази плоскост не считам, че има обективни основания за различното третиране на посочените работнички или служителки спрямо останалите работници или служители както от мъжки, така и от женски пол, поради което и тази норма следва да бъде преосмислена през призмата на принципа за равенство и забраната на дискриминацията в труда.

Заклучение

Въз основа на направената систематизация на специалната закрила могат да се направят следните *правни изводи* относно *основателността* или не на тази закрила на посочените категории лица през призмата на принципа за равенство и забраната за дискриминация в труда. *Първо*, правните норми, съдържащи специална закрила за бременните работнички или служителки и за работничките или служителките в напреднал етап на лечение ин-витро, е обективно обоснована и не разкрива белези на неравноправно третиране. Тези правни субекти се намират в различно фактическо положение, което обосновава и различното правно третиране – предоставянето на допълнителни права, например като тези по чл. 140, ал. 4, т. 2, чл. 147, ал. 1, т. 2, чл. 157, ал. 2, чл. 307, чл. 309, чл. 333, ал. 5 и ал. 6 КТ. Тези права като съвкупност се определят като тяхна специална трудовоправна закрила по индивидуалното им трудово правоотношение, която е обоснована и не е дискриминираща спрямо останалите работници или служители. Извън *биологичните елементи* на майчинството¹⁴ обаче могат да се открият редица норми от КТ, в които може да се констатира неравноправно третиране на работниците и служителите от мъжки пол и на работниците и служителите, независимо от пола им, които полагат реални грижи за малки деца, но не са техни майка или баща. Такива най-общо са правните норми, титуляри на правата по които са само „майки“ или само „жени“. Тези норми бяха анализирани по-горе, а тук като пример ще посоча само нормите на: а) чл. 308 КТ – в частта относно задължението на работодателя, при когото работят 20 и повече жени, да обзаведат нарочни стаи за лична хигиена само на жени, съответното правото само на жените да ползват стаи за лична хигиена. Извън вече поставения логичния въпрос мъжете нямат ли право на лична хигиена стои и принципният въпрос за опазването на правото на *лично достойнство* на работниците и служителите като част от който въпрос би могла да се

¹⁴ За елементите на майчинството като осигурен социален риск вж. Койчева, Райна, 2012. *Социално осигуряване на майчинството*. С.: Авалон Пъблишинг, 11–22.

разглежда и личната хигиена на трудещите се – както мъже, така и жени; и на б) чл. 333, ал. 1, т. 1 КТ – предварителната закрила при уволнение само на майките с деца до 3-годишна възраст, и т. н.

Специалната трудовоправна закрила на бременните и майките е уредена с императивни правни норми. Тя е изключителна закрила, приложима само към изрично и изчерпателно изброените в КТ работници или служители. Правните норми, с които тя е уредена, подлежат на стриктно (стеснително, ограничително) правно тълкуване. В този контекст следва да се подчертае друг важен аспект на нарушение на забраната за дискриминация в труда в анализираната правна уредба. Вижда се, че проблемът с неравноправното третиране се явява не само при прилагане на признака „пол“, а и при прилагане на признака „семеино положение“ и/или „лично положение“. В хипотезата, когато гледането на дете до определената в КТ възраст е реално възложено на работник или служител, който не е нито негова майка, нито баща, а е друго физическо лице, това друго физическо лице – работник или служител, не може да бъде титуляр на правата по чл. 140, ал. 4, т. 3, чл. 147, ал. 1, т. 3, чл. 310, чл. 312 и чл. 333, ал. 1, т. 1 КТ.

Принципно е правилна нормата на чл. 313 КТ, съгласно която правата на майката по чл. 310 и чл. 312 могат да се ползват от бащата, когато майката не е в състояние да се ползва от тях. Но тя разкрива и следните правни проблеми. Тук единият проблем е защо бащите могат да бъдат титуляри на правата само по чл. 310 и чл. 312 КТ, а не и на всички останали норми относно специалната закрила, които не са уредени в същия раздел на КТ. Нормата на чл. 313 КТ трябва да бъде допълнена в две направления. Първо, в нея следва да се включат и всички останали норми, които предвиждат специална закрила само за майките, когато правата не могат да се ползват от нея – например нормите на чл. 140, ал. 4, т. 3, чл. 147, ал. 1, т. 3, чл. 174, чл. 354, ал. 1, т. 6 и чл. 333, ал. 1, т. 1 КТ; 2. Второ, в нея следва да се включат като титуляри на правата не само бащите, а и всяко друго физическо лице, което полага реални фактически грижи за дете до определената в съответната норма на КТ възраст на детето. Съображенията тук са, че детето може да не се отглежда нито от майката, нито от бащата по различни причини – те може да са починали, може да са лишени от родителски права, може да са недееспособни и т. н. Тук закрилата в крайна сметка е насочена към *съчетаването на работата по трудово правоотношение и отглеждането на детето* чрез реалното полагане на грижи за детето. Титулярят на правата по трудовото правоотношение има необходимост от тази специална правна закрила, за да може да съчетава реалната грижа за детето с работата си по трудовото правоотношение. Такива субекти могат да бъдат баба, дядо, леля, чичо, всеки

пълнолетен дееспособен роднина или друг близък на детето, дори пълнолетни братя или сестри на детето, приемно семейство и всяко друго пълнолетно и дееспособно физическо лице, на което е възложено реалното отглеждане на детето на правно основание. В *Закона за закрила на детето* субектите са посочени така: „*родители, настойници, попечители или други лица, които полагат грижи за дете*“. Този кръг от лица също може да бъде използван в КТ за определяне на титулярите на правата във връзка със специалната закрила по повод полагането на грижа за дете до определена възраст, когато майката и/или бащата на детето не могат да упражняват лично тези права поради обективна невъзможност. В самия КТ като самостоятелен титуляр на права е изведено „*лицето, което е поело отглеждането на детето*“ (арг. от чл. 164, ал. 4 и чл. 164б, ал. 7 КТ). Това физическо лице следва да може да бъде титуляр на специалната правна закрила по чл. 140, ал. 4, т. 3, чл. 147, ал. 1, т. 3, чл. 310, чл. 312, чл. 174, чл. 354, ал. 1, т. 6 и чл. 333, ал. 1, т. 1 КТ за периода, в който реално полага грижи за детето при спазване на процедурата по чл. 313а КТ. За тази грижа, която се полага за детето, няма фактическо значение дали това лице, което полага грижата, е от мъжки или от женски пол, както и няма значение дали лицето е майка, баща, баба, дядо, брат, сестра, друг роднина или близък, щом то полага грижите на законно правно основание. Това трябва да намери отражение в правната уредба в Кодекса на труда чрез съответните законодателни промени на посочените правни норми, за да бъде реално проведен принципът за равенство в труда и забраната на дискриминация в трудовото право.

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Дискриминационни законодателни решения и административни практики при упражняване на осигурителни родителски права

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Българското осигурително законодателство в исторически план традиционно акцентира върху осигурителните права на жената майка, която работи по трудово правоотношение. На по-късен етап осигурителната закрила се разширява и обхваща и други категории работещи майки – упражняващи свободни професии, занаятчийска дейност, търговска дейност и др. В по-ново време осигурителната закрила на майчинството постепенно се трансформира в родителска осигурителна закрила, като възникват осигурителни права освен за бащата, но също и за няколко други групи лица, натоварени с изпълнение на родителска грижа: осиновители и приемни родители. Динамиката на осигурителното законодателство в тази посока неизменно се съпътства и от спорни законодателни решения, които съставляват дискриминация. Някои от тях отпадат през годините, за други се правят опити за минимизиране, трети са изцяло изоставени от законодателя. Тази проблематика се усложнява и от незаконосъобразни практики на Националния осигурителен институт. Основните проблеми, създаващи неравнопоставеност на родителите, се очертават на две нива: между осигурените по чл. 4, ал.1 КСО майка и баща, и между осигурените родители по чл. 4, ал.1 КСО и самоосигуряващите се родители по чл. 4, ал. 3 КСО.

Ключови думи: осигурителни права, майчинство, родителски права, закрила, баща, неравнопоставеност

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Discriminatory legislative decisions and administrative practice in exercising parental rights

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Historically, the Bulgarian social security legislation traditionally emphasizes the social security rights of the mother working under an employment relationship. At a later stage, the insurance protection is expanded to other categories of working mothers, and in more recent times, maternity insurance protection has gradually transformed into parental insurance protection. The dynamics of insurance legislation in this direction is inevitably accompanied by controversial legislative decisions that result in discrimination. Some of them have been excluded over the years, for others attempts are made to limit their field of application, others are completely abandoned by the legislator. This problem is also complicated by illegal practices of the National Social Security Institute.

Keywords: *insurance, maternity leave, parental, protection, father, inequality, rights*



1. Българското осигурително законодателство в исторически план първоначално акцентира върху осигурителните права на жената майка, която работи по трудово правоотношение, като осигурителните права тясно следват трудовите права, свързани с ползването на отпуските по майчинство в Кодекса на труда (КТ). Така в първоначално действащия осигурителен закон – Кодекса на труда от 1951 г., са били уредени общо три вида обезщетения, свързани с майчинството: при трудоустрояване на бременна работничка (чл. 155а КТ/51 г.); при ползване на отпуск поради бременност и раждане по чл. 163 КТ и при ползване на отпуск за гледане на дете до 2 г. по чл. 164 КТ, чл. 156, ал. 1 и ал. 3 КТ/51 г. Правното основание за получаване на тези обезщетения се свързва преимуществено с работещи жени майки, за които е настъпило раждане или осиновяване на дете, и само по изключение осигурителни права са били предвидени и за работещия по трудово правоотношение баща: при смърт на майката и при прехвърляне на отпуска за гледане на дете до 2 г. на бащата (чл. 156, ал. 3 и ал. 4 КТ/51 г.).

2. На по-късен етап с влизането в сила през 2000 г. на Кодекса за задължително обществено осигуряване (обн. ДВ, бр. 110 от 17.12.1999 г.), впоследствие с променено наименование Кодекс за социално осигуряване (КСО), осигурителната закрила при риска майчинство се разширява и обхваща и други категории работещи майки: упражняващи свободни професии, занаятчийска дейност, търговска дейност и др. (чл. 4, ал. 3, т. 1-4 КСО), които да могат по свое желание да се осигуряват за риска майчинство (чл. 4, ал. 4 КСО). Междувременно започва по-уверено да си проправя път и по-широка осигурителна закрила на работещите бащи, като от една страна в кръга на правоимащите се добавят и самоосигуряващите се бащи, а от друга в КТ и КСО се установяват нови видове отпуски и осигурителни права на бащите при раждане на дете:

2.1. Право на отпуск поради бременност и раждане след 6-тия месец на детето със съгласие на майката по чл. 163, ал. 10 КТ (в сила от 2006 г.) с право на парично обезщетение от ДОО при ползването му по чл. 50, ал. 7 КСО;

2.2. Право на 15-дневен отпуск на бащата след изписване на детето от лечебното заведение по чл. 163, ал. 8 КТ (в сила от 2008 г.) с право на парично обезщетение от ДОО при ползването му по чл. 50, ал. 6 КСО;

2.3. Право на неплатен отпуск за гледане на дете до 8 г. по чл. 167а КТ (в сила от 2004 г.), който се зачита за осигурителен стаж (чл. 9, ал. 2, т. 1 КСО);

2.4. Право на платен отпуск за гледане на дете до 8 г. по чл. 164в КТ, в сила от 2022 г., с право на парично обезщетение от ДОО при ползването му по чл. 53 д – чл. 53ж КСО.

3. Наред с традиционните родители – майка и баща, осигурителната закрила на майчинството постепенно започва да се трансформира в родителска осигурителна закрила. В кръга на правимащите осигурени лица се добавят и други осигурени лица, на които са възложени родителски задължения, свързани с отглеждане на деца, като баби и дядовци на родители или осиновители (чл. 163, ал. 10 КТ; чл. 164, ал. 3 КТ; чл. 167, ал. 1 – 5 КТ; чл. 164б, ал. 5 КТ; чл. 51 КСО; чл. 53, ал. 2 КСО и др.), настойници (чл. 167, ал. 5 КТ; чл. 53, ал. 2 КСО, чл. 50а, ал. 2 КСО и др.) и приемни родители по чл. 26 от Закона за закрила на детето (чл. 164а КТ, чл. 50, ал. 5 КСО и др.). Значително се обогатява и съществуващата първоначално по-оскъдна правна уредба за осиновителите с нови трудови и осигурителни права, като законодателят отблизко следва модела на правната уредба на родителските трудови и осигурителни права. Пример в тази насока е установеният през 2013 г. нов вид отпуск по чл. 164б КТ за отглеждане на осиновено дете до 5 г. с право на парично обезщетение от ДОО по чл. 53а КСО.

4. Развитието на националното осигурително законодателство в голяма степен е повлияно и от развитието на международната уредба относно закрилата при упражняване на трудови и осигурителни права от работещите родители. Така първоначално Международната организация на труда (МОТ) приема конвенции за защита и насърчаване на равенството за всички работещи жени с акцент върху грижата за майката и детето¹, а на по-късен етап вече се отчита необходимост от гарантиране на равенство на възможностите и еднакво отношение към работниците и служителите със семейни задължения от двата пола.²

На ниво Европейски съюз (ЕС) също са приети множество директиви относно равенството между половете и равновесието между професионалния и личния живот, а в последните години вече отчетливо се поставя фокус за равнопоставеност на родителите и лицата, полагащи родителска грижа.³

5. От тази хронология на международната и национална правна уредба могат ясно да се открият две водещи тенденции:

Първата е насочена към разширяване обхвата на осигурителна закрила към по-широк кръг работещи лица, поели родителски задължения – родители, осиновители, приемни родители и т. н.

Втората поставя акцента в преодоляване на дискриминационното третиране по пол и гарантиране на равностойни осигурителни права за ли-

¹ Конвенция за закрила на майчинството (ревизирана), 1952 г. и Препоръката за закрилата на майчинството, 1952 г.

² Конвенция № 156 на МОТ от 2006 г.

³ Директива (ЕС) 2019/1158 на Европейския парламент и на Съвета.

цата, поели родителски задължения при съвместяването на трудова дейност и полагане на родителска грижа.

И двете тенденции, особено втората, към настоящия момент са поставени пред сериозни изпитания в контекста на набиращото популяризиране европейско законодателство и законодателства на редица държави членки на ЕС за радикална промяна на традиционния семейно-родителски модел в светлината на легализиране на еднополовите бракове, упражняването на родителски права от еднополови родители, заличаването на традиционните социално-правни роли на майката и бащата и замяната им с безполовите „Родител 1“ и „Родител 2“.⁴ Макар че засега България все още остава встрани от тези процеси, те неизбежно ще засегнат правната уредба на семейните, а оттам и осигурителните правоотношения предвид действащите регламенти на ниво ЕС за свободното движение на хора и за координиране на системите за социална сигурност, както и решенията на Съда на Европейския съюз (СЕС) по тяхното прилагане. Законодателството и практиката на българските съдилища за момента са категорични по въпросите относно еднополовите бракове. Макар и сключени в държави, където правната уредба позволява това, еднополовите бракове не се признават на българска територия, но това не оправдава каквито и да е форми на дискриминация, основана на сексуална ориентация. С решението на Европейския съд по правата на човека от 5.09.2023 г. по делото „*Коилова и Бабулкова срещу България*“, българската държава е задължена да създаде правна рамка и защита на двойките от един и същи пол. В тази връзка вероятно в най-скоро време ще се инициират и съответни законодателни промени, включително засягащи родителските и осигурителни права на еднополовите семейни двойки с родени или осиновени деца.

6. Динамиката на това антидискриминационно законодателство и неговата проекция в българското осигурително законодателство неизменно се съпътства от колебливи и спорни законодателни решения. Някои от тях отпадат през годините, за други се правят опити за минимизиране, трети са изцяло изоставени от законодателя.

6.1. Един от най-ярките примери за законодателно установена дискриминация при упражняване на родителски осигурителни права беше правната уредба за различен срок за получаване на парични обезщетения при майчинство в зависимост от поредността на детето. Това законодателно

⁴ Съюзът между двама души от един и същи пол е легализиран в тридесет държави в света.

Държави членки на ЕС, признаващи еднополовите бракове, са: Австрия, Белгия, Дания, Финландия, Франция, Германия, Ирландия, Люксембург, Малта, Холандия, Норвегия, Португалия, Испания, Швеция, Гърция. Холандия е първата страна в света, която легализира еднополовите бракове на 1 април 2001 г. Въпреки това към днешна дата еднополовите бракове все още остават забранени в много страни.

решение предвиждаше различна продължителност на отпуските при бременност, раждане и гледане на малко дете като за периода от 1986 г. до 1999 г. работещите майки имат право на 120, 150 или 180 дена отпуск по чл. 163 КТ, съответно за първо, второ и трето дете и 120 дена за всяко следващо. Респ. за същите срокове е и правото им на парично обезщетение от ДОО (чл. 156 КТ/51 г.). Идентично законодателно решение беше възприето до края на 2015 г. и за отпуска по чл. 164 КТ, респ. срокът на обезщетението по чл. 53 КСО съответно за първо и второ дете до навършване 2 г. на детето, а за трето и следващи деца – само 6 месеца.

6.2. По други въпроси законодателят успешно минимизира различното третиране на осигурените лица с родителски задължения с цел осигуряване на еднаква или равностойна осигурителна закрила. Те обхващат видовете осигурителни престации, предпоставките за тяхното получаване, размера и срока за получаването им.

Без претенции за изчерпателност, ще посоча няколко примера, от анализа на които може да се направят и изводи доколко адекватни и целесъобразни са съответните законодателни решения.

6.2.1. Като успешна може да се оцени законодателната политика в посока изравняване на осигурителната закрила на родители и осиновители. Потвърждение на това е уредбата на отпуска и обезщетенията при бременност, раждане и гледане на малко дете по КТ и КСО, които са в почти равностойни на отпуските и обезщетенията при осиновяване на дете до 5-годишна възраст: 410 дни за майките (чл. 163, ал. 1 КТ и чл. 50, ал. 1 КСО) и 365 дни за осиновителките (чл. 164б КТ и чл. 53в КСО); право на отпуск/обезщетение на баща/осиновител при смърт и заболяване на майката (чл. 167 КТ и чл. 51 КСО); обезщетение при неизползван отпуск (чл. 50а и чл. 53г КСО); платен отпуск 2 месеца за гледане на дете до 8 г. на баща/осиновител (чл. 53д КСО); право на обезщетение при прекратяване на осигуряването на родител и осиновител (чл. 52 КСО) и др. За двете категории осигурени лица – родители и осиновители, е предвиден също така еднакъв предварителен осигурителен стаж – 12 м. (арг. чл. 48а и чл. 53а КСО) и еднакви правила за определяне на размерите на обезщетенията при риска майчинство (арг. чл. 49 и чл. 53в КСО).

6.2.2. Като успешна може да се оцени и законодателната политика в посока изравняване на осигурителната закрила на родители и приемни родители по чл. 26 от Закона за закрила на детето, като все пак тук се отчита професионалният характер на родителската грижа. Потвърждение на това е уредбата на отпуските и обезщетенията при бременност, раждане и гледане на малко дете по КТ и КСО за приемните родители, които са съпоставими с отпуските и обезщетенията на родителите, с нормалното приспадане на липсващия период на бременност и раждане: чл. 163, ал. 7 КТ чл. 50, ал. 5

КСО „в размер на разликата от възрастта на детето в деня на настъпването му до изтичане на полагащия се отпуск за раждане....“ (чл. 164а КТ и чл. 53, ал. 3 КСО – право на отпуск и парично обезщетение за гледане на дете до 2 г. и т. н.)

6.2.3. Като успешна може да се оцени и законодателната политика в посока изравняване на осигурителната закрила на родители, осигурени за всички рискове по чл. 4, ал. 1 КСО, и родители – самоосигуряващи се лица по чл. 4, ал. 3 КСО, доброволно осигурени за риска майчинство. И тук правата на осигурените и самоосигуряващите се родители и осиновители са почти идентични, досежно предпоставките за получаване на обезщетения (чл. 48а и чл. 50, ал. 8 КСО), размерите на паричните обезщетения, сроковете за получаване и т.н. Несъществена разлика се наблюдава в реда за упражняване на осигурителните права, като при осигурените лица по чл. 4, ал. 1 КСО той се предхожда от ползване на съответен вид отпуск по първичното правоотношение, което липсва при самоосигуряващите се лица. Различни са и правилата за зачитане на осигурителен стаж като при самоосигуряващите се лица той задължително е обвързан с платени осигурителни вноски (чл. 9, ал. 1, т. 1 и т. 4 КСО).

7. Макар и българският законодател да е положил сериозни усилия да обезпечи равнопоставеност на осигурените лица, полагащи родителска грижа, все още се срещат и правни норми, които съставляват дискриминация най-вече по признака пол.

Най-красноречив пример за това е липсата на самостоятелно право на отпуск на бащата в хипотезата на чл. 163, ал. 10 КТ, което като резултат води и до проблеми с правото на парично обезщетение на бащата по чл. 50, ал. 7 и ал. 8 КСО. Независимо че законодателят го обозначава като „право на осигуреното лице“ от анализа на правната уредба е видно, че това не е същинско субективно право, а по-скоро е особен вид „квази право“, което стои по-близо до правната възможност, тъй като е *двойно ограничено* спрямо същинското право, уредено в полза на осигурената жена майка (чл. 163, ал. 1 КТ и чл. 50, ал. 1 КСО). Така майката има право на общо 410 дни платен отпуск за бременност, раждане и гледане на дете с начало 45 дни преди раждането спрямо „право“ за бащата да ползва 182 дни след навършване на 6 месеца на детето, но само под условие на задължително съгласие от майката.

7.1. Това законодателно решение донякъде е житейски оправдано от гледна точка на изключителната физиологична роля на жената майка за износване на плода, раждане на детето и ранния следродов период, както и от традиционно установената в българското общество народопсихология за водещата роля на майката за отглеждането на децата. Същевременно лишаването на бащата изцяло от самостоятелно право да полага родителска грижа е изцяло нелогично и неоправдано. От една страна законодателят сякаш

презюмира, че съгласието на майката е само формалност при упражняване на уж равностойни права от двамата родители, като изисква за всеки от тях наличие на предварителен осигурителен стаж от 12 месеца (чл. 48а КСО). От друга страна, макар и да обвързва ползването на този отпуск от бащата само с първоначално дадено съгласие от майката, законодателят на практика е уредил конструкция на правна възможност за бащата да „встъпи“ в правото на майката.

Нещо повече. След като полагането на родителска грижа от бащата се допуска само по изрично съгласие на майката, то трябва да е налице и за целия срок, през който бащата ще ползва „отстъпеното“ от майката право по чл. 163, ал. 1 КТ и чл. 50, ал. 1 КСО. Макар и изрично да не е предвидено в закона, няма законова пречка титулярят на правото по чл. 163 КТ и чл. 50, ал. 1 КСО – осигурената майка, да оттегли по всяко време даденото съгласие и така да суспендира „правото“ на бащата. Житейските причини за това могат да бъдат легитимни и подчинени на грижа за детето, но могат да бъдат и форма на класическа злоупотреба с родителски права. Идентична е уредбата и в чл. 50, ал. 8 КСО по отношение на самоосигуряващия се баща.

7.2. Изцяло непонятно е и друго законодателно решение, поставящо в неравностойно положение бащата при ползване правото на отпуск и парично обезщетение по чл. 50, ал. 7 и ал. 8 КСО, който след получаване на съгласието от майката впоследствие продължава да е обвързан не само от собствения си осигурителен статус, но също и с този на майката. Съгласно чл. 5 от Наредбата за паричните обезщетения и помощи от ДОО при упражняване на правото по чл. 50, ал. 7 и ал. 8 КСО от бащата, той е длъжен да декларира определени обстоятелства, сред които е и дали майката продължава да е осигурено лице. В случай, че след придобиване от бащата на правото на обезщетение по чл. 50, ал. 7 и ал. 8 КСО осигуряването на майката бъде прекратено без значение причината за това (болест, неплатен отпуск, смърт, уволнение), то това автоматично ще предизвика погасяване „правото“ на бащата. Ако прекратеното осигуряване на майката настъпи по време на получаване на обезщетението по чл. 50 КСО и преди края на 410-те дни, неговото изплащане ще бъде прекратено, ако бъде своевременно заявено от бащата или установено от органите на НОИ. Ако обаче обезщетението по чл. 49 КСО е получено изцяло от бащата в хипотезата на чл. 50, ал. 7 и ал. 8 КСО и впоследствие бъде установено правопогасяващото обстоятелство „прекратено осигуряване на майката“, то полученото обезщетение ще подлежи на възстановяване от бащата в хипотезата на чл. 114, ал. 1 като недобросъвестно получено ведно с лихвата по чл. 113 КСО. Съдебната практика изобилства от подобни казуси, при които бащата се третира като недобросъвестен по причина, че не е заявил своевременно промяна в декларирано по чл. 5 от НПОПДОО обстоятелство, а именно – прекратяване осигуряването на майката. В някои от решенията изрично се приема, че

„бащата, на който е прехвърлено правото на платен отпуск за отглеждане на малко дете и съответно – на парично обезщетение, не разполага със самостоятелни права, от които да черпи предоставените от закона обезщетения, а те са акцесорни, като предпоставка за получаването им е правото на майката на детето на обезщетение за майчинство.“⁵

7.3. Смятам че тази законодателна и съдебна практика не може да бъде споделена, тъй като в КСО никъде не се съдържа изискването веднъж упражнено със съгласието на майката, правото на бащата по чл. 50, ал. 7 и ал. 8 КСО да е поставено в зависимост от последващо непрекътено осигуряване на майката. Съгласно чл. 7, ал. 2 от Закона за нормативните актове (ЗНА), наредбата се издава за прилагане на законова разпоредба, а не за нейното допълване, поради което не може с подзаконов нормативен акт да се предвижда несъществуващо в закона правило, в случая – непрекътено осигуряване на майката. В тази връзка смятам, че предвиденото в чл. 5 от НПОПДОО задължение за деклариране осигуреност на майката, въздигнато в предпоставка за получаване на парично обезщетение по чл. 50, ал. 7 и ал. 8 КСО от бащата за целия остатъчен срок до изтичане на 410-те дни по чл. 50, ал. 1 КСО, освен че е дискриминационно, е и незаконосъобразно, поради което на основание чл. 15 ЗНА не следва да се прилага от съдилищата.

7.4. Същата конструкция на подчиненост и обвързаност със съгласие и осигуреност на майката, е предвидена и за осигурения баща/осиновител при ползване на отпуск и получаване на парично обезщетение за гледане на дете до 2 г. (чл. 164, ал. 3 КТ и чл. 53, ал. 2 КСО; 164б, ал. 3 КТ и чл. 53в, ал. 3 КСО).

7.5. В заключение, за преодоляване на дискриминационните законодателни решения спрямо мъжете – бащи/осиновители, при ползване на отпуски и осигурителни обезщетения след раждането на дете и постигане на равнопоставеност с майката/осиновителката при полагане на родителска грижа, предложението *de lege ferenda* е за следродовия период и до навършване на 2 години на детето двамата родители да имат самостоятелно право на отпуск по чл. 163 и чл. 164 КТ и на парично обезщетение по чл. 50 и чл. 53 КСО по модела на съвместно споделяне на неплатения отпуск по чл. 167а КТ: по равен брой месеци за двамата родители с възможност за взаимно прехвърляне на правото или на част от него.

8. Дискриминационни практики се откриват и в практиката на НОИ спрямо различни категории осигурени лица и самоосигуряващи се лица по повод упражняване на осигурителни права при майчинство. Макар и на пръв поглед да се касае за различни казуси, всички те са обединени от

⁵ Решение № 9914 от 7.11.2022 г. на ВАС, 6-то отд. по адм. д. № 3707/2022 г.; Решение № 7416 от 5.07.2023 г. на ВАС, 6-то отд. по адм. д. № 6022/2020 г. и др.

превратно вътрешноведомствено тълкуване и прилагане на осигурителното законодателство с цел компрометиране на съществуващи осигурителни права и лишаване на правоимащи лица от осигурителни обезщетения. При условия на известна цикличност длъжностните лица на осигурителния орган се опитват да налагат разнородни практики спрямо различни категории правоимащи лица, които се третират неблагоприятно по различни формални и несъществуващи в закона изисквания за упражняване на осигурителни права при майчинство. Това порочно явление се улеснява и от пренебрежимо малкия брой казуси, които попадат в обхвата на съдебния административен контрол върху актовете на НОИ. Като краен резултат, значително се затруднява и забавя (в случаите на административно и съдебно обжалване – бел. моя), а понякога изобщо се осуетява получаването на дължимите осигурителни престации и осигурените лица се оказват „жертви“ на фактическа административна дискриминация.

8.1. Пример за фактическа административна дискриминация е несъществуващото в закона, но прилагано в практиката на НОИ изискване осигурените лица по чл. 4, ал. 1, т. 7 КСО и самоосигуряващи се лица по чл. 4, ал. 3, т. 2 КСО при упражняване на правото на парично обезщетение за бременност, раждане и гледане на дете по чл. 50 КСО да бъдат заличени като управители в търговския регистър, респ. заменени с друг управител и/или прокурист. Без да се изследва наличието на конкретни прояви на съвместяване на трудова дейност и получаване на обезщетения, позовавайки се само и единствено на презумпцията на чл. 7 от Закона за търговския регистър и регистъра на юридическите лица с нестопанска цел (ЗТРРЮЛНЦ), че са трето добросъвестно лице относно вписаните в търговския регистър обстоятелства, без да оспорват състоянието на осигуреност и настъпването на риска майчинство, длъжностните лица от ТП на НОИ безрезервно приемат, че лицето е продължило да извършва трудова дейност по смисъла на чл. 10 КСО, респ. няма право да получи парично обезщетение от ДОО. Най-често първоначално се отпуска и изплаща полагащото се обезщетение по чл. 50 и чл. 53 КСО, но впоследствие в резултат на последващ контрол по чл. 108 КСО върху собствените си актове длъжностните лица от системата на НОИ предприемат следната поредица от привидно законни, но целящи увреждане на осигурените лица правни действия:

8.1.1. Издаване на задължителни предписания по чл. 108, ал. 1, т. 3 КСО за коригиране на подадени осигурителни данни в НАП от осигурителя за осигуреното лице или за самоосигуряващо се лице, ползващо отпуск по майчинство, с искане за замяна на подадените данни с данни за извършване на трудова дейност и получаване на доход за периода на ползване на отпуските за бременност, раждане и гледане на малко дете. Задължителните предписания като индивидуален административен акт подлежат на адми-

нистративно и съдебно обжалване по реда на чл. 117 КСО и в случай, че не се обжалват, се пристъпва към следваща стъпка.

8.1.2. При неоспорване и влизане в сила на задължителните предписания за коригиране на данни, издаване на ревизионен акт за начет по реда на чл. 110 КСО за причинени щети на ДОО от неправилно извършени разходи, в случая – неправомерно изплатени обезщетения за майчинство по чл. 50 и/или чл. 53 КСО, като „щетата“ спрямо осигурителя и самоосигуряващото се лице се равнява на дължимите осигурителни вноски за периода на отпуските по майчинство.

8.1.3. При неоспорване и влизане в сила на задължителните предписания за коригиране на данни, издаване на разпореждане по чл. 114, ал. 3 КСО за възстановяване на недобросъвестно получени суми от осигуреното лице за парични обезщетения по чл. 50 и чл. 53 КСО.

8.2. Друг пример са случаи, при които макар и с различни нюанси осигурителният орган отказва да отпусне обезщетение за бременност и раждане като оспорва наличието на качеството „осигурено лице“: поради нерегистриран в НАП трудов договор по реда на чл. 62, ал. 5 КТ; поради „прекъснато осигуряване“ на осигурено лице по чл. 4, ал. 1, т. 8 КСО – общински съветник, за дните в които не се провеждат заседания и не се изплаща възнаграждение; лицето е постъпило на работа, но няма отработен поне 1 цял работен ден и др.⁶

8.3. С любопитен казус е била сезирана Комисията за защита от дискриминация (КЗД) по преписка № 42 от 2020 г. за отказ от отпускане на обезщетение за бременност и раждане на регистриран земеделски производител с внесени осигурителни вноски с мотив, че често напускал страната, респ. не е извършвал реално трудова дейност. Оплакването е за дискриминация по етническа принадлежност на самоосигуряващо се лице от турски етнос, като се сочат и множество други подобни решения за откази от ТП на НОИ – гр. Кърджали. С Решение № 780 от 21.10.2021 г. КЗД отхвърля жалбата като недоказана, но от данните по преписката се повдигат някои други принципно важни правни въпроси: Доколко ТП на НОИ може да опровергава презумпцията за извършване на трудова дейност, декларирана от самоосигуряващото се лице по реда на чл. 1 от Наредба за обществено осигуряване на самоосигуряващите се лица, българските граждани на работа в чужбина и морските лица и върху кого лежи доказателствената тежест при оплакване за дискриминация в административните и съдебни производства пред КЗД и административните съдилища?

⁶ Решение № 16434 от 3.12.2019 г. по адм. д. № 1179/2018 г. на ВАС, VI отд.; Решение № 9942 от 23.07.2009 г. по адм. д. № 4013/2009 г. на ВАС, VI отд.; Решение № 1257 от 30.01.2019 г. по адм.д. № 1376/2018 г. на ВАС, VI отд.

Частичен отговор на втория въпрос се съдържа в мотивите на Решение № 780 от 21.10.2021 г. на КЗД, в което се подлага на анализ разпоредбата на чл. 9 от Закона за защита от дискриминация като се застъпва разбирането за необходимостта лицето, търсещо защита от дискриминация, да представи факти, от които да се презюмира дискриминация (*prima facie*), след което доказателствената тежест се прехвърля върху ответната страна. В същия смисъл са и мотивите на СЕС в практиката му по тълкуване на разпоредби от Директива 2000/43/ЕС от 29 юни 2000 г., прилагаща принципа за равно третиране на лица, независимо от расовия им и етнически произход и при тълкуването на разпоредби от Директива 2000/78/ЕО от 27.11.2000 г., създаваща основна рамка за равно третиране при заетостта и наемането на работа.⁷

Тези въпроси са предмет на самостоятелно изследване и излагането им тук, макар и по-странично от основната тема, цели да провокира бъдеща научна дискусия по темата.

⁷ Решение от 10.07.2008 г. по дело С 54/2007 г. на Съда на ЕО ; Решение от 17.07.2008 г. по дело С-303/2006 на Съда на ЕО.

Правната защита на работниците или служителите от тормоз на работното място – проблеми на нормативната уредба и новите предизвикателства пред законодателя в Република България

Николета Лазарова*

В статията авторът търси отговор на въпроса – нормативната уредба на Закона за защита от дискриминация (ЗЗДискр.) осигурява ли необходимата правна защита на работниците или служителите от тормоз на работното място? В тази връзка е направен кратък анализ на правната уредба на Закона за защита от дискриминация относно тормоза на работното място като форма на дискриминация. В контекста на изследването е анализирано действащото трудово законодателство и правните възможности за защита на работника или служителя от тормоз на работното място, който не се основава на дискриминационни критерии по смисъла на чл. 5 от ЗЗДискр. В статията е обсъден въпросът за ратификацията на Конвенция № 190 на Международната организация на труда (МОТ) за премахване на насилието и тормоза в областта на труда от Република България.

Ключови думи: *тормоз; работно място; дискриминация; защитени признаци; Конвенция № 190 на МОТ; правна защита; трудови права; достойнство; здравословни и безопасни условия на труд; работна среда*



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The legal protection of workers or employees against workplace harassment – regulatory issues and new challenges for the legislator in the Republic of Bulgaria

Nikoleta Lazarova

In the article, the author seeks an answer to the question – does the regulatory framework of the Anti-Discrimination Act (ADA) provide the necessary legal protection for workers or employees from harassment at the workplace? In this regard, a brief analysis of the legal framework of the Protection from Discrimination Act regarding workplace harassment as a form of discrimination has been made. In the context of the study, the current labour legislation and the legal options for protecting the worker or employee from harassment at the workplace, which is not based on discriminatory criteria in the sense of Art. 5 of ADA. The article deals with the ratification of Convention No. 190 of the International Labour Organization (ILO) on the elimination of violence and harassment in the field of labour by the Republic of Bulgaria.

Keywords: *bullying; workplace; discrimination; protected signs; ILO Convention No. 190; legal protection; labour rights; dignity; health and safety working conditions; work environment*



Увод

Настоящата статия има за цел да анализира съществуващата правната уредба относно тормоза на работно място като рисков фактор на работната среда, накърняващ физическото, психическото и социалното благополучие на работниците или служителите. Тормозът на работното място лишава работещите от фундаменталното им трудово право на достойни условия на труд, прогласено в разпоредбата на чл. 1, ал. 3 от Кодекса на труда (КТ)¹, което обуславя значимостта на разглежданата проблематика. Съгласно действащото законодателство тормозът на работното място се смята за дискриминация като правната уредба се съдържа в Закона за защита от дискриминация (ЗЗДискр.)². Смятам, че съществуват множество случаи, които не могат да се квалифицират като тормоз на работното място по смисъла на антидискриминационното законодателство, тъй като нежеланото поведение не се основава на защитен признак. В Кодекса на труда липсва както легална дефиниция на понятието „тормоз на работното място“, така и изричната му забрана. Посочената празнота в закона поставя въпроса – *нормативната уредба на Закона за защита от дискриминация осигурява ли необходимата правна защита на работниците или служителите от тормоз на работното място?* Смятам, че отговорът на поставения въпрос е отрицателен и е необходимо както изрично въвеждане на легална дефиниция за „тормоз на работното място“, така и изричната му забрана в Кодекса на труда като аргументи в тази насока ще изложа в следващите редове.

I. Правна уредба на тормоза на работното място в Закона за защита от дискриминация

Съгласно разпоредбата чл. 5, ал. 1 от ЗЗДискр. тормозът на основа на признаците по чл. 4, ал. 1 ЗЗДискр. сексуалният тормоз, подбуждането към дискриминация, преследването и расовата сегрегация, както и изграждането и поддържането на архитектурна среда, която затруднява достъпа на лица с увреждания до публични места, *се смятат за дискриминация*³.

¹ Обн., ДВ. бр. 26 от 1 април 1986 г.

² Обн., ДВ. бр. 86 от 2003 г. Законът влезе в сила на 1 януари 2004 г.

³ Необходимо да е да се уточни, че законодателят разглежда сексуалният тормоз като разновидност на тормоза. Легалната дефиниция на понятието „сексуален тормоз“ се съдържа в разпоредбата на § 1, т. 2 от ДР на ЗЗДискр., съгласно която „сексуален тормоз е всяко нежелано поведение от сексуално естество, изразено физически, словесно или по друг начин, с което се накърняват достойнството и честта и се създава враждебна, принизяваща, обидна, унижителна или застрашителна среда и, в частност, когато отказът да се приеме подобно поведение или принудата към него може да повлияе на вземането на решения, засягащи лицето“. В настоящата статия ще бъде разгледан въпросът за тормоза на работното място на общо основание.

Разпоредбата на чл. 4, ал. 1 от ЗЗДискр. въвежда забрана за пряка или непряка дискриминация, *основана на пол, раса, народност, етническа принадлежност, човешки геном, гражданство, произход, религия или вяра, образование, убеждения, политическа принадлежност, лично или обществено положение, увреждане, възраст, сексуална ориентация, семейно положение, имуществено състояние или на всякакви други признаци*, установени в закон или в международен договор, по който Република България е страна. Забраната за дискриминиране на работника или служителя от работодателя в рамките на едно трудово правоотношение е формулирана и в действащото трудово законодателство в разпоредбата на чл. 8, ал. 3 от КТ⁴.

Легалната дефиниция на понятието „тормоз“ се съдържа в разпоредбата § 1, т. 1 от Допълнителните разпоредби (ДР) на ЗЗДискр., съгласно която „тормоз“ е *всяко нежелано поведение на основата на признаците по чл. 4, ал. 1, изразено физически, словесно или по друг начин, което има за цел или резултат накърняване достойнството на лицето и създаване на враждебна, принижавща, унижителна, обидна или застрашителна среда*⁵. В материално-правния обхват на легалната дефиниция попада на общо основание и тормозът на работното място, въпреки че понятието „работно място“ не е изрично посочено от законодателя в текста на разпоредбата на § 1, т. 1 от ДР на ЗЗДискр. Посоченият извод се извежда и от разпоредбата на чл. 17 от ЗЗДискр., която регламентира задължението на работодателя, получил оплакване от работник или служител, който се смята за подложен на тормоз, включително сексуален тормоз на работното място, да извърши проверка, да предприеме мерки за прекратяване на тормоза, както и да наложи дисциплинарна отговорност, ако тормозът е извършен от друг работник или служител⁶.

Анализът на разпоредбата на § 1, т. 1 от ДР на ЗЗДискр. налага няколко уточнения относно предпоставките, които трябва да са налице, за да приемем, че е налице тормоз на работното място:

⁴ Стайков, Ив., 2005. *Понятие за дискриминация в трудовите отношения*. – Правен преглед, № 1, 22–42. Средкова, Кр. *За съвременната „кодификация“ на българското трудово законодателство*. – Юбилейна научна конференция по повод 70 години от приемането на първия Кодекс на труда и 35 години от приемането на действащия Кодекс на труда; Средкова, Кр., 2001. *Принципът за недопустимост на дискриминацията по етнически и расов признак според Директива № 2000/43/ЕС от 29 юни 2000 г. и българското трудово и осигурително законодателство*. – Юридически свят, № 1, 154–163.

⁵ Александров, А., 2014. *Кога е налице тормоз на работното място*. – Труд и право, № 8, 10–18.

⁶ Александров, А., 2011. *В състояние ли е работодателят да предотврати всички форми на дискриминация на работното място*. – Труд и право, № 8, 5–12, от него: *Предотвратяване на дискриминацията и тормоза на работното място*. – Труд и осигуряване, 2016, № 8 (139), 20–26.

1. тормозът следва да бъде осъществен в рамките на едно съществуващо трудово правоотношение – по време, при или по повод осъществяване на трудовите функции на работника или служителя, тъй като само в този случай пострадалият ще има качеството на работник или служител;
2. съгласно действащото законодателство тормозът по отношение на работника или служителя трябва да е осъществен на работното място. Законът за защита от дискриминация не съдържа дефиниция на понятието „работно място“, поради което следва да направим препратка към разпоредбата на § 1, т. 8 от ДР на КТ, която въвежда легална дефиниция за „работно място“⁷. В трудовоправната доктрина е изразено становището, което споделям, че за някои хипотези е наложително разширително тълкуване на понятието „работно място“, като в него се вложи съдържанието на понятието „предприятие“ по смисъла на § 1, т. 2 от ДР на КТ. Подобно тълкуване ще обхване по-голям кръг хипотези и в по-голяма степен ще отговаря на целта на законовата норма и целта на закона в цялост⁸;
3. тормозът на работното място може да е извършен от работодателя към работника или служителя (вертикален тормоз), от работник или служител към друг работник или служител, намиращи се на едно йерархично ниво в предприятието (хоризонтален тормоз) или от трето външно лице. Независимо кой осъществява тормоза на работното място следва да е налице функционална връзка между тормоза и работното място, на което пострадалият работник или служител извършва работа си;
4. трябва да е налице нежелано поведение от работодател, друг работник/служител или трето лице, изразено физически, словесно или по друг начин, което има за цел или резултат накърняване достойнството на лицето и създаване на враждебна, принизяваща, унижителна, обидна или застрашителна среда. Посочените предпоставки трябва да са налице в условията на кумулативност;
5. нежеланото поведение на работодателя или на друг служител или работника да бъде основано на защитените признаци по чл. 4,

⁷ Съгласно разпоредбата на разпоредбата на § 1, т. 8 от ДР на КТ „работно място“ е помещение, цех, стая, нахождение на машина, съоръжение или друго подобно териториално определено място в предприятието, където работникът или служителят по указание на работодателя полага труда си в изпълнение на задълженията по трудовото правоотношение, както и място, определено от предприятие ползвател. При извършване на надомна работа и работа от разстояние работно място е домът на работника или служителя или друго помещение по негов избор извън предприятието.

⁸ Стайков, Ив., 2006. *Тормоз на работното място – същност, последици и правна защита*. – Адвокатски преглед, № 4–5, с. 7.

ал. 1 от 33Дискр. По аргумент от разпоредбата на § 1, т. 8 от ДР на 33Дискр. – „на основата на признаците по чл. 4, ал. 1“ означава на основата на действителното, настояще или минало, или предполагаемо наличие на един или повече от тези признаци у дискриминираното лице или у лице, с което то е свързано, или се предполага, че е свързано, когато тази връзка е причина за дискриминацията.

Следователно *не всяко нежелано поведение на работодателя ще представлява тормоз на работното място по смисъла на § 1, т. 1 от ДР на 33Дискр., а само това, което се основава на някои от признаците по чл. 4, ал. 1 от 33Дискр.* Per argumentum a contrario *не е налице тормоз по смисъла на 33Дискр.*, ако е налице нежелано поведение, което макар и накърняващо достойнството на работника или служителя и създаващо враждебна, принизяваща, унижителна, обидна или застрашителна среда *не се основава на някой от признаците по чл. 4, ал. 1 от 33Дискр.* Поради изложената причина има множество случаи, които няма да могат да се квалифицират като тормоз на работното място, тъй като нежеланото поведение не се основава на защитен признак.

В случай, че по отношение на даден работник или служител е налице тормоз на работното място въз основа на защитен признак, за него ще възникне субективното право на правна защита съгласно Закона за защита от дискриминация, както следва:

1. Работникът или служителят може да подаде оплакване до работодателя по аргумент от разпоредбата на чл. 17 от 33Дискр.⁹.

⁹ Работодателят, получил оплакване от работник или служител, е длъжен незабавно да извърши проверка, да предприеме мерки за прекратяване на тормоза, както и за налагане на дисциплинарна отговорност, ако тормозът е извършен от друг работник или служител. Във връзка с разпоредбата на чл. 17 от 33Дискр. и чл. 18 от 33Дискр. все повече работодатели разработват нарочни процедури за подаване на сигнали от работници или служители за осъществен по отношение на тях тормоз на работното място, респективно извършване на проверка и предприемане на мерки за предотвратяване на всички форми на дискриминация на работното място. В разпоредбата на чл. 19 от 33Дискр. законодателят е уредил юридическата отговорност за работодателя при неизпълнение на задължението му за предприемане на ефективни мерки за предотвратяване на всички форми на дискриминация на работното място. Повече за трудовите задължения на работодателя, отнасящи се до извършени прояви на тормоз, включително сексуален тормоз, на работното място: Стайков, Ив., 2006. *Тормоз на работното място – същност, последици и правна защита*. – Адвокатски преглед, № 4–5, 9–19; Стайков, Ив., 2006. *Право на информация на работника или служителя във връзка със защитата от дискриминация*. – В: Юбилеен сборник на департамент „Право“, посветен на 15 години на Нов български университет. С.: Издателство на НБУ и Феня, 277–293; Александров, А., 2011. *В състояние ли е работодателят да предотврати всички форми на дискриминация на работното място*. – Труд и право, № 8, 5–12.

2. Работникът или служителят може да подаде жалба до Комисията за защита от дискриминация, въз основа на която да бъде образувано производство, в чиито рамки да се установи извършено ли е нарушението, кой е нарушителят, респективно да се определи видът и размерът на санкцията и да се приложат принудителни административни мерки по аргумент от чл. 65 от ЗЗДискр.¹⁰.
3. В условията на алтернативност и съгласно разпоредбата на чл. 71, ал. 1 от ЗЗДискр. пострадалият работник или служител може да предяви иск пред районния съд.

Посочените правни средства за защита от дискриминация са относими към случаите, при които тормозът на работното място се основава на някои от признаците по чл. 4, ал. 1 ЗЗДискр. Както бе отбелязано, съществуват множество случаи, които не могат да се квалифицират като тормоз на работното място, тъй като нежеланото поведение не се основава на защитен признак, поради което пострадалият работник или служител не разполага с възможност да реализира някои от изброените средства за правна защита, уредени в Закона за защита от дискриминация. Посоченият извод налага да се потърси решение в действащото трудово законодателство като тормозът на работното място бъде разгледан в контекста на основните трудови права на работника или служителя, респективно на насрещните трудови задължения на работодателя и правната защита при нарушаването им. В посочените случаи, тормозът на работното място следва да се разглежда като всяко нежелано поведение на работното място, изразено по отношение на съответния работник или служител физически, словесно или по друг начин, което има за цел или резултат накърняване достойнството на лицето и създаване на враждебна, принизяваща, унижителна, обидна или застрашителна среда.

II. Тормозът на работното място в контекста на трудовото задължение на работодателя, регламентирано в разпоредбата на чл. 127, ал. 2 от КТ

Съгласно разпоредбата на чл. 127, ал. 2 от КТ *работодателят е длъжен да пази достойнството на работника или служителя по време на изпълнение на работата по трудовото правоотношение*. Задължението по

¹⁰ Необходимо е да се отбележи, че Комисията за защита от дискриминация няма компетентност да присъди на пострадалия работник или служител обезщетение за претърпените вреди при установен случай на дискриминация по аргумент от чл. 65 от ЗЗДискр. В случай, че Комисията постанови решение, с което приема за установено извършването на тормоз по смисъла на чл. § 1, т. 1 от ДР на ЗЗДискр. или сексуален тормоз от работодателя, пострадалият работник или служител има право да предяви осъдителен иск за претърпените вреди (имуществени и неимуществени) пред гражданския съд.

смисъла на чл. 127, ал. 2 от КТ има за предмет отношението на работодателя към личността на работника или служителя. По аргумент на противното от разпоредбата на чл. 127, ал. 2 от КТ следва, че работодателят не може да се държи грубо, непристойно и властнически с работника или служителя. Недопустимо е работодателят да унижава човешкото самочувствие и достойнство на работника или служителя. Недопустимо е и използването на физическо, психологическо и сексуално насилие над работника или служителя от работодателя. Точно обратното съгласно разпоредбата на чл. 127, ал. 2 от КТ работодателят дължи на работника или служителя зачитане на човешкото му достойнство¹¹. Задължението на работодателя по чл. 127, ал. 2 от КТ съществува в определен времеви отрязък – по време на изпълнение на работата по трудовото правоотношение.

Важно е да се отбележи, че задължението на работодателя по чл. 127, ал. 2 от КТ има действие и в случаите, при които работникът или служителят нарушава установената трудовата дисциплина в предприятието, извършвайки дисциплинарни нарушения. Трудовото законодателство предвижда правни възможности за работодателя в подобни хипотези – да наложи съответстващото дисциплинарно наказание, но не и да погазва достойнството на работника или служителя¹². Дори и при най-тежки и дръзки нарушения на трудовата дисциплина от страната на работника или служителя не е допустимо да се наруши разпоредбата на чл. 127, ал. 2 от КТ. Обратното би надхвърлило законоустановените предели на работодателската власт.

Разпоредбата на чл. 127, ал. 2 от КТ е въведена във връзка с ратификацията на Европейската социална харта (ЕСХ)¹³. Съгласно чл. 26 от ЕСХ всички работници имат право на зачитане на тяхното достойнство на работното им място. Европейската социална харта очертава сексуалния тормоз и всяко друго унижително или силно негативно поведение по смисъла на чл. 26, т. 2 от ЕСХ, което всъщност бихме могли да определим като тормоз на работното място като основна причина, застрашаваща достойнството на работника или служителя. Тормозът в различните му проявления е най-честата причина за накърняване на достойнството на работника или служителя. В тази връзка е въведена и разпоредбата на чл. 26 от ЕСХ, която е инкорпорирана в националното ни законодателство чрез разпоредбата на чл. 127, ал. 2 от КТ.

¹¹ Мръчков, В., Кр. Средкова, А. Василев, Е. Мингов, 2021. *Коментар на Кодекса на труда*. 13 издание. С.: Сиби, с. 1073; Мръчков, В., 2017. *Субективно право и субективни трудови права*. С.: Сиби.

¹² Стайков, Ив., 2003. *Дискриминация при прекратяване на трудовото правоотношение*. – Съвременно право, № 6, 16–19.

¹³ Обн., ДВ, бр. 43 от 4 май 2001 г.

Кодексът на труда на Република България не съдържа правна уредба на понятията „тормоз на работното място“, както и забрана за упражняването му. Липсата на изрична законодателна уредба в трудовото законодателство налага извличане на правни решения по тълкувателен път. Общото между различните проявни форми на тормоза на работното място е, че всички те накарняват достойнството на работника или служителя, поради което представляват и нарушение на разпоредбата на чл. 127, ал. 2 от КТ¹⁴.

Следователно, предвид липсата на изрична правна уредба към днешна дата, работникът или служителят може да се защити срещу работодателския

¹⁴ Пример за нарушение на разпоредбата на чл. 127, ал. 2 от КТ са случаите, при които работодателите наричат работниците или служители с обидни или подигравателни квалификации, държат се непристойно с трудещите се и други подобни прояви. В посочения пример вербалните действия на работодателя съставляват тормоз, който накарнява достойнството на работника или служителя. Налице ще е неизпълнение на задължението по чл. 127, ал. 2 от КТ и в случаите, при които тормозът е осъществен от друг работник/служител или трето лице, но работодателят не е предприел действия по опазване на достойнството на пострадалия след като е установил съответните противоправни действия.

В българската действителност съществуват примери, при които работодателят извършва непрестанни проверки на определен работник или служител, изисква ежедневни подробни писмени отчети за свършената работа през деня от работника или служителя, което допълнително утежнява работата на съответния работник или служител, издава нареждания за изпълнение на голям обем от работа на работника или служителя в много кратки срокове за изпълнение. Целта на тези действия от страна на работодателя е да се създаде враждебна и унизителна среда, посредством което да се повлияе върху психиката на работника или служителя, който да реши да напусне работа по своя инициатива. По този начин работодателят ще осигури прекратяването на едно нежелано трудово правоотношение по лесен начин, без да се спазват законоустановените прекратителни процедури и предварителната закрила по чл. 333 от КТ, без да се дължат обезщетения на работника или служителя и др. Въсъщност, действията на работодателите в разглежданите примери са съобразени с действащото законодателство на пръв прочит, тоест те не могат да се квалифицират като незаконни в общия случай, но реално поставят работника или служителя в условията на силен стрес и невъзможност за изпълнение на поставените задачи, която се дължи не на липса на качества, а на неблагоприятното съчетание между прекомерната по обем работа, кратки срокове и стресова работна среда. Практиката познава и случаи, при които работодателите поставят в изолация от трудовия колектив конкретните работници или служители, чрез което работодателят търси начин недобросъвестно да постигне целта си, създавайки неблагоприятна и враждебна работна среда, водеща до психически дискомфорт на работника или служителя. Няма съмнение, че недобросъвестен е онзи работодател, който, упражнявайки правото си да ръководи и контролира трудовия процес, се опитва да принуди работник или служител въпреки волята му да прекрати трудовото си правоотношение посредством упражняване на тормоз. В подобна хипотеза ще е налице злоупотреба с право от страна на работодателя, което представлява и нарушение на разпоредбата на чл. 8, ал. 1 от КТ, съгласно която трудовите права и задължения се осъществяват добросъвестно съобразно изискванията на закона.

тормоз, който не попада в обхвата на § 1, т. 1 от ДР на ЗЗДискр., чрез разпоредбата на чл. 127, ал. 2 от КТ, като извършил следните действия:

1. Да сезира Инспекция по труда, която съгласно разпоредбата на чл. 399, ал. 1 от КТ осъществява цялостния контрол за спазване на трудовото законодателство във всички отрасли и дейности, за да установи дали е налице нарушение на разпоредбата на чл. 127, ал. 2 от КТ. В случай, че Инспекцията по труда установи нарушение на разпоредбата на чл. 127, ал. 2 от КТ следва да наложи глоба на работодателя при условията на чл. 414, ал. 1 от КТ.

Проблемът, който възниква в практиката е, че работниците или служителите сезират Инспекцията по труд с твърдението, че достойнство им е накърнено, тъй като работодателят е упражнил спрямо тях тормоз на работното място. В тези случаи Инспекцията по труда отказва да разгледа сигналите като приема, че не разполага с необходимата компетентност в случаите на тормоз на работното място. Инспекцията по труда насочва работника или служителя към Комисия за защита от дискриминация, тъй като единствено Законът за защита от дискриминация съдържа правна уредба относно тормоза на работното място.

Изходът в подобна ситуация е да се сезира Инспекцията по труда с твърдението за нарушение на разпоредбата на чл. 127, ал. 2 от КТ, като се опишат противоправните действия на работодателя, без да се използва терминът „тормоз на работното място“. Въпреки, че посоченият вариант е възможен, в повечето случаи Инспекцията по труда преценява, че е налице трудовоправен спор по смисъла на чл. 357, ал. 1 от КТ, поради което указва на работника или служителя да се насочи към гражданския съд по аргумент от чл. 360, ал. 1 от КТ¹⁵.

2. Работникът или служителят може да реализира правната си защита и по съдебен ред, предявявайки иск пред съответния районен съд за нарушение на разпоредбата на чл. 127, ал. 2 от КТ, като в рамките на съдебното производство се установи налице ли е твърдяното нарушение. Необходимо е да се отбележи, че работникът или служителят не следва да обосновава исковата си претенция с твърдението за наличие на тормоз на работното място, освен ако същият не се основава на защитен признак, тъй като в подобна хипотеза съдът ще разгледа спора през призмата на разпоредбата на § 1, т. 1 от ДР на ЗЗДискр. В случай, че съдът не установи наличие на законоустановените предпоставки, уредени в § 1, т. 1 от ДР на ЗЗДискр., ще отхвърли иска като

¹⁵ Чочова, М. *Относно същността на трудовите спорове по чл. 357, ал. 2 от Кодекса на труда*. – В: Актуални проблеми на съдебната практика по граждански дела и поставянето им като казуси в процеса на обучението. Сборник с доклади, изнесени на научна сесия, проведена в Благоевград на 25 октомври 2013 година. Благоевград, УИ „Неофит Рилски“, 2014, 63–65.

неоснователен. Посоченият развой на разглежданата хипотеза доказва, че е налице необходимост от въвеждане на легална дефиниция на понятието „тормоз на работното място“ в Кодекса на труда, за да се осигури пълноценна защита на работника или служителя срещу всяко нежелано поведение на работното място, което има за цел или резултат накръняване достойнството на лицето и създаване на враждебна, принизяваща, унижителна, обидна или застрашителна среда¹⁶.

3. Кодексът на труда не предвижда правна възможност за изплащане на обезщетение за претърпените вреди от работника или служителя вследствие на нарушението на чл. 127, ал. 2 от КТ. Този законодателен пропуск трябва да бъде преодолян, като *de lege ferenda* се уреди изрично право на обезщетение за работника или служителя за претърпените имуществени и неимуществени вреди от нарушението на чл. 127, ал. 2 от КТ от страна на работодателя. Смятам, че въвеждането на имуществена отговорност за работодателя в посочените хипотези би насърчила опазването на достойнството на работника или служителя.

На този етап за работника или служителя съществува правната възможност да предяви иск пред гражданския съд за неимуществени вреди по смисъла на чл. 52 от Закона за задълженията и договорите. Няма пречка работникът или служителят да претендира от съда и имуществени вреди, ако е претърпял такива, отново по реда на Закона за задълженията и договорите на плоскостта на непозволеното увреждане.

III. Тормозът на работното място в контекста на трудовото задължение на работодателя да осигури на работника или служителя здравословните и безопасни условия на труд съгласно разпоредбата на чл. 127, ал. 1, т. 3 от КТ

Няма съмнение, че тормозът на работното място представлява нарушение на здравословните и безопасни условия на труд. В § 1 от ДР на Закона за здравословни и безопасни условия на труд се съдържа легална дефиниция на понятието „здравословни и безопасни условия на труд“, според която това са условия на труд, които не водят до професионални заболявания и злополуки при работа и създават предпоставка за пълно физическо, психическо и социално благополучие на работещите лица.

¹⁶ Михайлов, Г., 2018. *Регулаторна оценка. Качество на законодателството*. С.: ИК „Пропелер“; Mihaylov, G. *Evaluación regulatoria del proceso legislativo (regulatory assesment of the legislative process, revista inclusiones* ISSN 0719-4706 volumen 5 – número especial – enero/marzo2018, pp. 49–55, <https://revistainclusiones.org/index.php/inclu/article/view/697>.

Съгласно разпоредбата на чл. 127, ал. 1, т. 3 от КТ работодателят е длъжен да осигури на работника или служителя здравословни и безопасни условия за труд. Въвеждането на задължение на работодателя по смисъла на 127, ал. 1, т. 3 от КТ има за цел както опазването на живота, здравето (физическото и психическото) и трудоспособността на работника или служителя, така и защита на достойнството на човешката му личност.

Тормозът на работното място може да накърни физическото и психическото здраве на трудещия се, което да се отрази негативно и на социалното му благополучие. Житейската практика сочи, че най-честите прояви на тормоз са вербални, като същите оказват неблагоприятното си влияние предимно върху психиката на работника или служителя. Психическият тормоз на работното място е психосоциален рисков фактор на работната среда, който може да допринесе за развитието на хронични разстройства и заболявания на работниците или служителите. Европейската агенция за безопасност и здраве е посочила психологическия тормоз на работното място като един от примерите на условия на труд, водещи до психосоциални рискове¹⁷. В Наръчника за организация на работата и стреса, изготвен от Световната здравна организация, е посочено, че една от основните причини, предизвикващи стреса на работното място е тормозът, а стресът се отразява неблагоприятно на физическото и психическото здраве работници или служителите¹⁸.

В контекста на горните разсъждения може да се изведе заключението, че тормозът на работното място, без значение от проявната му форма, се явява пряко нарушение на разпоредбата на чл. 127, ал. 1, т. 3 от КТ, съгласно която работодателят е длъжен да осигури на работника или служителя здравословни и безопасни условия за труд. Работодаателят ще носи отговорност за нарушение на разпоредбата на чл. 127, ал. 1, т. 3 от КТ и в хипотезата, при която тормозът на работното място се осъществява от друг работник или служител или трето лице¹⁹. Разбира се, липсата на легална дефиниция на понятието „тормоз на работното място“ в Кодекса на труда ще създаде трудности пред правната защита на пострадалите работници или служители²⁰.

¹⁷ <https://osha.europa.eu/en/themes/psychosocial-risks-and-mental-health>.

¹⁸ <https://iris.who.int/bitstream/handle/10665/42625/9241590475.pdf>

¹⁹ Така например в здравния и социалния сектор се наблюдава най-висока степен на излагане на насилие на работното място, като насилственото поведение се проявява много често от пациенти или потребители на съответните социални услуги.

²⁰ Интересен е и въпросът може ли тормозът на работното място да бъде разглеждан като причина за настъпване на трудова злополука в контекста на извършено самоубийство от служител. Съгласно Решение № 13861/18.11.2010 г. по адм. дело № 5405/2010 г. на ВАС, шесто отделение, е прието, че в разглеждания казус е извършено самоубийство от страна на служителка, поради което е налице трудова злополука, дължаща се на причинна връзка между условията на труд и настъпилата тежка реактивна

IV. Конвенция № 190 от 2019 г. за премахване на насилието и тормоза в сферата на труда на Международната организация на труда (МОТ), в сила от юни 2021 г.

Конвенцията е приета на Генералната конференция на Международната организация на труда, провела се през м. юни 2019 г. в Женева²¹. Тя е първият международен документ, който прогласява трудовото право на всеки човек на работно място без насилие и тормоз²².

За пръв път в Конвенцията се определят конкретни, приложими в световен мащаб стандарти за борба с тормоза и насилието, свързани с труда, и

депресия, довела до смъртта на служителката. По делото е установено, че след смяната на ръководството на предприятието са предприети проверка и ревизия, нетолерантното отношение на проверяващите, изразяващо се в заплахи, унижения, упреци и обиди на работното място, работа до късните часове на денонощието, които са развили у служителката тежка реактивна депресия. Според съдебно-медицинска експертиза депресивното състояние на пострадалата е възникнало в отговор на значима психотравматична ситуация, която е причината за решението ѝ да прекъсне живота си. Поведенческите изменения у пострадалата непосредствено преди и по време на извършваните проверки в търговското дружество, в което тя е работила като главен счетоводител, са дефинирани от вещото лице като тежка реактивна депресия. Експертът заключава, че така получената остра психична травма е довела до изчерпване на съпротивителните сили, а настъпилото потискане на психомоториката, вкл. и на волевата активност – са обусловили осъществяването на суицидният акт. Съдът е приел решаващия извод, че в случая не е налице волевият момент от умисла като субективно състояние при осъщественото деяние, поради което не може да се приложи разпоредбата на чл. 55, ал. 3 от КСО.

Всъщност, посочените действия от страна на ръководството в разглеждания казус съставляват тормоз на работното място, но посоченият термин не е използван в съдебното решение поради липса на легална дефиниция в Кодекса на труда. Макар че посоченото решение е постановено през 2011 г. то повдига въпроса за необходимостта от въвеждане на легална дефиниция за „тормоз на работното място“ в Кодекса на труда, което ще улесни съда при разрешаване на подобни спорове, и ще създаде възможност за всеобхватна защита на работници или служителите на работното им място от всяко нежелано поведение, изразено физически, словесно или по друг начин, което има за цел или резултат накърняване достойнството на лицето и създаване на враждебна, принижаваша, унижителна, обидна или застрашителна среда.

²¹ Мръчков, В., 1975. *Правна и политическа същност на конвенциите и препоръките на Международната организация на труда*. – Правна мисъл, № 1, 13–26; от него: *Българското трудово законодателство и международните трудови конвенции и препоръки*. С., Наука и изкуство, 1978; *България пред международните трудови норми*. Встъпителен коментар към Сб. Международните трудови конвенции в България. С.: КНСБ, 1992, 24–33; Чочова, М. *Конвенциите на Международната организация на труда в практиката на Конституционния съд на Република България*. – В: Международната организация на труда и България. 100 години и напред. С.: Сиби, 2020, 108–115.

²² https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190.

се определят конкретно мерките, които се изискват от държавите и другите имащи отношение участници. С Конвенцията се създава и международна дефиниция на насилието и тормоза в сферата/областта на труда, включително насилие и тормоз, основани на пол. На 22.01.2022 г. Европейската комисия изготви предложение за Решение на Съвета за упълномощаване на държавите членки за ратифициране на конвенцията²³. С предложеното решение на Съвета ще се даде възможност на държавите членки да ратифицират Конвенцията за премахване на насилието и тормоза в сферата на труда на Международната организация на труда. Конвенцията все още не е ратифицирана в Република България. Българските синдикати, както и неправителствения сектор изразяват становище за необходимостта от ратифициране на конвенцията²⁴. Ратификацията на Конвенцията ще наложи и съответните изменения и допълнения в националното законодателство на основните ѝ принципи по такъв начин, че да се достигне крайната цел – защита на всички субекти, включени в обхвата на Конвенцията, от насилие и тормоз, свързани с работното им място.

Заклучение

Професор Атанас Василев отбелязва, че трудовото право възниква като „право на закрила на труда“²⁵. Закрилата на труда като фундаментална цел на трудовото законодателство, съгласно разпоредбата на чл. 1, ал. 3 от КТ, налага предприемане на съответните законодателни мерки срещу тормоза на работното място, както следва:

1. De lege ferenda създаване на легална дефиниция за „тормоз на работното място“ в Кодекса на труда, за да бъдат обхванати и случаите на тормоз, които не се основават на признаците по чл. 4, ал. 1 от ЗЗДискр. Възможен текст на дефиницията е:

„Тормоз на работното място“ е всяко нежелано поведение на работното място, изразено физически, словесно или по друг начин, което има за цел или резултат накърняване достойнството на лицето и създаване на враждебна, принижаваша, унижителна, обидна или застрашителна среда.

2. De lege ferenda създаване на нова точка в разпоредбата на чл. 127, ал. 1 от КТ, която да въведе задължение за работодателя да осигури на работника или служителя нормални условия за изпълнение на работата по

²³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0024>

²⁴ Становище по въпроса за ратификация на Конвенцията:

https://esc.bg/wp-content/uploads/2022/07/ESC_4_019_2022.pdf

<https://knsb-bg.org/index.php/2023/08/14/stanovishte-otnosno-merkite-na-pravitelstvoto-za-borba-s-nasilieto-i-neobhodimostta-ot-ratificirane-na-konvencziya-190-na-mot/>

²⁵ Василев, Ат., 1997. *Трудово право*. БСУ, с. 28.

трудоовото правоотношение, за която се е уговорил, *като му осигури работно място без тормоз*.

3. De lege ferenda допълване на разпоредбата на чл. 127, ал. 1 от КТ с изрично задължение за работодателя да разработва правила за предотвратяване на тормоз на работното място, респективно за подаване на сигнал, установяване на тормоз и защита на работниците или служителите при вече реализиран тормоз на работното място.

4. De lege ferenda допълване на разпоредбата на чл. 127, ал. 1 от КТ с изрично задължение за работодателя да информира всички работници и служители за правилата в предприятието за защита от тормоз на работното място и да държи на разположение на работниците и служителите съответните текстове.

5. De lege ferenda създаване на нова разпоредба, в която да е уредено правото на работника или служителя на обезщетение за претърпените от него имуществени и неимуществени вреди, които са настъпили в причинно-следствена връзка с осъществен тормоз на работното място или при нарушение на разпоредбата на чл. 127, ал. 2 от КТ.

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Пенсията по чл. 68, ал. 4 КСО – дискриминационна или не?

Ваня Митева*

Член 68, ал. 4 КСО е приет по прилагане на европейските регламенти за координация на системите за социална сигурност: Регламент (ЕО) № 883/2004, Регламент (ЕО) № 987/2009, Регламент (ЕС) № 1231/2010 – на Европейския парламент и на Съвета, и Регламент (ЕО) № 987/2009. Нормата предвижда няколко предпоставки, които следва да са налице кумулативно. Приложното ѝ после на свой ред води до несправедливи и дискриминационни последици по отношение на лицата, придобили осигурителен стаж в повече от една държава членка на Съюза. Това поставя редица проблеми в практиката и създава несигурност при упражняване правото на пенсия за осигурителен стаж и възраст.

Ключови думи: пенсия, социална сигурност, европейски регламенти, осигурителен стаж, дискриминация



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The pension under art. 68, para. 4 of the Social Security Code – discriminatory or not?

Vanya Miteva

Art. 68, para. 4 of the Social Security Code was adopted in application of the European regulations for the coordination of social security systems: Regulation (EC) No. 883/2004, Regulation (EC) No. 987/2009, Regulation (EU) No. 1231/2010 – of the European Parliament and the Council and Regulation (EC) No. 987/2009. The norm provides for several prerequisites, which should be present cumulatively. Its application then, in turn, leads to inequitable and discriminatory consequences for its recipients who have acquired insurance experience in more than one member state of the Union. This poses a number of problems in practice and creates uncertainty when exercising the right to a pension for length of service and age.

Keywords: *pension, social security, European regulations, insurance experience, discrimination*



Пенсиите като осигурителни обезпечения, предоставени от държавното обществено осигуряване, заемат важно място в осигурителната система на Република България. Най-голям дял сред видовете пенсии според броя на лицата, които ги получават, са пенсиите за осигурителен стаж и възраст (ПОСВ).¹ Една от тях е ПОСВ по чл. 68, ал. 4 от Кодекса за социално осигуряване (КСО).

Разпоредбата на чл. 68, ал. 4 КСО, в сила от 01.01.2019 г., е приета по прилагане на европейските регламенти за координация на системите за социална сигурност: Регламент (ЕО) № 883/2004, Регламент (ЕО) № 987/2009, Регламент (ЕС) № 1231/2010 – на Европейския парламент и на Съвета. Нормата предвижда няколко предпоставки, които следва да са налице кумулативно. Приложното ѝ после на свой ред води до несправедливи и понякога дискриминационни последици по отношение на лицата, придобили осигурителен стаж в повече от една държава – свързана с прилагане на международен договор, по който Република България е страна, или на европейските регламенти за координация на системите за социална сигурност. Това поставя редица проблеми в практиката и създава несигурност при упражняване правото на пенсия за осигурителен стаж и възраст от тези лица.

По своето съдържание правото на пенсия е осигурително субективно потестативно право.² При упражняването му настъпва съществена промяна в осигурителното правоотношение между осигуреното лице и осигурителния орган. Първото придобива качеството пенсионер, а след признаване на това му качество³ той придобива и правото на ежемесечно парично вземане по основното дългосрочно обществено осигуряване⁴ от Националния осигурителен институт. Пенсиите за осигурителен стаж и възраст са от групата на т. нар. контрибутивни пенсии. При тях осигуреното лице при упражняването на трудова дейност е участвало в натрупването на паричните средства, от които по-късно се изплащат пенсиите. Пенсията като периодично парично осигурително плащане има и специфично предназначение – служи за из-

¹ Според Статистически бюлетин „Пенсии“ към 31.03.2023 г. на Националния осигурителен институт към м. декември 2023 г. броят на изплатените пенсии е 2 048 976. От тях (от общия брой на всички пенсии, изплатени през 2023 г.) 70,32% са пенсиите за осигурителен стаж и възраст (ПОСВ). Отново според статистиката на НОИ средният размер на ПОСВ на един пенсионер през 2023 г. е възлизал на 830,01 лв., а пенсионерите, получавали минималния размер на ПОСВ са 36,2% от всички лица, получавали съответния вид пенсия.

² Така Мръчков, В., 2019. *Осигурително право*. Седмо издание. С.: Сиби, с. 281.

³ Качеството пенсионер се придобива след упражняване правото на пенсия с подаване на заявление за отпускане на пенсия, подадено до съответното ТП на НОИ.

⁴ В случаите на прехвърляне на средствата по допълнителното задължително пенсионно осигуряване (ДЗПО) в публичните фондове на НОИ, т. нар. „втора пенсия“ също се изплаща от тях.

дръжка и осигуряване на жизнените потребности на лицето, придобило и упражнило правото си да я получава, или на неговите наследници. Тя има алиментен характер.⁵

Предпоставките за придобиване правото на пенсия за осигурителен стаж и възраст са установени в чл. 68 КС. Те се свеждат до две: навършването на определена възраст и придобиване на определен осигурителен стаж от осигуреното лице. И двете следва да са налице едновременно към момента на упражняване на правото. Тук няма да разглеждам диференцирането на двете предпоставки по пол, нито според специфичния характер на извършваната работа и условията на труд при някои категории лица. Те са изрично определени от законодателя.

По отношение на осигурителния стаж в някои изрично предвидени случаи Кодексът за социално осигуряване (КСО) и Наредбата за пенсиите и осигурителния стаж (НПОС) установяват специални изисквания – да е придобит при точно определени условия. Такъв е случаят с действителния осигурителен стаж. Понятието *действителен стаж* има легална дефиниция в § 1, т. 12 от Допълнителните разпоредби на КСО⁶. Наличието му следва да се отчита при придобиване правото на пенсия по чл. 68, ал. 3 и ал. 4 КСО (пенсия в намален размер пожизнено и срочната пенсия, която се получава при наличие на осигурителен стаж в друга държава), чл. 74, ал. 2 и ал. 3 (пенсия за инвалидност поради общо заболяване), както и при определяне размера на пенсията съгласно чл. 70, ал. 2 КСО.

Факторите, от които зависи размерът на пенсията, на следващо място най-общо са: осигурителният доход, от който се изчислява пенсията, и осигурителният стаж. Формулата, чрез която се изчислява индивидуалният размер на ПОСВ на всеки правоимащ няма да бъде предмет на настоящото изследване, в това число и начинът на определяне и изчисляване на индивидуалния коефициент и съотношенията, от които той зависи. Това не е необходимо при отпускане на пенсията по чл. 68, ал. 4 КСО.

В чл. 68, ал. 4 КСО⁷ законодателят уреди един нов вид *срочна* ПОСВ, която да предшества получаването на ПОСВ по чл. 68, ал. 1 и 2 КСО – до събиране на необходимата информация и установяване на пълния стаж на лицето, положен в чужбина, признат при прилагане на международен договор, по който Република България е страна, или на европейските регламенти за координация на системите за социална сигурност. Ал. 4 на чл. 68 всъщност ни казва, че „*При преценяване на правото на пенсия по ал. 1 и 2, свързана с прилагане на международен договор, по който Република*

⁵ Така Средкова, Кр., 2016. *Осигурително право*. Пето издание. С.: Сиби, с. 399; Мръчков, В. Цит. съч., с. 282.

⁶ Нова – ДВ, бр. 107 от 2014 г., в сила от 1.01.2015 г., доп. – ДВ, бр. 8 от 2023 г.

⁷ Нова – ДВ, бр. 102 от 2018 г., в сила от 1.01.2019 г.

България е страна, или на европейските регламенти за координация на системите за социална сигурност, когато само със зачетения по българското законодателство осигурителен стаж лицето не придобива право на пенсия, но има поне 15 години действителен осигурителен стаж и до удостоверяване на чуждия осигурителен стаж навърши възрастта по ал. 3, се отпуска пенсия в размер на социалната пенсия за старост, при условие, че лицето не получава друг вид пенсия.“

От цитираната по-горе разпоредба можем да изведем и условията, при които тя следва да намери приложение:

1. лицето да е подало заявление за отпускане на ПОСВ по чл. 68, ал. 1 и 2 КСО;
2. лицето да представи доказателства пред длъжностното лице в НОИ, че притежава или поне да твърди, че притежава *осигурителен стаж в чужбина*⁸;
3. спрямо лицето (в зависимост от държавата, в което е положен стажът) да са приложими международен договор, по който Република България е страна, или европейските регламенти за координация на системите за социална сигурност;
4. положеният и доказан към датата на подаване на заявлението осигурителен стаж, зачетен по българското законодателство, *да не достига на лицето* за да придобие право на пенсия;
5. лицето да е придобило поне 15 години действителен осигурителен стаж;
6. *до удостоверяване на чуждия осигурителен стаж* лицето да навърши 67 години.

Ако всички посочени по-горе предпоставки са налице, а те не са никак малко, на лицето ще бъде отпусната ПОСВ в размер на социалната пенсия за старост⁹. За сравнение, за да придобие право на ПОСВ по чл. 68, ал. 3 КСО – в намален размер, за лицето трябва да са налице кумулативно само три предпоставки: две положителни и една отрицателна. Отрицателната предпоставка е лицето да няма право на ПОСВ по ал. 1 и ал. 2 на чл. 68 КСО, а положителните – да е навършило 67-годишна възраст¹⁰ – за жените и мъжете, и да има най-малко 15 години действителен осигурителен стаж.

⁸ В тези случаи се възлага служебна проверка след попълване на проучвателна молба.

⁹ Размерът на социалната пенсия за старост се определя от Министерския съвет по предложение на Министерството на труда и социалната политика и НОИ. С ПМС № 94 от 27.06.2023 г. социалната пенсия за старост от 01.07.2023 г. е в размер на 276,64 лв.

¹⁰ Тази възраст вече е константна величина, считано от 01.01.2023 г. Допреди това възрастта за придобиване правото на този вид пенсия се увеличаваше ежегодно с по 2 месеца от 31 декември 2016 г. до достигане на 67-годишна възраст.

Размерът на този вид ПОСВ се определя по правилата на чл. 70 КСО, като ал. 13 с. чл. указва, че той не може да бъде по-малък от 85% от минималната ПОСВ по чл. 68, ал. 1 КСО. Последната на свой ред се определя ежегодно със Закона за бюджета на държавното обществено осигуряване (ЗБДОО)¹¹.

Осигурителният орган в държавното обществено осигуряване – НОИ, е този, който следва да прилага разпоредбата на чл. 68, ал. 4 КСО, по мое мнение само в случаите, в които е упражнено правото на ПОСВ по чл. 68, ал. 1 и 2 КСО. Самото Заявление за отпускане на пенсия¹² обаче не предполага да бъде посочена конкретна разпоредба от КСО, а само видът на пенсията – дали се иска ПОСВ, пенсия за инвалидност поради общо заболяване, пенсия за инвалидност поради трудова злополука, наследствена пенсия и пр. Така в хипотезата, при която едно лице, което *притежава осигурителен стаж както в Република България* (зачетен по нашето законодателство), *така и в чужбина* (било то само няколко дни, месеца или 2-3 години) *и е изпълнило изискванията за придобиване правото на ПОСВ по чл. 68, ал. 3, но не отговаря на изискванията по чл. 68, ал. 1 и 2 КСО*, ще получи разпореждане от длъжностното лице в ТП на НОИ за отпускане на ПОСВ по чл. 68, ал. 4 КСО. Тази пенсия ще бъде определена в размер на социалната пенсия за старост, а именно: 276,64 лв. За сравнение, минималният размер на ПОСВ по чл. 68, ал. 3 КСО е 444,58 лв. – от 1 януари до 30 юни 2024 г. и 493,48 лв. – от 1 юли до 31 декември 2024 г. Разликата е почти двойна. Оттук следва и по-неблагоприятното третиране на лицата, навършили 67-годишна възраст, извършвали трудова дейност и придобили осигурителен стаж в друга държава, в сравнение с лицата, навършили тази възраст, но с 15-годишен действителен осигурителен стаж само в Република България. Считаю, че подобно неравно третиране освен нехуманно от човешка гледна точка е и абсолютно неправилно и дискриминационно. Прилагането на чл. 68, ал. 4 КСО по начина, по който това се прави в момента от НОИ, попада в приложното поле на чл. 4, ал. 3 от Закона за защита от дискриминацията (ЗЗДискр.) и е проявна форма на непряка дискриминация.

Съдебните решения, в които съдилищата са тълкували и разглеждали правилното приложение на чл. 68, ал. 4 КСО е твърде оскъдна вероятно поради краткия период на прилагането ѝ – от 01.01.2019 г. досега¹³. Това са

¹¹ В чл. 10 ЗБДОО за 2024 г. (Обн. ДВ бр. 106 от 22 декември 2023 г., доп. ДВ бр. 34 от 16 април 2024 г.) се определя минимален размер на пенсията за осигурителен стаж и възраст по чл. 68, ал. 1 от Кодекса за социално осигуряване за 2024 г., а именно: от 1 януари до 30 юни – 523,04 лв.; от 1 юли до 31 декември – 580,57 лв. Следователно минималният размер на ПОСВ по чл. 68, ал. 3 КСО възлиза на: 444,58 лв. – от 1 януари до 30 юни 2024 г., и 493,48 лв. – от 1 юли до 31 декември 2024 г.

¹² Образец УП-1.

¹³ Решение № от 15.07.2022 г. по адм. д. № 405/2022 г. на Административен съд – Хасково; Решение № 741 от 12.10.2023 г. по адм. д. № 571/2023 г. на Административен

спорове за неправилно определена и отпусната ПОСВ вследствие от колизи-
ята при приложение на ал. 68, ал. 3 и ал. 4 КСО. Нещо повече дори едини-
ците постановени съдебни решения са на ниво административни съдилища.
Все още няма натрупана практика по правилното тълкуване и прилагане
на ПОСВ по чл. 68, ал. 4 КСО от Върховния административен съд (ВАС).

Смятам за редно да изложа факторите, които според мен би следвало да
се отчитат, когато се прави преценка за приложимостта на чл. 68, ал. 4 КСО.

На първо място, следва да се разтълкува правилно четвъртата от
изброените по-горе шест предпоставки, а именно: „положеният и доказан
към датата на подаване на заявлението осигурителен стаж, зачетен по
българското законодателство, *да не достига на лицето*, за да придобие
право на *пенсия*“. Категорично трябва да разбираме идеята, заложена от
законодателя, като „да няма право на никаква пенсия“, а не само пенсия
по чл. 68, ал. 1 и 2 КСО. Т.е. ако едно лице е придобило право на ПОСВ по
чл. 68, ал. 3 КСО и особено, но не само, ако посочи изрично в заявлението
си, че желае да му бъде отпусната точно този вид ПОСВ, твърдението или
представените документи, удостоверяващи придобит осигурителен стаж
в чужбина, не би следвало да са пречка за отпускане на тази пенсия. Едва
ако лицето не отговаря на изискванията на предходните алинеи на чл. 68
и има стаж в друга държава, следва да се отпусне временно пенсията по
чл. 68, ал. 4 КСО, разбира се, при наличието на останалите предпоставки и
до получаването на информация от компетентна чуждестранна институция
за осигурителния стаж и осигурителния доход на лицето в чужбина.

На второ място считам за необходимо длъжностното лице в ТП на
НОИ след получаване на всички документи от лицето и извършване на
служебно проучване в базата данни на НОИ и Националната агенция за
приходите, удостоверяващи осигурителен стаж и осигурителен доход, да
извърши индивидуална преценка (*ad hoc*, за всеки конкретен случай) дали с
положения стаж в чужбина лицето би придобило право на ПОСВ по чл. 68,
ал. 1 и 2 КСО. Ако отговорът на последния въпрос е отрицателен и са нали-
це всички предпоставки за придобиване правото на ПОСВ по чл. 68, ал. 3
КСО, дори без да е посочен видът на желаната от осигуреното лице пенсия,
на последния би следвало да се отпусне именно тя, а не пенсията по чл. 4
с. чл., като по-благоприятна и справедлива.

Следващото смущаващо в така регламентираната ПОСВ по чл. 68, ал. 4
КСО е свързано с последната от изброените по-горе шест предпоставки,
а именно: „*до удостоверяване на чуждия осигурителен стаж* лицето да

съд – Хасково; Решение № 5 от 6.01.2023 г. по адм. д. № 460/2022 г. на Админи-
стративен съд – Кърджали; Решение № от 29.09.2023 г. по адм. д. № 350/2023 г. на
Административен съд – Велико Търново; Решение № 3793 от 8.06.2023 г. по адм. д.
№ 2747/2023 г. на Административен съд – София-град.

навърши 67 години“. Тук логично се появяват въпросите: Горното означава ли, че разпоредбата съдържа отрицателна предпоставка: към датата на подаване на заявлението, респективно отпускането на ПОСВ по чл. 68, ал. 4, лицето все още да не е навършило възрастта по чл. 68, ал. 3 КСО? А ако я е навършило вече? Следва да се отпусне ПОСВ по чл. 68, ал. 3 (ако има поне 15 год. действителен ОС) или следва да се отпусне тази по чл. 68, ал. 4? Ако приемем за категоричен втория отговор, а именно той е по-логичен с оглед на съществуващата към момента законодателна уредба (чл. 94, ал. 5 КСО изрично регламентира, че тази пенсия се отпуска „от датата на навършване на възрастта по чл. 68, ал. 3, но не по-рано от подаване на заявлението“), то съмненията за проява на дискриминация стават сериозни. Тези, а вероятно и други въпроси повдига формулировката на законодателя на чл. 68, ал. 4 КСО.

Смятам за безспорно тук при отпускане на пенсията по чл. 68, ал. 4 КСО приложението на чл. 96, ал. 3 КСО, съгласно която, след постъпване на необходимата информация от чуждестранната институция за положения в друга държава осигурителен стаж и осигурителния доход, ПОСВ по чл. 68, ал. 4 КСО следва да бъде прекратена от датата на отпускането ѝ и вместо това да се отпусне със същата начална дата новият вид ПОСВ – по чл. 68, ал. 1–3 КСО. Притеснителното обаче в случая е, че лицата, по отношение на които тази разпоредба ще бъде приложима, са на и над 67-годишна възраст с неясна и твърде вероятно кратка оставаща продължителност на живота.¹⁴ На свой ред събирането на информацията за придобития осигурителен стаж от чуждестранните институции може да отнеме месеци, дори години. През това време лицето, на което е отпусната ПОСВ по чл. 68, ал. 4 КСО, ще бъде принудено да живее със средства два пъти по-малки от линията на бедност в страната¹⁵, както и почти два пъти по-малки от минималния размер на ПОСВ по чл. 68, ал. 3 КСО. Тази сума едва ли ще му стига да посреща дори основните си жизнени потребности. Последното на свой ред намалява шансовете му да доживее получаването на надлежна информация от чуждата институция, преизчисляването и определянето на действителния размер на полагащата му се пенсия. Смятам горното решение на законодателя при създаването на разпоредбата на чл. 68, ал. 4 КСО за социално несправедливо, както и за дискриминационно. Нормата поставя или има опасност да постави голям брой индивиди в изключително уязвимо и неравностойно положение, без да отчита възрастта им и свързаните с нея специфични нужди и потребности. Самият преамбюл на Конституцията на

¹⁴ По данни на НСИ за 2022 г. средната продължителност на живота в България е била 71,9 год., с 1,9 год. по-малко от 2021 г., т.е. тенденцията е тя да намалява, въпреки съвременните достижения на науката, технологиите и медицината.

¹⁵ За 2024 г. тя е определена на 526 лв.

Република България (КРБ) прокламира общочовешките ценности: хуманизъм, равенство и справедливост като основополагащи в съществуването и развитието на държавата и обществото. Тя издига като върховни принципи достойнството и сигурността на всеки български гражданин и „обещава“ създаването на социална държава. Твърде далеч от тези принципи и дух е текстът на чл. 68, ал. 4 КСО с всичките му неясноти.

Всичко изложено по-горе формира у мен убеждението, че разпоредбата на чл. 68, ал. 4 КСО е недомислена, недостатъчно добре формулирана и със сигурност създаваща сериозни рискове за проява на непряка дискриминация, основаваща се на *наличието или липсата на осигурителен стаж в чужбина*. Така, както е прилагана в момента от осигурителния орган в държавното обществено осигуряване, тя води до неблагоприятни последици и ощетяване на гражданите. Когато те отговарят на изискванията за получаване на ПОСВ по чл. 68, ал. 3 КСО, но не им достига осигурителен стаж, за да придобият право на ПОСВ по ал. 1 и 2 на с. чл., само заради това, че имат положен ОС и извън Република България¹⁶, те ще бъдат третираны по-неблагоприятно и ще получат вместо пенсия в размерите по чл. 70, ал. 13 КСО, такава в размер на социалната пенсия за старост.

Обсъдената от мен разпоредба би получила справедливо и целесъобразно приложение във вида, в който е поместена в КСО към настоящия момент само в случай, че се прилага по отношение на две групи лица:

- 1) лица, които все още не са навършили възрастта по чл. 68, ал. 3 КСО и заявят (респективно, представят достатъчно доказателства) в производството по отпускане на ПОСВ по чл. 68, ал. 1 и 2 КСО, че притежават придобит осигурителен стаж в чужбина, който е равен или надхвърля недостигащия им осигурителен стаж по българското законодателство;
- 2) лица, които са навършили възрастта по чл. 68, ал. 3 КСО, придобили са осигурителен стаж в друга държава, който още не е удостоверен официално, затова не изпълняват изискването за наличие на поне 15 години действителен стаж, признат по нашето законодателство.

В тези две хипотези и за да получат адекватна осигурителна закрила, лицата следва да получават временно (до окончателно изясняване на пълния им осигурителен стаж и осигурителен доход) срочната ПОСВ по чл. 68, ал. 4 КСО.

Нормата със сигурност се нуждае от прецизиране, ако законодателят е имал намерение приложението ѝ да обхваща всички хипотези на лица,

¹⁶ в държава, с която България е обвързана от прилагане на международен договор или европейските регламенти за координация на системите за социална сигурност.

осъществявали трудова дейност в чужбина и подали заявление за отпускане на ПОСВ. В този случай бих предложила текстът ѝ да се ревизира и да придобие следното изражение, както и да се добавят две нови алинеи:

„(4) При преценяване на правото на пенсия по ал. 1, 2 и 3, свързана с прилагане на международен договор, по който Република България е страна, или на европейските регламенти за координация на системите за социална сигурност, на лицето се отпуска пенсия в размер на социалната пенсия за старост до официално удостоверяване от компетентната институция на чуждия осигурителен стаж при наличие на следните предпоставки:

1. лицето не получава и не е придобило право на друг вид пенсия и
2. са представени писмени документи и/или твърдения за придобит осигурителен стаж в чужбина и
3. стажът по т. 2 е равен или надхвърля недостигащия осигурителен стаж по българското законодателство и
4. има поне 15 години действителен осигурителен стаж и
5. към датата на подаване на заявлението за отпускане на пенсия е навършило възрастта по ал. 1, но не е достигнало 67-годишна възраст.

(5) обстоятелствата по ал. 4 се декларират писмено от лицето при подаване на заявлението за отпускане на пенсия.

(6) В случай че след отпускане на пенсията по ал. 4 и до удостоверяване на чуждия осигурителен стаж лицето навърши 67-годишна възраст, то има право на пенсия по ал. 3. В този случай отпуснатата пенсия по ал. 4 се прекратява от датата на подаване на заявлението за новия вид пенсия. Последното не е пречка за последващо отпускане на пенсия по ал. 1 и ал. 2 след удостоверяване на чуждия осигурителен стаж в съответствие с чл. 96, ал. 3.“

Направените по-горе предложения *de lege ferenda* следва да се отразят и в съответните изменения на чл. 94, ал. 5 КСО, в следния смисъл:

„(5) Пенсията по чл. 68, ал. 4 се отпуска от датата на навършване на възрастта по чл. 68, ал. 1, но не по-рано от датата на подаване на заявлението.“

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За негативния ефект на предварителната закрила

Мария Радева*

Предварителната закрила при уволнение е уредена с разпоредбата на чл. 333 от Кодекса на труда, тя е част от специална закрила за работниците и служителите с намалена работоспособност. Закрилата цели компенсирането на тяхната уязвимост. Съществува и теза, че поради здравословното им състояние те са по-малко „желани“ като работници и служители. Изследването представя и една възможна друга гледна точка. Не здравословното състояние на лицата с намалена работоспособност, а трудовоправната закрила, особено закрилата по чл. 333 от КТ, може да се разглежда като пречка за достъпа на тези лица до пазара на труда.

Ключови думи: *Кодекс на труда, закрила при уволнение, лица с намалена работоспособност, достъп до пазара на труда*



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On the negative effect of dismissal protection

Maria Radeva

The preliminary protection in case of dismissal is governed by the provision of Art. 333 of the Labour Code, it is part of special protection for employees with reduced working capacity. Protection aims to compensate for their vulnerability. A common view is that because of their health condition they are less 'desirable' as workers and employees. The article presents one possible alternative perspective. Not the state of health of persons with reduced working capacity, but the labour law protection, especially the protection under Art. 333 of the Labour Code, can be seen as an obstacle to the access of these persons to the labour market.

Keywords: *Labour Code, protection against dismissal, persons with reduced working capacity, access to the labour market*



Увод

Човек осигурява необходимите си средства за съществуване благодарение полагането на активни, целенасочени усилия, т.е. трудейки се. Икономическите промени след индустриалната революция водят и до промяна в организацията на труда¹. Индустриализацията осигурява ръст на икономиката, но все по-голям брой работници стават зависими от наемния труд, а не от собствените си средства за производство. Залог за оцеляването на голяма група от хора и на техните семейства остава единствено възможността за размяна на работната сила срещу средства за препитание (трудово възнаграждение). Земерделецът има земя, индустриалецът фабриката си, търговецът – магазина, интелигентът служба и т.н., а това, което има работникът, е трудът², т.е. работната си сила. И следва логичният въпрос каква би била последицата за онзи работник, чиято работна сила поради някаква причина, основно здравословна, бъде засегната. Работникът губи единственият си актив, който той може да размени срещу средства за съществуването си.

Предоставянето на материална подкрепа за работника, вкл. и на неговото семейство в случай на намалена или изгубена работоспособност е в основата на възникването и развитието на осигурителното законодателство. От своя страна трудовото законодателство също въвежда редица защитни механизми с цел опазване живота и здравето на трудещите се. Предмет на анализ на настоящото изследване е единствено закрилата при уволнение, уредена в чл. 333, ал. 1, т. 1–3 от КТ.

Защитните норми в Наредбата закон за трудовия договор

Наредбата закон за трудовия договор (1936 г.) урежда трудовоправното положение на работник, който се е разболял. Съгласно чл. 53, ал. 1, когато работникът се разболее, работодателят е длъжен да му даде предписания от съответния лекар отпуск, който е с максимална продължителност три месеца. Здравословното състояние може да е предпоставка и за прекратяване на трудовия договор. Съгласно чл. 53, ал. 1, изр. 3 от НЗТД, ако работникът не може да оздравее в рамките на три месеца³, трудовият договор се счита прекратен от момента на започване на ползването на отпуска поради болест.

¹ Boter, C., J. Schmidt, 2023. *Labour in modern history* (ca. 1800–1900). – The European experience: a multi-perspective history of modern Europe, 1500–2000, pp. 669–678.

² Лещов, А., 1941. *Трудът*. – Преглед за трудово право – списание за трудово и професионално право, общ. осигуряване и социална политика, кн. 1 и 2, с. 25.

³ Ошанов, Р., 1936. *Коментар на Наредбата закон за трудовия договор*, С., 98–99.

Съгласно чл. 53, ал. 2 от НЗТД работодателят *е длъжен* след оздравяването на работника при „ваканция“ (свободно работно място) да го приеме отново на работа, като го предпочете пред всички други, ако не са изминали 9 месеца от деня, в който се счита, че трудовият договор е прекратен. С тази разпоредба се осигурява своеобразна закрила на работник, чийто трудов договор е прекратен в хипотезата на ал. 1, изр. 3. Гаранция за спазване задължението на работодателя е предвидената в чл. 70 санкция.

Наредбата закон за трудовия договор предвижда и две основания за прекратяване на трудовия договор поради причини, свързани със здравословното състояние на работника. Съгласно чл. 66 работодателят може да уволни работник без предизвестие, когато работникът страда от заразителна болест, установена от лекар при фонда „Обществени осигуровки“ (б. „д“) и е неспособен или вследствие на дълготрайна болест станал неспособен да изпълнява задължението си по трудовия договор (б. „е“)⁴. При всички случаи на прекратяване на трудовия договор по чл. 66 (вкл. б. „д“, б. „е“) работникът може да отнесе спора до трудовия (помирителния) съд, където работодателят е длъжен да докаже основателността на уволнението. Ако уволнението е неоснователно, работодателят следва да заплати на работника обезщетение⁵.

Наредбата закон за трудовия договор съдържа и друга защитна разпоредба, сходна с действащото трудово законодателство. Съгласно чл. 52, когато работник, който е поискал или започнал ползването на платения си отпуск, може да бъде уволняван. Съгласно чл. 54, ал. 2 работодателят не може да уволнява работничка поради бременността ѝ и раждането.

Посочените неизчерпателни примери показват, че още в първия трудов закон е включен комплекс от норми, предоставящи закрила вкл. и при уволнение за определени работници и служители, намиращи се в специфично фактическо положение.

Защитни норми в Кодекса на труда от 1951 г.

Новата общество-политическа и икономическа реалност след 1945 г. налага и съществена промяна в трудовото законодателство. В Кодекса на труда от 1951 г., глава втора, раздел 3 (Прекратяване на трудовия договор), са предвидени защитни норми за определени категории работници и слу-

⁴ Текстовете на НЗТД са цитирани съгласно Сталев, Ж., 1946. *Трудово право – текст на законите за закрила на работническия труд със синтез на юриспруденцията*, С.

⁵ Ошанов, Р., 1943. *Правна закрила на труда в България*, С., с. 140.

жители, които имат съответствия с разпоредби от действащото трудово законодателство. Съгласно чл. 35 от КТ не може да бъде уволнена със или без предизвестие работничка или служителка след 4-тия месец на бременността ѝ⁶, а също и майка до навършване на 8-месечна възраст на детето, освен за тежки провинения и с разрешение на съответната инспекция на труда за всеки отделен случай. Тежестта на провиненията се преценява не от страната по трудовото правоотношение⁷, а от външен за правоотношението субект – Инспекцията по труда.

В същия смисъл е и текста на чл. 36 относно работник или служител, започнал ползването на разрешения му отпуск. Целта на нормата е осигуряване спокойното ползване на какъвто да е отпуск, след като същият е разрешен⁸.

Закрила е предвидена и за профсъюзни дейатели, посочени в изрична инструкция, които не могат да бъдат уволнявани, освен със съгласието на централния комитет на съответния професионален съюз (чл. 38). Съображенията за това правно разрешение са, че така се „гарантира свободата на критика и на упражняване на ония контролни функции от страна на профсъюзните дейатели върху администрацията на предприятието“⁹.

С редакцията на Кодекса на труда от 1957 г.¹⁰ се разширява предоставената до този момент закрила при прекратяване на трудовия договор, като отново могат да бъдат направени паралели с действащото трудово законодателство. Един от новите текстове в Кодекса на труда е разпоредбата на чл. 29, б. „к“ от КТ, съгласно която трудовият договор се прекратява по болест на работника или служителя. В този случай се иска съгласие на профкомитета и писмено мнение на трудово-експертна лекарска комисия за стабилизирана инвалидност и невъзможност да извършва заеманата работа, нито да бъде преназначен на друга подходяща за здравословното му състояние работа в същото предприятие, учреждение или организация¹¹.

⁶ Бременността се изчислява по календарни, а не по лунарни месеци – решение по гр. дело 6152/1958 г. на II г. о. на ВС, публикувано в Съдебна практика по трудови дела 1955–1960, ДИ „Наука и изкуство“, 1960, с. 119.

⁷ Радоилски, Л., 1960. *Трудово право на Народна република България*, С.: ДИ „Наука и изкуство“, с. 574.

⁸ Радоилски, Л. Цит. съч., с. 575.

⁹ Радоилски, Л. Цит. съч., с. 575.

¹⁰ Обн., „Известия“, бр. 92/1957 г.

¹¹ В курса Трудово право на НРБ, съобразен със законодателството към 15.03.1957 г., Л. Радоилски сочи като едно от основанията за прекратяване на трудовия договор – прекратяването поради болест, позовавайки се на чл. 152 от КТ и чл. 21 от Правилника за прилагане на Дял III.

В текста на чл. 31 е включена нова ал. 3, която е първообраз на текста на чл. 333, ал. 1, т. 3 от действащия Кодекс на труда. Съгласно новата алинея 3 работодателят може да прекрати трудовия договор с предизвестие при пълна или частична ликвидация или при съкращение в щатовете или при спиране на работата за повече от 30 дни (чл. 31, ал. 1, б. „а“ и „б“) *с работници и служители, боледуващи от определени болести, указани в наредба само след разрешение от инспекцията по труда за всеки отделен случай и след като се вземе мнението на трудово-експертната лекарска комисия.* В Наредбата за обезщетенията и помощите при уволнение на работници и служители¹² е указано (т. 2), че работодателят *не може* да прекрати трудовия договор по чл. 31, ал. 1, б. „а“ и „б“ от КТ с работници и служители, боледуващи, преболедували или трудоустроени от туберкулоза и силикоза *без мнението на трудово-експертната лекарска комисия и без разрешение от инспекцията по труда за всеки отделен случай.*

Разширен е и обхватът на чл. 35 от КТ. Към правоимащите лица се включат и работнички и служителки, чиито съпрузи отбиват редовната си военна или трудова служба. Предвидена е и хипотеза на абсолютна защита. Съгласно изр. 2 на чл. 35 независимо от тежестта на провинението не може да се уволнява, нито да се променят условията по трудовия договор с работничка или служителка, която ползва отпуск за бременност и раждане по чл. 60.

Включени са нови категории лица, ползващи права по чл. 38 от КТ. Работодаателят не може да уволнява със или без предизвестие работници и служители – членове на помирителни комисии или профсъюзни дейатели, изброени в списък изработен от профсъюзите, докато същите заемат определените профсъюзни длъжности и до 6 месеца след освобождението им, освен със съгласието на централното ръководство на съответния профсъюз.

Основанията по чл. 35, 36, 38 от КТ Л. Радоилски разглежда като особени случаи на прекратяване на трудовото правоотношение.

Закрила при уволнение съгласно Кодекса на труда

Въведената с първия Кодекс на труда закрила при прекратяване на трудовото правоотношение за работници и служители с оглед здравословното им състояние и по време на отпуск е възпроизведена с първоначалната редакция на чл. 333 от КТ от 1986 г. Разпоредбата е наименувана „Особена закрила при уволнение“.

¹² Обн., „Известия“, бр. 29/1958 г.

Съгласно чл. 333, ал. 1 в случаите на частична ликвидация, при съкращение в щата или при спиране на работата за повече от 30 дни предприятието може да уволни работници, боледуващи от определени болести, указани в наредба, *само с предварително разрешение от окръжната инспекция по охрана на труда за всеки отделен случай и след като вземе мнението на трудово-експертната лекарска комисия*. В сила от 1.01.1987 г. е Наредба № 5 от 20.02.1987 г. за болестите, при които работниците, боледуващи от тях, имат особена закрила съгласно чл. 333, ал. 1 от Кодекса на труда¹³ (наричана за краткост Наредба № 5). Предоставената специална закрила е продиктувана от хуманни съображения, като се има предвид, че болният работник по-трудно може да намери друга подходяща работа, а и по-трудно може да се адаптира към нея¹⁴.

Разпоредбата на чл. 333, ал. 2 урежда, че предприятието не може да уволнява със или без предизвестие работник, който е започнал ползването на разрешения му отпуск освен при дисциплинарно уволнение или при пълна или частична ликвидация на предприятието и то с предварително разрешение на окръжната инспекция по охрана на труда за всеки отделен случай. Целта на забраната за уволнение в случая е да се осигури на работника възможността да ползва отпуска съгласно неговото предназначение¹⁵.

Освен с текста на чл. 333 от КТ специална закрила за определени категории работници се установява и с редица други разпоредби, отменени или изменени с редакцията на Кодекса на труда от 1993 г. С разпоредбата на чл. 47 от КТ е предоставена закрила за профсъюзни и други дейци. Чрез установяването на закрилата на профсъюзните дейци се цели да се гарантира нормалното изпълняване на техните функции, защото при осъществяването им те могат да се окажат в конфликт с работодателя.

В глава 15, раздел II Специална закрила на жените е включена нормата на чл. 313, озаглавена Закрила при уволнение. Бременна работничка, работничка майка с дете до 3-годишна възраст или чийто съпруг отбива редовната си военна служба може да бъде уволнена само дисциплинарно, поради ликвидация на предприятието или за възстановяване на работа на незаконно уволнен работник. Дисциплинарното уволнение и уволнението поради частична ликвидация на предприятието се извършват само с предварително разрешение на окръжната инспекция по охрана на труда за всеки отделен случай (ал. 1). Съгласно ал. 2 предприятието не може едностранно

¹³ Обн., ДВ, бр. 33/1987 г.

¹⁴ Милованов, Кр., 1989. *Прекратяване на трудовия договор*, С.: Наука и изкуство, с. 102.

¹⁵ Милованов, Кр. Цит. съч., 103–104.

да прекратява със или без предизвестие трудовото правоотношение с работничка по време на отпуск за бременност, раждане и отглеждане на малко дете до 3-годишна възраст.

Разпоредбата на чл. 321 от КТ също е озаглавена Закрила при уволнение, но систематично се намира в Раздел III – Специална закрила на лицата с намалена трудоспособност. Трудоустроен работник може да бъде уволнен със или без предизвестие от предприятието само с предварително разрешение на окръжната инспекция по охрана на труда (ал. 1). Съгласно ал. 2 само с предварително разрешение на окръжната инспекция по охрана на труда може да бъде уволнен и работник, който по предписание на здравните органи е трудоустроен, но не е преместен на друга подходяща работа съгласно предписанието. Съображенията за установяване на специалната закрила в случая са социални — да се гарантира в по-висока степен правото на труд на лица, които след едно уволнение биха били значително затруднени да си намерят друга работа.

Първоначалната редакция на чл. 335 от КТ е озаглавена Съгласие на профкомитета при прекратяване на трудовия договор от предприятието. Съгласно чл. 335, ал. 1 от КТ прекратяването на трудовия договор от предприятието в случаите на чл. 190, ал. 1, 325, т. 9, и 328, ал. 1, т. 2–5, 9 и 10 се извършва след предварително писмено съгласие на профкомитета. По същество това са почти всички основания за уволнение, при които може да се прави преценка дали трудовият договор да бъде прекратен, или не. При решаването на въпроса дали да даде или да не даде съгласие за уволнение на определен работник профкомитетът осъществява едновременно две функции – контрол за спазване на трудовото законодателство и защита на интересите на работника. Уволнението може да е целесъобразно от гледна точка на интересите на предприятието, но да е нецелесъобразно от гледна точка например на семейното и материалното положение на работника, на неговото здравно състояние, на неговото квалификационно развитие и др. Поради това профкомитетът може да откаже съгласието си¹⁶.

В исторически аспект, макар и с различен обхват закрилните норми имат идентична цел. Те дават допълнителни гаранции на работници и служители, притежаващи специфично правно качество или намиращи се в уязвимо положение.

¹⁶ Милованов, Кр. Цит. съч., с. 106.

Закрила при уволнение съгласно чл. 333, ал. 1, т. 1–3 от КТ

След измененията от 1993 г. разпоредбата на чл. 333 от КТ започва да се оформя във вида, в който е действаща и към настоящия момент. Доктрината, както и съдебната практика приемат, че предварителната закрила при уволнение е израз на социалната защита на правото на труд. Предназначението на предварителната закрила при уволнение е да се осигури социална справедливост при уволнението¹⁷.

Допълнително притежаваните качества на работника или служителя, ползващ се със закрилата, са изчерпателно посочени. Част от тези качества могат да се придобиват единствено по време на трудовото правоотношение, чието прекратяване се цели. В тази категория са работник или служител, който е избран за представител на работниците и служителите по реда на чл. 7, ал. 2 и чл. 7а от КТ; синдикален член в хипотезата на чл. 333, ал. 4 от КТ и др. Друга част от релевантните правни качества могат да се придобият както по време на трудовото правоотношение, което ще се прекратява, но могат да са налични и преди неговото възникване. Тук се отнасят и най-често срещаните основания, активиращи предварителната закрила по чл. 333, ал. 1 от КТ – работничка или служителка, която е майка на дете до 3-годишна възраст; трудоустроен работник или служител; работник или служител, боледуващ от болест, определена в наредба на министъра на здравеопазването (чл. 333, ал. 1, т. 1–3).

Не във всички случаи, но с голяма степен на вероятност престирането на работната сила в пълен обем от посочените три категории работници и служители (чл. 333, ал. 1, т. 1–3) може да бъде възпрепятствано. Житейски обосновано е да се мисли, че майка на дете до 3-годишна възраст ще ползва отпуск за гледане на болно дете. Здравословното състояние на другите две категории работници и служители засяга тяхната работоспособност. И в тази връзка логично е да се мисли, „че когато се налага да намалява броя на работниците и служителите, работодателят има интерес да уволнява трудоустроените (*а и боледуващите* – заб. моя), чиято работна сила не е със същата стойност и ценност като тази на останалите“¹⁸. С оглед личното си положение (майка на дете до 3-годишна възраст или здравословно състояние) тези работници и служители са във фактическа неравнопоставеност спрямо останалите. С установяване на предварителната закрила, която цели запазване на трудовото правоотношение на уязвимите работници и служи-

¹⁷ Решение по гр. д. № 3/2020 г. на ВКС, 3-то гр. о.

¹⁸ Гевренова, Н., 2014. *Специална закрила на работниците и служителите с намалена работоспособност*, С.: Сиби, 218–219.

тели, се преодолява фактическата неравнопоставеност и „превръщането ѝ в юридическа равнопоставеност“ (Гевренова).

Въпреки личната позиция на автора¹⁹, критиката на института на предварителната закрила не е предмет на настоящото изложение. Фокусът е дали въведената предварителна закрила, особено в хипотезата на чл. 333, ал. 1, т. 1–3 от КТ няма негативен ефект при достъпа на пазара на труда за лицата с посочените правни качества. Не са изолирани случаите, при които работодатели се въздържат да сключват трудов договор с лице, което е майка на дете до 3-годишна възраст, трудоустроен работник или служител; работник или служител, боледуващ от съответната болест. В подобни случаи работодателят няма да посочи като причина състоянието на лицата. Но това не променя факта, че посочените категории лица са в една или друга степен „нежелани“ работници и служители. Може да се мисли, че капацитетът на работната сила е печката за тяхното наемане. Но в много случаи именно усложнената процедура по прекратяване на трудовия договор или изобщо невъзможността за прекратяването му с оглед разпоредбата на чл. 333, ал. 1, т. 1–3 и ал. 2 от КТ е това, което въздържа работодателите. Липсва социологическо изследване за нагласите на работодателите особено в частния сектор спрямо бъдещите работници и служители, които попадат в обхвата на чл. 333, ал. 1, т. 1–3 от КТ. Едва ли подобно изследване би било обективно предвид опасенията на работодателите да споделят негативните си нагласи, но в практиката подобни случаи не са изолирани.

Критика на текстовете и предложения

Актуализиране на подзаконовата нормативна уредба

Наредба № 5 от 20.02.1987 г. за болестите, при които работниците, боледуващи от тях, имат особена закрила съгласно чл. 333, ал. 1 от Кодекса на труда (накратко Наредба № 5) се прилага без изменение и допълнение от момента на влизането ѝ в сила. Промяната в здравната система (и не само) налага осъвременяване на подзаконовата нормативна уредба.

В сила от 1.01.2005 г. се прилага Наредба № 42 от 2004 г. за въвеждане на класификационни статистически системи за кодиране на болестите и проблемите, свързани със здравето, и на медицинските процедури. Болестите и проблемите, свързани със здравето, се посочват в съответната документация

¹⁹ В този смисъл Радева, М., 2016. *Критика на закрилата по чл. 333 от Кодекса на труда в случаите на дисциплинарно уволнение*. – Научни трудове на Русенския университет – 2016, том 55, серия 7, 89 – 93.

с техния четиризначен код по Международната статистическа класификация на болестите и проблемите, свързани със здравето – десета ревизия (МКБ 10). Следователно в наличната у работниците и служителите медицинска документация тяхното заболяване е посочено по стандартите на МКБ 10. В тази връзка посочването на болестите, попадащи в обхвата на чл. 1, ал. 1 от Наредба № 5 следва да е съобразено с въведената системи за кодиране на болестите. Така ще се осигури идентичност между подзаконовата уредба и издаваните медицински документи. Това ще гарантира и сигурност за работодателя дали заболяването, посочено в медицинската документация на работника или служителя, попада или не в обхвата на наредбата. Въпреки че в самата наредба е посочено, че същата се издава на основание чл. 333, ал. 1 от КТ, коректното правно основание е чл. 333, ал. 1, т. 3 от КТ. Обективно наредбата урежда процедурата относно работниците, боледуващи от някоя от посочените болести. Наредбата не визира трудоустроените работници и служители, обект на закрилата по чл. 333, ал. 1, т. 2 от КТ. Но процедурата по чл. 3 до 6 от Наредба № 5 е приложима и в двете хипотези на чл. 333, ал. 2 от КТ – както за трудоустроените (т. 2), така и за боледуващите от посочените болести (т. 3). И тук следва важният за работодателите въпрос относно приложението на чл. 1, ал. 2 от Наредба № 5. Съгласно този текст предприятието събира предварителна информация от работниците, които са определени за уволнение, страдат ли от болести, посочени в ал. 1. Правната норма указва активно поведение за работодателя. Смисълът на нормата, а и разбирането на съдебната практика е, че в хипотезата на чл. 333, ал. 1, т. 3 от КТ работодателят *трябва* да събере информация, да изиска документи, за да направи преценка дали е налице или не предпоставката за предварителната закрила. Посоченото правно разрешение е логично, защото е възможно работодателят да не разполага с информация за здравословното състояние на работника или служителя, а и той не е задължен да я предоставя предварително.

Въпросът е приложимо ли е задължението по чл. 1, ал. 2 от Наредба № 5 в случаите на трудоустроен работник или служител. От формалния прочит на нормата отговорът следва да е отрицателен. Но съдебната практика е в друга насока. Нещо повече, въпросът, обусловил достъпа до касационно обжалване на въззивното решение по к. гр. д. № 4303/2018 г. на ВКС е „Задължението на работодателя, с оглед преодоляването на предварителната закрила при уволнение по чл. 333, ал. 1, т. 2 от КТ, за изискване на предварителна информация за трудоустройство на работник или служител, счита ли се изпълнено с факта на уведомяване на последния да представи такава – ако разполага с нея или е необходимо изрично и определянето на срок за

това?“ ВКС приема, че при уволнение на основанията, посочени в чл. 333, ал. 1 от КТ, се изисква *задължително* от работодателя предварително да събере информация от работниците и служителите, към чието уволнение ще се пристъпва, *дали са трудоустроени, респ. страдат ли от болестите* по чл. 1, ал. 1 от Наредба № 5. Подобно разширително тълкуване на чл. 1, ал. 2 от Наредба № 5 е неприемливо, но формира установена съдебна практика.

Отговорност за работници и служители, които укриват факта на трудоустрояването

В този ред на мисли се поставя и въпросът за правните последици, когато работниците и служителите премълчават за факта за налично предписание за трудоустрояване. В общия случай работодателите са в неведение за предписанието на здравните органи по чл. 317, ал. 1 от КТ, когато то е издадено преди началото на настоящото трудово правоотношение. В този случай предписанието следва да достигне до работодателя чрез работника или служителя. Причината за затаяването на този факт е опасението на работника или служителя, че предписанието за трудоустрояване ще препятства сключването на трудовия договор. Практиката приема, че работодателят е обвързан от предписанието на здравните органи след като същото достигне до него. Например работодателят ще зачете правото по чл. 319 от КТ или чл. 317, ал. 3 от КТ след получаване на експертното решение на ТЕЛК или НЕЛК независимо в какъв период след възникване на трудовото правоотношение то да му е представено от работника или служителя.

Изправен пред възможността за прекратяване на трудовия договор, работник или служител, ползващ се със закрилата по чл. 333, ал. 1, т. 2 от КТ, дори и до този момент да е затаявал факта на трудоустрояването си, сега би се позовал на специфичното си трудовоправно качество. След като работодателят е обвързан (с оглед възприетото от съдебната практика) със задължението по чл. 1, ал. 2 от Наредба № 5 и в резултат на поискването на информация е представено предписанието на здравните органи за трудоустрояване, той следва да започне процедурата по преодоляване на предварителната закрила. В подобна хипотеза е налице известна непропорционалност между задълженията на страните по трудовото правоотношение. Поведението на работника или служителя за затаяване на факта на трудоустрояването може да бъде определено като недобросъвестно в смисъла на чл. 8, ал. 1 от КТ, но липсва санкция. Работодаателят обаче е обвързан от разширителното тълкуване на задължението му по чл. 1, ал. 2 от Наредба № 5 и при непоискване на информация за евентуално трудоустрояване, респ. преодоляване на закрилата – уволнението би било незаконно.

Отпадане на мнението на ТЕЛК

Съгласно чл. 333, ал. 2 от КТ в случаите, когато закрилата е предоставена на трудоустроен работник или служител и работник или служител, боледуващ от болест, определена в цитираната наредба преди уволнението, се взема мнението и на трудово-експертната лекарска комисия. Целта е да се ангажират здравните органи, тъй като закрилата по чл. 333, ал. 1, т. 2 и 3 от КТ е по здравни, а не по социални причини, както са останалите случаи по чл. 333, ал. 1 от КТ.

Мнението на ТЕЛК по чл. 333, ал. 2 от КТ е задължителен елемент от процедурата по преодоляване на предварителната закрила при уволнение по чл. 333, ал. 1, т. 2 и т. 3 от КТ. Липсата на мнение на ТЕЛК по чл. 333, ал. 2 от КТ – когато такова не е искано от работодателя и/или не е дадено от ТЕЛК, означава, че предварителната закрила при уволнение по чл. 333, ал. 1, т. 2 или т. 3 от КТ не е преодоляна, дори Инспекцията по труда да е дала разрешение за уволнението²⁰. Становището е, че мнението на ТЕЛК е от значение за информиране на инспекцията по труда за здравословното състояние на работника или служителя²¹.

Нормативната уредба на визираната процедура е в коментираната по-горе, неактуална Наредба № 5. Съгласно чл. 4 от същата въз основа на събраната и представена от работодателя медицинска документация, ТЕЛК оформя мнението си в експертно решение, което се изпраща служебно на работодателя и на работника или служителя. Работодателят прилага ЕР на ТЕЛК, с което е дадено мнението към писменото си искане до съответната Инспекция по труда.

Съгласно чл. 4, ал. 1 от Наредба № 5 в *седемдневен срок* ТЕЛК оформя мнението си в експертно решение за всеки работник отделно. Практиката показва, че предвид затрудненията в работата на органите на медицинската експертиза, ТЕЛК не спазва указания срок. В подобни случаи липсва възможност за реакция от страна на работодателя. Вярно е, че съгласно чл. 194, ал. 4 от КТ сроковете за налагане на дисциплинарни наказания не текат през времето от подаване на искането до получаване на мнението на трудово-експертната лекарска комисия и/или на предварителното разрешение за уволнение от инспекцията по труда в случаите по чл. 333, ал. 1 от КТ. Но в останалите случаи – особено съкращаване на щата, намаляване обема на работа – предприетите от работодателя вътрешно-организационни проме-

²⁰ В този смисъл е и практиката на ВКС – решение по гр. дело № 1784/2009 г. на ВКС, IV-то гр. о., решение по гр. дело № 1644/2009 г. на ВКС, III-то гр. о.

²¹ Решение по к. гр. д. № 3777/2016 г. на ВКС.

ни оставят висящи за неопределен срок. Това е още една причина, поради която работодателите са негативно настроени спрямо лицата, ползващи предварителна закрила по чл. 333, ал. 1, т. 2 и 3 от КТ.

Съгласно чл. 4, ал. 2 от Наредба № 5 в експертното решение се посочват болестта, от която страда работникът, и преценка на трудоспособността му, показаните и противопоказаните условия на труд и *целесъобразността на уволнението от гледна точка на адаптацията на организма при евентуална промяна в условията на труд*. Изследване на експертни решения на ТЕЛК, постановени на основание чл. 333, ал. 2 от КТ показват, че почти винаги липсва произнасяне относно *адаптацията на организма при евентуална промяна в условията на труд*. Така експертните решения стават формални актове, без да съответстват на целта на законодателя.

Липсата на част от изискуемото съдържание също поставя редица въпроси пред работодателите, касаещи законността на уволнението. Това е видно и от съдебната практика. Касационно обжалване е допуснато²² по правния въпрос преодолена ли е закрилата по чл. 333, ал. 1, т. 3 КТ, ако работодателят е поискал разрешение от ДИТ за уволнението, но *мнението на ТЕЛК няма съдържанието по чл. 4, ал. 2 от Наредба № 5*. Становището на ВКС е, че полученото от страна на работодателя мнение на ТЕЛК, *независимо дали съдържа изрично посочване как уволнението ще се отрази на здравословното състояние на лицето*, не се приравнява на липсата на изпълнена от негова страна процедура по чл. 333, ал. 2 от КТ, след като въз основа на това мнение е получено разрешение за уволнението²³. С така възприетото разбиране мнението на ТЕЛК, целящо да въвлече в процедурата здравния орган – се лишава от смисъл, а ЕР става един формален, но задължителен акт.

От изрично използвания от законодателя термин „мнение“ в разпоредбата на чл. 333, ал. 2 от КТ, същото – под формата на ЕР на ТЕЛК – има само информативен характер и не обвързва по задължителен начин Инспекцията по труда. ДИТ може да не се съобрази с това мнение при даването или отказването на разрешение за уволнение²⁴. И по този въпрос в съдебната практика няма колебания и тя е трайно установена, но в същото време е и вътрешно противоречива. От една страна мнението на ТЕЛК цели да изясни здравословното състояние на лицето, но от друга – не е обвързващо за ДИТ. Остава открит въпросът за действителния смисъл на произнасянето

²² Определение по к. гр. д. № 3777/2016 г. на ВКС.

²³ Решение по гр. д. № 1374/2012 г. на ВКС.

²⁴ Решение по гр. д. № 456/2012 г. на ВКС.

на ТЕЛК освен като задължителен етап от процедурата по преодоляване на предварителната закрила с оглед разпоредбата на чл. 333, ал. 2 от КТ.

Възприето е и становището, че разпоредбата на чл. 333, ал. 2 от КТ е специална по отношение на разпоредбата на чл. 113, ал. 3 от Закона за здравето²⁵ и дерогира приложението на последната в случаите, когато ТЕЛК дава мнение по чл. 333, ал. 2 от КТ. Именно предвид информативния, но не и задължителен характер на последното, работодателят след като получи служебно от ТЕЛК експертното решение не е необходимо да изчаква то да влезе в сила, а може веднага да го приложи към искането си до ДИТ дори в случаите, когато то е обжалвано по реда на чл. 112 от ЗЗ²⁶. В тези случаи работодателят сам поема риска при евентуална отмяна на издаденото ЕР на ТЕЛК, с което е дадено мнението по чл. 333, ал. 2 от КТ, да се стигне до липсата на такова, а следователно и до непреодоляване на предварителната закрила при уволнение по чл. 333, ал. 1, т. 2 или т. 3 от КТ. Хипотетично ЕР на ТЕЛК може да бъде отменено, за което работодателят няма вина, но той ще понесе последиците на едно евентуално незаконно уволнение.

Прекалено усложнена процедура по произнасяне на ТЕЛК с възможност за различни процесуални прийоми за забавянето ѝ може да постави работодателя в изчаквателна или несигурна позиция. А както беше посочено, ЕР на ТЕЛК, постановено в изпълнение на чл. 333, ал. 2 от КТ, придобива облика на все по-формален акт, лишен от първоначално вложения смисъл, но поставящ съществени пречки пред работодателите, вкл. и времев.

Мотивиране волеизявлението на ДИТ по чл. 333, ал. 1 от КТ

Съгласно чл. 6 от Наредба № 5 въз основа на документите по чл. 5 ДИТ в седемдневен срок отказва или дава разрешение за уволнение. Разпоредбата на чл. 5 визира, че работодателят отправя писмено искане за разрешение, като прилага към него и експертното решение на ТЕЛК. Наредбата не визира други изискуеми документи. При липсата на нормативна уредба като положително може да се оцени предоставената подробна информация за административната услуга от Интегрираната информационна система на държавната администрация²⁷. Подробно са посочени документите (макар и нормативно неустановени), които следва да придружават искането. Публику-

²⁵ Решенията на органите на медицинската експертиза, които не са обжалвани или редът за обжалването им е изчерпан, са задължителни за всички лица, органи и организации в страната.

²⁶ Практиката не допуска такова обжалване – решение по адм. дело № 2728/2007 г. на VI-то отд. на ВАС.

²⁷ https://iisda.government.bg/adm_services/services/service_provision/22511.

ван е и образец на Искане за издаване на разрешение или отказ за уволнение на някои категории работници или служители, ползващи специална закрила по чл. 333, ал. 1 и ал. 5 от Кодекса на труда, който не е задължителен, но е улесняващ работодателите формуляр.

Критиката тук е, че към волеизявлението на ДИТ не се изискват мотиви, защото такива изисквания не са законово установени²⁸. Това правно разрешение също е причина за негативната позиция на работодателите. Законосъобразното прекратяване или не на трудовото правоотношение е поставено от волята на субект, външен за правоотношението, който дори не дължи мотивиране на волеизявлението си. Волеизявлението на ДИТ не подлежи и на никаква форма на контрол, което засилва още повече негативната реакция на работодателите.

В заключение

Правенето на обобщения на базата на конкретен пример не е добър подход. Но работодатели обменят информация особено за откази на ДИТ, което формира и тяхното негативно отношение към предварителната закрила, респ. към ползващите я лица.

Считано от 1.09.2023 г. работодателят е утвърдил ново щатно разписание, съгласно което е извършено съкращаване на длъжност. Предвид сключения КТД, работодателят е преодолял закрилата по чл. 333, ал. 4 от КТ. В изпълнение на задължението си по чл. 1, Наредба № 5 е установено, че служителят се ползва с закрилата по чл. 333, ал. 1, т. 3 от КТ като боледуващ от захарна болест. На 30.10.2023 г. работодателят отправя искане до ТЕЛК, но ЕР е получено на 3.01.2024 г. Съдържанието на същото не отговаря на нормативно установеното такова. На 16.01.2024 г. работодателят депозира писмено искане с всички посочени от административния орган документи за даване на разрешение за прекратяване на трудовото правоотношение на основание чл. 328, ал. 1, т. 2, пр. 2 от КТ (поради съкращаване на щата) със служителя като ползващ се със закрила по чл. 333, ал. 1, т. 3 от КТ – боледуващ от захарна болест. В рамките на седмодневния срок е получено волеизявлението на ДИТ, с което не е дадено разрешение за прекратяване на трудовия договор. В акта на ДИТ²⁹ се сочи, че на първо място от искането на работодателя „не става ясно, на коя от всички визирани в разпоредбата на чл. 333, ал. 1 от КТ се иска предварителното разрешение“. Това твърдение

²⁸ Решение по гр. д. № 1879/2021 г. на ВКС, 3-то гр. о.

²⁹ Изх. № 24003926/19.01.2024 г. на ДИТ – Монтана.

не е вярно и очевидно ДИТ греши. На второ място отказът на ДИТ е мотивиран с това, че „не са изчерпани всички възможности за приспособяване на лицето на работа“. От една страна подобно задължение за работодателя липсва. От друга страна заключението на ДИТ е произволно, защото не е искана допълнителна информация и документи от работодателя в тази насока.

Следва повторно сезиране на ДИТ с молба да се отстрани техническата грешка, защото в искането на работодателя ясно е посочено, основанийето на закрилата, чието преодоляване се цели – по чл. 333, ал. 1, т. 3 от КТ. Относно второто съображение работодателят обръща внимание, че няма задължение за приспособяване лицето на друга работа, още повече, че липсва и предписание за трудоустрояване. Нещо повече – от представеното пред ДИТ експертно решение на ТЕЛК е видно, че *лицето е отказало да бъде освидетелствано*. Допълнителна гаранция за спазване правата на служителите е и обстоятелството, че работодателят е страна по КТД. Полученото съгласие от синдикалния орган е представено на ДИТ към писменото искане. Синдикалният орган познава ситуацията в предприятието, както и причините за съкращаването на щата и утвърждаването на новото щатно разписание. В случай, че синдикалният орган имаше съмнение, че са нарушени трудовите права на служителя, предварителното съгласие по чл. 333, ал. 4 от КТ нямаше да бъде дадено. В допълнение е представен протокол, от който е видно, че работодателят е изпълнил и задължението си по чл. 315 от КТ. Определените работни места, подходящи за трудоустрояване, които за работодателя са четири и са заети от трудоустроени служители. Работодателят е изпълнил и квотата си съгласно ЗХУ, като е назначил две лица с трайни уреждания, като допълнително е назначено и още едно лице, което е трудоустроено. Работодателят няма обективна възможност за приспособяване на лицето на друга работа.

ДИТ отказва произнасяне по допълнителните съображения. Работодателят не успява да преодолее предварителната закрила и следователно законосъобразно да прекрати трудовия договор. У работодателя остава резонния въпрос – каква трудова функция да бъде възложена на служителя, още повече, че преценката на работодателя е за съкращаване на заемания щат.

Подобни случаи не са изолирано явление. Резултатът от подобно поведение на компетентните органи за преодоляване на предварителната закрила по чл. 333, ал. 1, вр. ал. 2 от КТ, неактуална подзаконова уредба, многобройна, но спорна на моменти съдебна практика е причина за формиране на негативно отношение у работодателите срещу закрилните механизми. Това фактически се отразява върху лицата, за които предварително

е ясно, че попадат в обхвата на закрилата по чл. 333, ал. 1, т. 1–3 от КТ и те стават непредпочитани при сключването на трудов договор. Така една норма със социално предназначение практически се превръща в спънка пред съответните лица за достъпа им до пазара на труда и води до тяхното неблагоприятно третиране³⁰.

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³⁰ Стайков, Ив., 2005. *Понятие за дискриминация в трудовите отношения*. – Правен преглед, № 1, 22–42.

Създава ли законът ефективни мерки за защита на работника и служителя, подал сигнал за нарушение при дискриминативно отношение от работодателя му?

Цвета Попова*

Авторът анализира въведените с новия Закон за защита на лицата, подаващи сигнали или публично оповестяващи информация за нарушения мерки за защита на работника или служителя, подал сигнал за нарушение и станал обект на дискриминационно отношение от своя работодател. Изследването доказва, че новият закон не съдържа достатъчно ефективна защита срещу неравностойно третиране от страна на работодателя, нито предвижда санкции при такова нарушение. Авторът доказва нуждата от законодателни промени, за да се достигнат поставените цели от Директива (ЕС) 2019/1937 на Европейския парламент и на Съвета от 29 октомври 2019 г. за защитата на лицата, които докладват нарушения на правото на Европейския съюз.

Ключови думи: защита, дискриминация, работник и служител, лице, подаващо сигнал за нарушение, работодател, административни санкции, Директива (ЕС) 2019/1937



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Does the law effectively protect an employee, who is discriminated by the employer for being a whistleblower?

Tsveta Popova

The author examines the introduced by the newly adopted ‘Law on protection of persons who report or publicly disclose information about violations’ protection of an employee who has blown the whistle for being discriminated by the employer. The study finds that the Law does not provide enough effective protection against unfair treatment by the employer or against violations of its obligations. The author justifies the need for legislative changes to meet the objective of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

Keywords: *Protection, discrimination, employee, whistleblower, employer, Directive (EU) 2019/1937*



Законът за защита на лицата, подаващи сигнали или публично оповестяващи информация за нарушения (ЗЗЛПСПОИН)¹ се приема в изпълнение на изискванията на **Директива (ЕС) 2019/1937 на Европейския парламент и на Съвета от 23 октомври 2019 относно защита на лицата, подаващи сигнали за нарушения на правото на съюза**. Той урежда нормативни правила, които досега не са били обобщени, а в преобладаващата си част и не са съществували в българското законодателство. „Заварената“ национална уредба относно приемането и разглеждането на сигнали за нередности се ограничава до държавната и общинската администрация² и в по-малка степен създава правила за работодателите от частния сектор³.

¹ По-долу в текста се нарича и само Закон за защита на лицата, подаващи сигнали.

² Предвидени са в глава осма „Предложения и сигнали“ на Административнопроцесуалния кодекс още от 2006 г. Сред функциите на създадените на основание чл. 46 от Закона за администрацията инспекторати към министерствата са и приемането и обработването на сигнали за нарушения в публичния сектор. Служителите в държавната администрация се задължават да докладват на непосредствения си ръководител или на органа на власт административните слабости, пропуски и нарушения, които по тяхна преценка създават предпоставки за корупция, измами и нередности (чл. 7, ал. 3 от Кодекса за поведение на служителите в държавната администрация). Правила за разглеждане на сигнали от началото на 2018 г. са уредени и в Глава VI „Сигнали“ на Закона за противодействие на корупцията и за отнемане на незаконно придобитото имущество (загл. изм. ДВ, бр. 86 от 2023 г.). В зависимост от характера на нарушението сигнали за нередности може да се подават и до други компетентни ведомства и институции – Държавната агенция „Национална сигурност“ (за нарушения по чл. 72 от Закона за мерките срещу изпирането на пари и чл. 9 от Закона за мерките срещу финансиране на тероризма), омбудсмана (чл. 19, ал. 1, т. 1 и чл. 24–27 от Закона за омбудсмана) и пр.

³ Задължения във връзка с улесняване подаването на сигнали за нередности са произтичали от предмета на тяхната дейност. Работодателите във финансовия сектор следва да създават подходяща и ефективна процедура, по която служителите на банката да могат да сигнализират за нарушения в рамките на институцията по самостоятелен и независим ред. Законодателството относно регулацията на вътрешния пазар налага докладване в рамките на организацията за служителите на органите за администриране на нередности по чл. 2 от Наредбата за администриране на нередности по Европейските структурни и инвестиционни фондове. Според Закона за прилагане на мерките срещу пазарни злоупотреби с финансови инструменти, Закона за дейността на колективните инвестиционни схеми и на други предприятия за колективно инвестиране, Закона за пазарите на финансови инструменти, Кодекса за застраховането, Кодекса за социално осигуряване, Регламент (ЕС) относно пазарите на финансови инструменти или регулацията на вътрешния пазар и са били продиктувани от задължения, установени в актове на Европейския съюз. Трудовото законодателство също транспонира тези ангажименти, като урежда в специална алинея втора на чл. 187 от Кодекса на труда (КТ), в сила от 30.12.2016 г. (ДВ, бр. 105 от 2016 г.), дисквалификация като дисциплинарно нарушение на подаването на жалба, сигнал или съобщение до Комисията за финансов надзор за нарушение на определени нормативни актове или на актове по прилагането им. С разпоредбата се дисквали-

Не може да се твърди, че е налице реално прилагане на така уредените възможности на лицата да подават сигнали за нередност. В този смисъл причина за приемането на ЗЗЛПСПОИН е отново задължение, произтичащо от актове на Европейския съюз (ЕС). По-сложно е имплементирането им във вътрешното законодателство, когато липсва належаща необходимост да се уредят съществуващи обществени отношения. С влизането в сила на 4 май 2023 г. на Закона за лицата, подаващи сигнали, се задължават общо работодателите, независимо дали в публичния или в частния сектор да въведат механизъм за приемане и обработване на сигнали за нередности, както и да създадат условия и мерки за защита на лицата, които оповестяват информация за нарушения на българското законодателство или на актове на ЕС, застрашаващи или увреждащи обществен интерес и правото на Европейския съюз. Целта на това изложение е да анализира установените нормативни изисквания и предвидените в закона мерки, като оцени доколко те са адекватни и предоставят достатъчни гаранции за ефективна⁴ защита на работниците и служителите срещу евентуално репресивни мерки и неравно третиране на работното им място поради качеството им на податели сигнали за нередности. Отговорът на този въпрос е важен, тъй като още в съображение 1 от преамбюла на Директива (ЕС) 2019/1937 се посочва, че основна причина потенциалните лица, сигнализиращи за нередности⁵, да се въздържат да подадат сигнал за своите опасения или подозрения, е страхът от ответни действия с цел отмъщение.

Предварително е необходимо да се изясни прилагането на закона по отношение на времето, субектите, които може да извършат дискриминационни действия, и на какви условия следва да отговарят лицата, спрямо които такива може да бъдат предприети.

фицира такова поведение като нарушение на трудовата дисциплина, злоупотреба с доверието и уронване на доброто име на предприятието, разпространяване на поверителни за него сведения, освен в случаите, когато работникът или служителът умишлено съобщи невярна информация. Разпоредбата не урежда задължения за предприемане на определени действия от страна на работодателите, а по-скоро за въздържане от конкретно поведение, водещо до санкциониране на конкретното на иначе поверителна информация.

⁴ Повече за ефективната правна закрила Гевренова, Н., 2015. *Ефективната правна закрила – ново предизвикателство пред трудовото законодателство*. – В: Актуални проблеми на трудовото и осигурителното законодателство. Т. VII. С.: УИ „Св. Кл. Охридски“, 69-80.

⁵ Оттук нататък в изложението под лица, подаващи сигнали за нередности, ще се имат предвид и тези, публично оповестили информация съобразно изискванията на ЗЗЛПСПОИН.

Според § 10 от заключителните разпоредби (ЗР) на ЗЗЛПСПОИН той се прилага считано от 4 май 2023 г. – три месеца след обнародването му в Държавен вестник, като, както чл. 26, § 2 Директива (ЕС) 2019/1937 допуска, глава втора, раздел I с чл. 12–18 относно въвеждането на правила и механизъм за вътрешно подаване на сигнали да се прилагат по отношение на работодателите в частния сектор, които имат между 50 и 249 работници или служители, от 17 декември 2023 г. Освен това в чл. 9, т. 2 ЗЗЛПСПОИН е посочено, че не се образува производство по него, ако се подава сигнал за нарушение, извършено преди повече от 2 години. Като се съобразят така поставените времеви рамки и се има предвид, че глава III на закона урежда мерките за осигуряване на защита и нейното действие не е отложено във времето до декември 2023 г., то може да се твърди, че всички лица, които са подали сигнал, отговарящ на изискванията на закона след 4 май 2023 г. за нарушение, извършено не по-рано от 5 май 2021 г., могат да станат обект на неравно третиране от страна на своя работодател и в изпълнение на поставените цели от Директива (ЕС) 2019/1937 и от чл. 2 ЗЗЛПСПОИН, те следва да получат защита по закона, включително и срещу дискриминация на работното място заради подадения сигнал за нередности.

Самият закон в чл. 12 посочва кои са задължените субекти – работодатели, които трябва да предприемат изискуемите организационни мерки, както и от какви последващи действия следва да се въздържат спрямо лице, подало сигнал за нередност. Така всички работодатели от частния сектор с 50 и повече работници и служители, както и работодатели в публичния сектор, включително общини и всички органи по назначаване следва вече да са предприели необходимите действия в изпълнение на закона. Предвидените в чл. 12, ал. 1 ЗЗЛПСПОИН облекчения (да споделят ресурси за получаване на сигнали за нарушения и за предприемане на последващи действия по тях) за по-малки общини и работодатели с по-малко работници и служители не засягат задълженията им да не предприемат ответни действия срещу лицата, подаващи сигнали. В същото време ограничението от 50 работници и служители не засяга работодателите, чиято дейност попада в приложното поле на актовете на Европейския съюз, посочени в част I, буква “Б” и част II от приложението⁶ към чл. 3, ал. 1 ЗЗЛПСПОИН.

⁶ Това са работодатели, изброени в Приложение към член 3, ал. 1, т. 1, буква „б“ на ЗЗЛПСПОИН, които осъществяват финансови услуги, предлагат продукти и използват пазари, които имат значение за предотвратяване на изпирането на пари и финансирането на тероризма. Те са изброени в директивите, които установяват регулаторна и надзорна рамка и защита на потребителите и инвеститорите в областта на финансовите услуги на Съюза и капиталовите пазари, банкирането, кредитирането,

За тях законът се прилага независимо от броя на работниците и служителите им. Докато с изброяването на задължените по закона лица се постига необходимата яснота кои са работодателите, които са задължени по закона лица, то с легалното дефиниране на понятието „работодател“ в § 1, т. 2 от допълнителните разпоредби (ДР) на ЗЗЛПСПОИН законодателят не се е справил. Липсва всякаква систематичност и последователност в избора да се обедини в едно ясно и еднозначно определено в националната нормативна уредба по съдържание понятие каквото са работодатели субекти, които изобщо нямат такова качество. Неприсящо за него по смисъла на в § 1, т. 1 ДР на Кодекса на труда (КТ) в § 1, т. 2 ДР ЗЗЛПСПОИН са добавени и субектите, които самостоятелно „наемат работници и служители“ по служебно правоотношение. Така се оказва, че държавните служители се наемат, а не се „назначават“, при това не в качеството им на държавни служители, а на „работници и служители“ и то не от орган по назначаване, а от работодател. Макар и дадено за целите на този закон, легалната дефиниция смесва твърде различни правни понятия, а освен че е грешна, тя е и ненужна. Като се има предвид темата на това изследване – дискриминационно третиране на работници и служители от работодатели заради подаден сигнал за нередност по ЗЗЛПСПОИН, използваните понятия работодател и работник и служител ще имат общоустановените в трудовото законодателство и наука съдържание.

Вторият важен за това изследване въпрос е свързан с изясняване на лицата, спрямо които е възможно неравно третиране от работодателя при подаване на сигнал за нередност. Закриляните субекти са широк кръг лица, изброени в чл. 5 ЗЗЛПСПОИН. Сигнализиращо лице по смисъла на този закон е физическо лице, което подава сигнал или публично оповестява информация за нарушение, станало му известно в някакъв работен контекст. Работниците и служителите попадат в чл. 5, ал. 2, т. 1 ЗЗЛПСПОИН – работник, служител, който полага наемен труд, независимо от характера на работата, от начина на заплащането и от източника на финансирането. Това включва както работещите по трудово правоотношение за неопределено време, така и на срочни трудови договори; на пълно и непълно работно време; за надомна работа; за работа от разстояние и пр. Законодателят не съдържа ограничения или изключения по отношение на разнообразните форми на полагане на труд по трудово правоотношение. По-интересен е въпросът включват ли се към тях предвидените в чл. 5, ал. 2, т. 3 ЗЗЛПСПОИН лица, извършващи дейност

инвестициите, застраховането и презастраховането, професионалните или личните пенсии, продуктите, ценните книжа, инвестиционните фондове, услугите в сферата на плащанията и дейностите, изброени в приложения и в самите директиви.

като доброволец или стажант. Следва да се има предвид, че с доброволците в доброволните формирания към кмета на общината по чл. 40 от Закона за защита от бедствия не са работници и служители и не попадат в обхвата на това изследване. Обратно – съгласно чл. 233а и сл. КТ стажантът работи по трудов договор за стажуване и съответно е работник и служител, спрямо когото може да се предприемат дискриминационни мерки от работодателя. Специално внимание следва да се отдели и на категориите, посочени в чл. 5, ал. 2, т. 6 и т. 7 ЗЗЛПСПОИН. На първо място това са лицата, чието трудово правоотношение се очаква да възникне, тъй като са участвали във форма на подбор за постъпване на работа и са получили в това качество информация за нарушение. Те няма да получат защита, ако са останали кандидати, без да се очаква да възникне с тях трудово правоотношение. Що се отнася до бившите работници и служители, които са сигнализирали за нередност на основание информация, получена в рамките на трудовото им правоотношение, което е прекратено към момента на подаване на сигнала, то те също може да бъдат обект на неравно третиране от страна на вече бившия работодател и за тях се отнасят съответно направените в това изложение изводи.

Освен спрямо реално подаващите сигнали законът разпростира закрилата си и върху косвено засегнати лица – подпомагащи го, свързани лица и пр. в чл. 5, ал. 2, т. 9 ЗЗЛПСПОИН. Ако те са колеги на лицето, подаващо сигнал, те се включват сред работниците и служителите, които могат да пострадат от неравно третиране на своя работодател заради подадения сигнал за нередност. Става дума за колеги, например юрист или друг специалист, от когото сигнализиращото лице е получило някакво съдействие по подаването на сигнала, тъй като изрично е предвидено, че закрилата се прилага за тези, които помагат лицето.

Останалите застрашени субекти – изпълнители по граждански договори, акционери, съдружници, роднини, юридически лица и пр. не могат да пострадат от дискриминационно третиране от работодателя, тъй като не са в трудови правоотношения с него.

Работниците и служителите, които могат да пострадат от неравно третиране и би трябвало да получат закрила по ЗЗЛПСПОИН, следва да са подали сигнал, отговарящ на нормативните изисквания. На първо място както Директива (ЕС) 2019/1937 така и българският законодател изискват лицата да подават сигнал с информацията за нарушението, получена в т.нар. „работен контекст“. Според легалната дефиниция на § 1, т. 4 ДР ЗЗЛПСПОИН става дума за *настоящи или минали работни дейности в публичния или в частния сектор, чрез които независимо от тяхното естество лицата*

получават информация за нарушения и в рамките на които тези лица могат да бъдат подложени на репресивни ответни действия, ако подадат такава информация. Освен че самата дефиниция е недостатъчно ясна, тя е и ограничителна. Няма да е налице изискването за работен контекст, ако в рамките на своето трудово правоотношение лицата не могат да бъдат подложени на репресивни действия, въпреки че всъщност би имало връзка с работата – например са напуснали и вече спрямо тях няма как да се упражнят ответни репресивни действия, но могат да бъдат обиждани, включвани в черен списък и пр. Освен това самата дефиниция, тъй като повтаря дадената от директивата, е излишна, ако не въвежда насоките и изискванията ѝ. Българският законодател в чл. 5, както е посочил и в чл. 2 ЗЗЛПСПОИН, най-общо очертава какво се има предвид под „работен контекст“ – информация, станала му известна *при или по повод изпълнение на трудовите или служебните им задължения*. За целите на това изложение следва да се конкретизира, че става дума за тази информация, която е достигнала до работника или служителя в качеството му на такъв при или по повод изпълнение на трудовите му задължения. Така според новата редакция (ДВ, бр. 88 от 2023 г.) на чл. 5, ал. 1, т. 6 ЗЗЛПСПОИН би следвало не всички кандидати за работа да получат закрила, а само тези, с които е очаквано възникването на трудово правоотношение, независимо че са получили информация за нарушение, докато са били участници в процедура по подбор, конкурс и за нея подадат сигнал. Например са станали свидетели на случки, получили са случаен достъп до документи или по погрешка такива са им изпратени по имейл, докато са се явявали на интервю за работа в търговски отдел. Би следвало да се приеме, че те във връзка с професионалната си дейност са получили достъп до информация за нарушението, но, ако не са получили предложение да започнат работа, не са избрани в конкурса, то не отговарят на изискването на чл. 5, ал. 1, т. 6 ЗЗЛПСПОИН с тях да предстои да възникне трудовото правоотношение и не може да се ползват от защитата на закона.

Освен необходимостта информацията за нарушението да е получена в работен контекст, то самият сигнал следва да има посочен автор. Българският законодател не дава абсолютен приоритет на информацията за нарушения, като не включва сред лицата, получаващи закрила анонимно подаващи сигнали, въпреки че директивата му позволява подобна преценка. Реално и предоставянето на такава закрила, включително и срещу неравно третиране би било трудно, без лицето да може да бъде идентифицирано. Но, според чл. 10 ЗЗЛПСПОИН, ако лицата, подали анонимен сигнал, впоследствие са били идентифицирани и са станали обект на репресивни ответни действия, имат право на защита, когато са налице условията по чл. 6, ал. 1 и чл. 7

ЗЗЛПСПОИН, т.е. когато са изпълнени останалите условия за подаване на сигнали.

На следващо място в чл. 6 и чл. 7 ЗЗЛПСПОИН са предвидени още две условия за прилагане на закрилата срещу ответни действия. Сигналът следва да е „достоверен“. Т.е. този, за който лицето е имало основателна причина да счита, че подадената информация за нарушението в сигнала е била вярна към момента на подаването ѝ и че тази информация попада в обхвата на закона. Освен това е необходимо сигналът да е подаден по съответния ред на закона и да отговаря на условията му. Това означава, че подаден не по изискванията на закона сигнал, например, е отнесен не към компетентен орган, лишава от закрила неговия подател. Възможно е сигналът да е подаден и до институции, органи, служби или агенции на Европейския съюз. Такова подаване на сигнал се счита за подаване чрез външен канал. От казаното може да се направи извод, че се предоставя закрила на сигнализиращите лица, но само на тези, които са използвали реда, който законодателят приоритизира. Това включва и изискването да се спази поредността на подаване на сигнал – първо по вътрешен и впоследствие по външен канал, преди да се пристъпи към публично оповестяване. Този извод може да се направи от чл. 11, ал. 1 ЗЗЛПСПОИН, който установява, че с оглед възможността за бързо предотвратяване на нарушение или отстраняване на последиците от такова нарушение сигналът следва да се подава приоритетно чрез канал за вътрешно подаване на сигнали. Приоритизирането на вътрешното подаване може да се изведе и чрез тълкуване на разпоредбата на чл. 7, ал. 1 ЗЗЛПСПОИН, която за публично оповестяване изисква освен сигналът да е „достоверен“, да се отнася за нарушение, което попада в обхвата на закона, но следва да са налице някое от изброените в него алтернативни ситуации – по сигнала не са били предприети съответни действия в сроковете, предвидени в закона; по преценка на лицето то има основания да смята, че нарушението може да представлява непосредствена или явна опасност за обществения интерес или съществува риск от щети, които не могат да бъдат отстранени. Затова законодателят дава закрила на тези лица, когато публично са разкрили информация за нарушението. Става дума все за явна, непосредствена опасност за обществения ред, за риск от неотстраними щети, което също подлежи на доказване. Също е възможно да получи защита лице, подало по външен канал или публично оповестило информация, ако по негова преценка няма смисъл от външно подаване на сигнал поради риск от ответни действия или има вероятност нарушението да не бъде ефективно разгледано поради опасност от укриване или унищожаване на доказателства, съмнение за наличие на тайно споразумение

между компетентния орган и извършителя на нарушението, или за съучастие на органа в нарушението, както и поради други специфични конкретни обстоятелства по случая.

Като отрицателна предпоставка условие за прилагане на закрилата по закона е подаденият сигнал да не включва информация, представляваща квалифицирана или професионална тайна. Става дума за изключенията по чл. 4 ЗЗЛПСПОИН, че той не се прилага за сигнали за нарушения при обществени поръчки в отбраната и националната сигурност, ако попадат в обхвата на чл. 346 от Договора за функционирането на Европейския съюз⁷; на защитата на класифицирана информация по смисъла на чл. 1, ал. 3 от Закона за защита на класифицираната информация; станали известни на лица, упражняващи правна професия и за които съществува задължение по закон за опазване на професионална тайна; на поверителността на здравната информация по смисъла на чл. 27 от Закона за здравето – личните данни, свързани със здравословното състояние, физическото и психическото развитие на лицата, както и всяка друга информация, съдържаща се в медицинските рецепти, предписания, протоколи, удостоверения и в друга медицинска документация; на тайната на съдебното съвещение; на правилата на наказателното производство. Така може да се предположи, че лекар или друг професионалист, получил в рамките на дейността си данни за нарушение, което е защитено с професионална тайна или представлява класифицирана, военна или тайна по чл. 347 ДФЕС, или се нарушава с разкриването ѝ тайната на съдебното съвещение или на правилата на наказателното производство, няма да се ползва от закрилата по този закон при репресивни деяния срещу него, ако подаде сигнал.

Освен това подаденият сигнал следва да попада в материалните ограничения на нарушенията, изброени в чл. 3, ал. 1–3 ЗЗЛПСПОИН. В краткост, тъй като директивата цели да се защитят интересите на ЕС и средствата от неговите фондове, които се предоставят на държавите членки, тя касае сигнализиране за предимно такива нарушения⁸, но позволява приложното

⁷ Ако са предприети мерки от друга държава членка относно сериозни вътрешни вълнения, засягащи поддържането на законността, в случай на война, сериозно международно напрежение и заплаха за мира или международната сигурност.

⁸ Описани са в чл. 3, ал. 1 и в Приложението към закона, нарушения в областта на: обществените поръчки; финансовите услуги, продукти и пазари и предотвратяването на изпирането на пари и финансирането на тероризма; безопасността и съответствието на продуктите; безопасността на транспорта; опазването на околната среда; радиационната защита и ядрената безопасност; безопасността на храните и фуражите, здравето на животните и хуманното отношение към тях; общественото здраве; защитата на потребителите; защитата на неприкосновеността на личния живот и

поле да се разшири от националния законодател и за други, когато също да се прилага закрилата на закона за лицата, които подават сигнали или публично оповестяване По отношение на българското законодателство законът се прилага за сигнали единствено за нарушения: в областта на правилата за заплащане на дължими публични държавни и общински вземания, в трудово законодателство и до това, свързано с изпълнението на държавна служба (чл. 3, ал. 3 ЗЗЛПСПОИН). Така ако чистачката при нотариуса става свидетел на практика на нотариуса винаги да предлага на явилите се за изповядване на сделката страни да се декларира стойност на прехвърляното имущество според данъчната оценка, а не на действителната продажна цена и така се спестяват на хазната приходи от данък – то, ако тя подаде сигнал по закона, ще може да се ползва от закрилата му. Така може да се обобщи, че лицата, обект на това изследване поради евентуалното дискриминационно отношение от работодателя може да бъдат работници и служители, включително бивши, както и лица, чието трудово правоотношение предстои да започне, които в рамките на работен контекст са получили информация за нарушение от изброените в чл. 3, ал. 1–3 ЗЗЛПСПОИН области на правото на ЕС и на българското право, подали са сигнал по закона след 4 май 2023 г. с информация, която считат за достоверна, за нарушение, извършено до две години от подаване на сигнала и с разкриването ѝ не се нарушават забраните за разкриване на професионална или квалифицирана тайна. Освен това следва да са спазени и нормативните изисквания за начина за подаването на сигнала. Ако не е налице някое от обстоятелствата, позволяващи външно подаване на сигнала по чл. 7 ЗЗЛПСПОИН или за публично оповестяване на сигнала, сигналът с оглед приоритизацията по чл. 11 ЗЗЛПСПОИН следва да бъде подаден по вътрешния канал, създаден от работодателя. Само от прегледа на изброените предпоставки, необходими, за да се получи защита по ЗЗЛПСПОИН в сравнение с далеч по-ясните и облекчени условия за получаване на защита от дискриминация илюстрират колко по-трудно е да

личните данни; сигурността на мрежите и информационните системи; в областта на предотвратяването и на борбата с измамата, засягаща финансовите интереси на Съюза; нарушения на правилата на вътрешния пазар по смисъла на чл. 26, § 2 от Договора за функционирането на Европейския съюз (свободното движение на стоки, хора, услуги и капитали), относно конкуренцията и държавните помощи; нарушения, свързани с трансгранични данъчни схеми, чиято цел е да се получи данъчно предимство, което противоречи на предмета или на целта на приложимото право в областта на корпоративното данъчно облагане; извършено престъпление от общ характер, за което работникът или служителът е узнал във връзка с извършване на своята работа или при изпълнение на служебните си задължения.

се достигне до ефективност и реално прилагане на нормативната уредба при наличие на репресивни мерки спрямо подател на сигнал за нередност.

Самият Закон за защита на лицата, подаващи сигнали, установява и редица задължения спрямо работодателите – да въведат цялостна вътрешна организация, да предприемат съответни мерки и да се въздържат от репресивни ответни действия спрямо подаващите сигнали лица. Както може да се проследи от изложението досега, законодателят е твърде многословен, уредбата е усложнена и това затруднява ориентацията с какво тя допринася да се постигне целта на директивата и на закона, включително как осигурява защита от дискриминационни ответни действия на работниците и служителите, подаващи сигнали.

На следващо място, за да се определи дали са ефективни предвидените от закона мерки срещу евентуално предприети от работодателя ответни дискриминационни действия, трябва да се очертаят белезите на забранените ответни действия, както и дали те могат да се характеризират като неравносътнo третиране. От дадената легална дефиниция на ответно действие в § 1 т. 11 ДР ЗЗЛПСПОИН и от разпоредбите на чл. 33 ЗЗЛПСПОИН, особено от примерното изброяване, направено в неговата ал. 1 може да се очертаят и конкретните характеристики на репресивните деяния, които най-често може да бъдат предприети от работодателя срещу сигнализиращото лице. Още характеризиране на самото поведение създава затруднения. В чл. 33, ал. 1 ЗЗЛПСПОИН законодателят обявява за забранени и заплахите, и опитите за такива действия, което липсва в легалната дефиниция в § 1 т. 11 ДР ЗЗЛПСПОИН. Нееднакво е уредена и връзката на ответното действие с работата, и последиците, настъпили от такова деяние, което затруднява извличането на общите белези на понятието⁹.

Що се отнася до забраненото поведение, то може да *представява всяко пряко или непряко действие или бездействие* (по легалната дефиниция в § 1 т. 11 ДР ЗЗЛПСПОИН), независимо, че е определено в чл. 33, ал. 1 ЗЗЛПСПОИН само като ответно *действие*. След прилагане на изправителното тълкуване може да се обобщи, че такова може да се предприеме както с активно поведение – реално извършено действие, или с проявено бездействие, когато законосъобразното поведение е изисквало да се предприеме

⁹ Тази законодателна техника – да се дава легална дефиниция на понятие в допълнителните разпоредби на закона, а в отделни разпоредби на закона да се прибавят към съдържанието му допълнителни белези или да се изключват такива, е несполучлива и следва да се избягва. Дефиницията се дава, за да се използва в целия текст на закона еднозначно това понятие, а не да му се противоречи.

действие и то не е било осъществено. Допустими форми на деянието са и опит за такова или заплаха за предприемането му – т.е. да са предприети мерки за подготовката на такова деяние (опит) или дори само да са изказани предупреждения за предприемането му, с което да се е създадо основателно опасение у работника или служителя за действителното му извършване (заплаха). Законодателят допуска всяко едно от тях да бъде извършено пряко или да бъде подтикнато друго лице за извършването му.

На следващо място ответното деяние следва да е *настъпило в работен контекст*. Това изискване е поставено не в чл. 33 ЗЗЛПСПОИН, а само в легалната дефиниция. От примерното изброяване, направено в чл. 33, ал. 1 ЗЗЛПСПОИН, не личи всички посочени ответни действия да са свързани с работата – например тази по ал. 1, т. 11 – нанасяне на вреди, включително за репутацията на лицето в социалните мрежи, не изисква непременно да е нанесена обида, свързана с работата, каквито ответни действия, свързани с професионалната му репутация и достойнство са предвидени в ЗЗЛПСПОИН, чл. 33, ал. 1, т. 5 (отрицателна оценка за работата), т. 7 (действия, изразени словесно, които имат за цел накърняване на достойнството на лицето), т. 12 (включване в черен списък). Тълкувам изискването за задължителен работен контекст ограничително. Достатъчно е деянието да не е било предприето от работодателя, ако нямаше подаден сигнал от лицето и той няма друга връзка с работника или служителя, за да приема, че ответното деяние е предприето в работен контекст. Така не свързвам непременно последиците му с работата. С нея смятам, че е достатъчно да са свързани причините за предприемането му. Работодателят може да извърши с такава с цел очерняне или обида на лицето в публичното пространство и като такива те следва да бъдат класифицирани като репресивна мярка.

На следващо място, предприетото деяние следва да поставя в неблагоприятно положение подалото сигнала лице. Това изискване също трябва да се тълкува систематично с бележите, установени в § 1, т. 11 ДР ЗЗЛПСПОИН, тъй като редакцията на двете разпоредби се различава. Последната изисква деянието да *причинява или да може да причини неблагоприятни последици, увреждащи сигнализиращото лице*, докато в чл. 33, ал. 1 ЗЗЛПСПОИН се посочва, че деянията са забранени, защото *поставят в неблагоприятно положение лицата*, подаващи сигнали. Тази характеристика насочва и към сравнение между положението преди и след подаването на сигнала и неговото неблагоприятно развитие, което свързва деянието с механизма на дискриминационното поведение, при което винаги се налага сравнение¹⁰.

¹⁰ Така Илиева, М., 2009. *Избрани стандарти на антидискриминационното право*. С.: Сиби, 34–35.

Според легалната дефиниция деянието трябва да причинява или да може да причини неблагоприятни последици, увреждащи сигналаподателя, т.е. става дума все за резултатно деяние. Към такова е възможен и опит, какъвто е допуснат като форма на ответна мярка и в чл. 33, ал. 1 ЗЗЛПСПОИН. Що се отнася до заплахата обаче, тя може и формално да бъде осъществена – без реално да е постигнат ефектът, стига да е достигнала до сигналаподаващото лице и без да го е поставило в по-неблагоприятно положение. Такива също може да се определят като репресия в смисъл на оказване на натиск, принуда. В примерно изброените случаи чл. 33, ал. 1 ЗЗЛПСПОИН по-скоро става дума за хипотези на ответни действия, от които може или е последвал и реален неблагоприятен резултат, т.е. влошаване в имуществената или в личната сфера на лицето. Самото доказване на неблагоприятното положение ще изисква сравнение между положението преди и след предприемането на ответното действие и отрицателното му влияние върху деяние да е предизвикано от подаване на сигнал или публично оповестяване на информация за нарушение. Но дали е необходимо, особено при заплахата непременно да е възможен или реално да е осъществен такъв резултат, за да се класифицира заплахата като ответно действие – по-скоро – не. Не е мястото в това изложение да се прави по-задълбочен анализ на тези разминавания, които се наблюдават както в българския закон, така и в Директива (ЕС) 2019/1937.

Не на последно място ответното действие според легалната му дефиниция следва да е предизвикано от вътрешното или външното подаване на сигнала или от публичното му оповестяване (§ 1, т. 11 ДР ЗЗЛПСПОИН). Това означава, че е необходимо то да е реакция на сигнализирането или оповестяването. Следва да се има предвид и разпоредбата на чл. 40, ал. 2 ЗЗЛПСПОИН, която установява познатия при дискриминационните деяния принцип на *prima facie* – т.е. за прехвърляне тежестта на доказване. Защитата на работника или служителя не се препятства от изискването да съществува връзка между сигнализирането и репресивната мярка, тъй като той доказва единствено, че е бил обект на такова ответно действие и че то е реакция на подаден сигнал. Работодателят, предприел увреждащото деяние, следва да докаже, че характеризираните като репресивни действия от работника или служителя не са били свързани по никакъв начин с подадения сигнал или публичното оповестяване, а например, са резултат от несправянето на лицето с работата, заради което е уволнено. Липсата на такова доказване или непълното доказване на това, че предприетото поведение не е било по никакъв начин свързано с подадения сигнал води до извода от страна на решаващия орган, че предприетата от работодателя мярка е ответна и наказуема по смисъла на закона.

След направените заключения за общите белези на ответните мерки в разпоредбата на чл. 33, ал. 1 и на легалната дефиниция в § 1, т. 11 ДР 3ЗЛПСПОИН може да се конкретизира, че предприетата от работодателя спрямо сигнализиращия работник или служител ответно деяние има няколко характеристики. То е проявено от работодателя деяние – действие или бездействие (въздържане от предприемане на дължимо действие), заплаха или опит за такова, имащо репресивен характер спрямо работник или служител, подал сигнал или публично оповестил информация за нередност, които го поставят в по-неблагоприятно положение в някакъв работен контекст заради това сигнализиране. Прегледът на примерно изброените ответни мерки в чл. 33, ал. 1 3ЗЛПСПОИН показва, че в преобладаващите случаи става дума за деяния, които могат да бъдат извършени от работодател спрямо работник или служител, а не от директор на агенция, срещу когото гражданин подава сигнал за нередност. Примерно изброените ответни деяния носят белезите на неблагоприятно третиране по смисъла и на Закона за защита от дискриминация (ЗЗДискр.) по отношение на работник или служител от работодател във връзка с трудовото му правоотношение заради подадения сигнал – временно отстраняване, уволнение или друго прекратяване на правоотношението, понижаване в длъжност, забавяне на повишение, изменение на мястото или характера на работата или намаляване на трудовото възнаграждение, отказ за осигуряване на професионално обучение, отрицателна оценка, прилагане на имуществена или дисциплинарна отговорност, предсрочно прекратяване на срочен договор, отнемане на възможност за преминаване от срочен към трудов договор за неопределено време и т.н. (чл. 33, ал. 1, т. 1–10 3ЗЛПСПОИН). Това са все форми на пряка или на непряка дискриминация по смисъла чл. 4, ал. 2 и 3 във вр. с § 1, т. 7 ДР 3ЗДискр. – касае се все за актове, които водят до по-малко благоприятно третиране на едно лице спрямо друго или поставянето му в особено неблагоприятно положение в сравнение с други. Така освен изрично предвидената в разпоредбата на чл. 33, ал. 1, т. 8 3ЗЛПСПОИН форма на проявено ответно деяние като носещо белезите на пряка или непряка дискриминация, неравностойно или неблагоприятно третиране, немалка част от останалите изброени хипотези в чл. 33, ал. 1, т. 1–10 3ЗЛПСПОИН също могат да се квалифицират като конкретни форми на дискриминационно поведение. Без съмнение изричното им изброяване в Директивата, както и в закона улеснява квалифицирането им като ответни действия. То представлява и ефикасна мярка срещу предприето дискриминационно поведение от страна на работодателя.

Друго важно постижение на закона е изричното дефиниране в § 1, т. 11 ДР 3ЗЛПСПОИН на признака, който определя ответната мярка като

дискриминационна. Тя има тези характеристики, *когато е предизвикана от вътрешно или външно подаване на сигнал или от публично оповестяване*. Както е известно, принципът за равенство на гражданите и недопускане на дискриминация е предвиден в чл. 6, а конкретно признаците за дискриминация са изброени в разпоредбата на чл. 6, ал. 2 Конституцията на Република България. Преодоляно е тълкуването на Конституционния съд¹¹, че в нея изчерпателно са посочени всички признаци, според които гражданите могат да бъдат дискриминирани, и допълнителни признаци са уредени в текущото ни законодателство. Равенството в трудовите правоотношения е прогласено в чл. 8, ал. 3 КТ, където са посочени и конкретните признаци за неравно третиране, а в чл. 4, ал. 1 ЗЗДискр са уредени допълнителни признаци, според които едно деяние, включително и от изброените в чл. 33, ал. 1 ЗЗЛПСПОИН може да се квалифицира като проявна форма на дискриминация. От изричната забрана в чл. 33, ал. 1, т. 8 ЗЗЛПСПОИН на дискриминационно поведение и свързването му с признака по § 1, т. 11 ДР ЗЗЛПСПОИН се установява нов специален признак за дискриминация, което е безспорно положителна тенденция и улеснява работника или служителя, ако подаде сигнал, по-добре да защити правата си, включително и ползвайки достъпните производства за защита от дискриминация по ЗЗДискр., а не по Закона за защита на лицата, подаващи сигнали.

Освен изрично уредения специален признак за недискриминация – деяние, представляващо по-малко благоприятно третиране на едно лице спрямо друго или поставянето му в особено неблагоприятно положение в сравнение с други, предизвикано от вътрешно или външно подаване на сигнал или от публично оповестяване, в чл. 40, ал. 2 ЗЗЛПСПОИН изрично установява правилото за прехвърляне на тежестта на доказване¹², познато

¹¹ Въпреки че Конституционният съд се е произнесъл в Решение № 14 от 10 ноември 1992 г. по к. д. № 14/1992 г. за тълкуване на чл. 6, ал. 2 от Конституцията, че последната изчерпателно изброява признаците, по които дискриминация е недопустима, разпоредбата на чл. 14 от Европейската конвенция за правата на човека посочва, че и друг признак може да бъде приложен в защита на лицата от дискриминация. Така с чл. 8, ал. 3 КТ, в чл. 4, ал. 1 ЗЗДискр. и сега с § 1, т. 11 ДР ЗЗЛПСПОИН към признаците за дискриминация се добавя още един. Повече в Киселова, Н., 2021. *Конституция на Република България с тълкувателните решения на Конституционния съд* (1991 – 2020). С.: УИ „Св. Кл. Охридски“, 51–54. Повече за признаците за дискриминация по трудовото правоотношение – Мръчков, В., 2018. *Трудово право*. X изд. С: Сибир, 67–73; Средкова, Кр., 2010. *Трудово право. Обща част*. С.: УИ „Св. Кл. Охридски“, 132–135; Стайков, Ив., 2004. *Защита от дискриминация при наемане на работа*. – В: Актуални проблеми на трудовото и осигурителното законодателство. Т. I. С.: УИ „Св. Кл. Охридски“, 130–132.

¹² Повече в Илиева, М., *цит. съч.*, 105–130.

и от чл. 9 ЗЗДискр. То е идентифицирано като важна мярка за доказване връзката между ответното действие и сигнала в съображение 93 Директива (ЕС) 2019/1937. В тези случаи не се прилага общият принцип на гражданския процес, че всеки доказва фактите, които твърди и от които извлича ползващи го правни последици, а е достатъчно провеждането на непълно доказване, като се създаде не убеждение, а предположение за предприето дискриминационно отношение от страна на работодателя. То прехвърля задължението към последния да проведе вече пълно доказване, че предприятието от него поведение изобщо не е предизвикано от вътрешно или външно подаване на сигнал или от публично оповестяване, а единствено от други факти и обстоятелства. Както се посочва и в чл. 21, § 5 Директива (ЕС) 2019/1937 в производството, свързано с вреди, понесени от сигнализиращото лице, то следва да докаже, че е подало сигнал или е направило публично оповестяване и е претърпяло вреда, за да се приеме, че вредата е причинена с цел отмъщение за сигнала или за публичното оповестяване. В тези случаи предприетото вредоносна мярка лице може да докаже, че тя не е репресивна, ако установи, че е била основана на надлежно обосновани причини¹³. Например – налице е реално съкращаване в щата, извършен е обективен подбор при спазване на изискванията на чл. 329 КТ и наистина сигналоподателят е класиран последен от гледна точка на признаците по-висока квалификация и защото той не работи по-добре в сравнение с останалите работници и служители, изпълняващи същата или сходна работа. Тогава за сигналоподателя (работник или служител) е достатъчно да докаже *prima facie* единствено основните факти, които индицират към предприемане на ответната мярка, най-честите от които са изброени в чл. 33, ал. 1 ЗЗЛПСПОИН. Причините за установяване на това правило се намират в практиката, която показва, че рядко ищецът разполага с доказателства за открита дискриминация¹⁴ и е много трудно да се проведе пълно доказване, че това понижение, уволнение или намаляване на заплатата са свързани с дискриминационния признак, по който лицето е третирано различно, а в конкретните хипотези – са предизвикани от подаването на сигнала. Разместването на доказателствената тежест улеснява постигането на целите на закона за защита на лицата, подаващи сигнали, както и на Директива (ЕС) 2019/1937. Самият законодател, предполагам, с тази цел урежда легална

¹³ Повече за правото на уволнение, което не е проява на дискриминационно поведение, вж. Стайков, Ив., 2003. *Дискриминация при прекратяване на трудовото правоотношение*. – Съвременно право, № 6, 20–28.

¹⁴ Вж. мотивите по делото Хана срещу Министерството на отбраната, както и други решения в: Илиева, М., цит. съч. 107–108.

дефиниция на § 1, т. 13 ДР ЗЗЛПСПОИН на „достатъчно данни“, за да ориентира правоприложителя кога наличните данни дават основание да се приложи това разместване на доказателствената тежест. И когато те са установени, от тях може да се направи основателно предположение за извършено нарушение, което попада в приложното поле на този закон. Буди недоумение фактът, че никъде в текста на закона така дефинираното понятие *достатъчно данни* не се използва и трябва да се гадае какво е предназначението му, поради което изказаното по-горе твърдение е само предположение.

Законодателят урежда редица допълнителните механизми, които целят да осуетят ответни действия, включително представляващи форма на дискриминация, предприети срещу лицето, подало сигнал. Тяхната ефективност е съмнителна. Например по отношение на коригиращите мерки, които би следвало да се предприемат с цел преустановяване на предприетите ответни действия срещу лицето във връзка с подадения сигнал или оповестена информация (по легалната им дефиниция в § 1, т. 13 ДР ЗЗЛПСПОИН). Може да става дума и за дискриминационни мерки, както и за тормоз на работното място. Т.е. би следвало коригиращите мерки да имат незабавен спиращ репресията ефект. Предвидено е да се предприемат в чл. 33, ал. 2 от изброените в чл. 20, ал. 1 ЗЗЛПСПОИН органи. Прави впечатление, че сред тях не е включена Комисията за защита от дискриминация, въпреки че в чл. 33, ал. 1, т. 8 ЗЗЛПСПОИН като репресивни деяния са посочени пряка или непряка дискриминация и с оглед правомощията ѝ да налага такива принудителни административни мерки по чл. 76 ЗЗДискр. и да осъществява контрол по изпълнението им по чл. чл. 67 ЗЗДискр. Обратно – повечето от изброените в чл. 20, ал. 1 ЗЗЛПСПОИН органи изобщо не са компетентни да се намесят при уреждане на индивидуални трудови спорове¹⁵ по чл. 357 КТ, каквито би следвало да представляват различията в становищата на работника или служителя и на работодателя по отношение на това дали причините за временното отстраняване, уволнението, прекратяването, понижението в длъжност, забавянето на повишението, изменението на мястото, характера на работата или намаляването на трудовото възнаграждение и пр. са предизвикани от подаването на сигнал или имат друга причина. Нито един орган – Комисията за защита на конкуренцията, Комисията за финансов надзор, Българската народна банка и т.н., няма компетентност,

¹⁵ Трудовите спорове се решават от съдилищата. Това се потвърждава от съда, сезиран да установи наличие на дискриминация при прекратяване на трудово правоотношение, чиято законност е потвърдена от съдилищата, и счита, че и Комисията за защита от дискриминация не е компетентна да наложи мерки за отмяната му. Вж. мотивите на съда в Решение № от 30.09.2019 г. по адм. д.. № 322/2019 г., АС – Монтана.

нито уреден законов механизъм – процедура и правила, по които да се намесва, спира действието на заповед на работодателя или по друг начин решава индивидуални трудови правни спорове. Изпълнителният директор на Изпълнителна агенция „Главна инспекция по труда“ и оглавяваната от него институция има контролни и свързани с административното наказване правомощия във връзка с нарушения на трудовото законодателство и по заемане на държавна служба, изброени в чл. 3, ал. 2, т. 2 и 3 във вр. с чл. 20, ал. 1, т. 13 ЗЗЛПСПОИН, но няма как да изпълни задължението да предприеме коригиращи мерки по чл. 33, ал. 2 ЗЗЛПСПОИН (например да спре изпълнението на дискриминираща заради подаден сигнал заповед за уволнение или за едностранна промяна в правоотношението на работник или служител, подал сигнал), въпреки предвиденото в разпоредбата, че те се прилагат за времето на извършваната от компетентните органи проверка *независимо от правомощията им, предвидени в други закони*. Всъщност, разбира се, че упражняването на правомощията им е зависимо от изричната им уредба и липсата на такава осуетява възможността тези органи да предприемат каквито и да било коригиращи мерки с цел преустановяване на предприетите ответни действия срещу лицето по чл. 5 ЗЗЛПСПОИН във връзка с подадения сигнал или публично оповестена информация (както са дефинирани в § 1, т. 20 ДР ЗЗЛПСПОИН). В този смисъл те не представляват и никакви правни гаранции за предприемане на такива временни мерки, които да са уредени в националното право. Липсата в българското законодателство на ред и гаранции за реалното прилагане на мерки, които до осуетяват, спират или прекратяват действието на предприетите репресивни мерки, реално оставя разпоредбите на ЗЗЛПСПОИН само „на хартия“. Налага се работникът или служителят да ползва вече познатите средства за защита, например – да подаде иск за отмяна на незаконно уволнение по чл. 344, ал. 1, т. 1 КТ в сроковете по чл. 345 КТ, независимо че срок за предприемане на коригиращи мерки по чл. 33, ал. 3 ЗЗЛПСПОИН няма, нито такъв е уреден за обявяване на репресивните мерки за ответни по смисъла на § 1, т. 11 ДР ЗЗЛПСПОИН. Същото се отнася и до предприето от работодателя дискриминационно деяние. Тогава е много по-достъпно за работника или служителя, подал сигнал за нередност, да се защитава в рамките на познатите производства по ЗЗДискр. пред Комисията за защита от дискриминация и съда.

Що се отнася до мерките за подкрепа, уредени в чл. 35 ЗЗЛПСПОИН, за тях може да се каже същото. За нито една законът не установява механизъм за прилагане и поради това не може да се очаква да имат реален ефект, поне докато се предприемат допълнителни законодателни мерки. Например

съвсем формално е уредена първата мярка – предоставяне на информация относно процедурите и мерките за защита по чл. 34а, 36 – 39 от закона, които следва да се предоставят от Комисията за защита на личните данни на лицето, подаващо сигнал. За изпълнение на тази мярка би следвало да се назначи специалист по материята, който да дава безплатни съвети и информация относно защитата срещу репресивното поведение на работодателя, включително и когато се отнася до дискриминационна проява, иначе написаното в закона остава без смисъл. Същото се отнася и до следващата мярка – по чл. 35, ал. 1, т. 2 ЗЗЛПСПОИН – помощ пред всеки орган, необходим за тяхната защита. Това съдействие според ал. 2 също следва да се предоставя от Комисията. Ако няма специално назначени специалисти за целта, които са общодостъпни за гражданите, няма как сигналподателите да се възползват от нея. Не са по-малко формално уредени и следващите мерки за подкрепа – за оказване на правна помощ по Закона за правната помощ или за извънсъдебно разрешаване на споровете по Закона за медиацията. Засега тези мерки изглеждат набелязани, без реална възможност чрез тях да се постигне реален положителен ефект за подателите на сигнали поради липса на подготвени специалисти, които да са на разположение на защитените лица.

Що се отнася до мерките, които следва да се прилагат от съда, направените изводи се потвърждават и от оскъдната съдебна практика, която е била сезирана да разглежда и отмени, ако приеме за незаконосъобразни ответни действия на работодател срещу работник или служител, подал сигнал. Съдът в решенията си следва изцяло уредбата за индивидуалните трудови спорове по трудовото законодателство и решава делото по реда на исковото производство за отмяна на уволнението като незаконно, въпреки че ищецът, работник и служител, твърди, че обжалваното прекратяване на трудовото правоотношение е предприето поради подавани неколккратно сигнали до работодателя за нередности. Въпреки че съдът прави заключение в мотивите си, че сигналите отговарят на закона, исканията да се приложи защитата на подаващите сигнали са оставени без произнасяне. Съдиите не са приложили мярката, предвидена в чл. 33, ал. 4 ЗЗЛПСПОИН – да обявят *ответните действия* (уволнението) *за недействителни*, въпреки че по делото се установят данни, че предприетото прекратяване на трудовото правоотношение е свързано с многократно подаваните от работника или служителя сигнали. Не обявяват уволнението за недействително, въпреки че

работодателят не е успял да проведе пълно доказване, че прекратяването се дължи изцяло на други причини¹⁶. Интересно е едно друго съдебно решение, в мотивите на което се посочва, че ако ищецът е желал да бъдат наложени временни мерки по чл. 34а ЗЗЛПСПОИН и в рамките на образуваното съдебно производство да бъдат прекратени предприетите ответни действия до постановяването на съдебното решение, то е следвало да се предяви иск на основание чл. 33, ал. 4 ЗЗЛПСПОИН – за обявяване на недействително на уволнението (като това искане за прилагане на временни мерки по чл. 34а, ал. 2 ЗЗЛПСПОИН изрично се посочи в исковата молба), а не на основание чл. 344, ал. 1, т. 1 КТ за отмяна на уволнението. Съдът приема, че така подадена по чл. 344, ал. 1, т. 1 КТ с искане за прилагане на временни мерки исковата молба не очертава ясно какъв е предметът на образуваното исково производство като до отстраняването на несъответствието между обстоятелствена част и петитума на исковата молба, тя е нередовна. Нередовността на исковата молба от друга страна възпрепятства надлежното упражняване на правото на иск, включително съпътстващите го процесуални действия, каквото се явява постановяването на временни мерки и поради това съдът отказва налагането им¹⁷.

И ако поне в известна степен чл. 34а ЗЗЛПСПОИН предвижда изрично правомощие на съда да приложи конкретни временни мерки, докато тече съдебното производство, то липсва уредба за предприемане на коригиращи мерки по чл. 33, ал. 2 и 3 ЗЗЛПСПОИН, включително и когато са свързани с дискриминационно поведение на работодателя по подобие на принудителните административни мерки¹⁸, които по чл. 76 ЗЗДискр. налага Комисията за защита от дискриминация. Няма механизъм, по който всеки от изброените в чл. 20, ал. 1 ЗЗЛПСПОИН органи да приложи тези защитни мерки. Същото се отнася и до разпоредбата на чл. 20, ал. 5 ЗЗЛПСПОИН, която оправомощава лицето, подало сигнал, ако срещу него са предприети ответни мерки, да подаде молба до компетентния орган за възстановяване на положението, в което се е намирало преди предприемането им. Няма уреден орган с такива компетентности в рамките на трудовото законодателство с изключение на исовете по Кодекса на труда. За тях обаче се прилагат съответните правила и те невинаги могат да имат за последица възстановяване на положението (това е възможно при уважаване на исовете за отмяна на

¹⁶ Вж. Решение № 310 от 26.03.2024 г. ОС – Варна и Решение № 187 от 16.01.2024 г. по гр. д. № 11938/2023 г., РС – Варна.

¹⁷ Определение № 230 от 2.04.2024 г. по в. ч. гр. д. № 117/2024 г., ОС – Габрово.

¹⁸ Повече за налагането и ефективността им в Решение № 9437 от 25.06.2013 г. по адм. д. № 14870/2012 г., VII отд. на ВАС.

незаконно уволнение и за възстановяване на работата, от която лицето е уволнено; за изплащане на дължими парични задължение за възнаграждение и др.), но винаги се прилагат предпоставките, уредени в трудовото законодателство, а не в ЗЗЛПСПОИН, който да позволява прилагането на тези блокиращи и отменящи репресивните мерки без изискване за спазване на срок и процедура. Изобщо промяната в тази насока, предприета с ДВ, бр. 88 от 2023 г. в чл. 20 ЗЗЛПСПОИН добавя мерки само на хартия, които, без предпоставки и процедура за упражняване, са безсмислени.

От прегледа на административнонаказателните разпоредби в глава IV на ЗЗЛПСПОИН също може да се направи извод за съмнителен възпиращ спрямо работодателя ефект. Уредбата на административнонаказателната му отговорност не е прецизна по отношение на субектите на задълженията, които предвижда и реално не отразява, че работодателят е задължено по него лице, независимо кого е натоварил с извършването им, както и че срещу неговите ответни действия най-често се търси защита. Законодателят трябва ясно да му присвои задълженията по закона за защита на лицата, подаващи сигнали и още по-ясно и по-общо да са посочени случаите, когато за неизпълнението им ще му се наложи имуществена санкция. Вижда се, че изброяването на отделните нарушения в глава IV ЗЗЛПСПОИН е крайно недостатъчно. Освен това трябва да се опростят съставите и да се подобри уредбата на административните санкции, за да са годни за правоприлагане. За по-важните задължения, за по-тежките нарушения, следва да се предвидят квалифицирани състави и по-тежки санкции. При избора на законодателя на размера на санкциите по действащия закон не личи такова степенуване. Освен това всички уредени административни наказания, включително и имуществените санкции за юридическите лица са относително ниски по размер – с максимум до 30 000 лева. Тази разлика е особено осезаема при сравнение със санкциите по чл. 83, § 4 от Регламент 2016/679 относно защитата на физическите лица във връзка с обработването на лични данни и относно свободното движение на такива данни, които достигат до по-голямата сума между 10 000 000 евро или 2% от общия му годишен оборот на предприятието за предходната финансова година. Не може да се твърди, че предвидените в закона за защита на лицата, подаващи сигнали санкции са пропорционални и възпиращи нарушенията му, когато предвиждат почти същия размер глоба за тези, които чрез подаване на сигнал злонамерено оповестяват невярна информация. По този начин се способства въздържането от подаване на сигнали, а не насърчаването му, каквато е била целта на Директива (ЕС) 2019/1937. Само поради изброените причини може да се твърди, че Законът за защита на лицата, подаващи сигнали или публич-

но оповестяващи информация за нарушения има спешна нужда от ремонт, за да въведе изискуемото ниво на защита на лицата, подаващи сигнали за нарушения.

Единствената смислена мярка остава наложеното от законодателя правило за запазване на конфиденциалността на самоличността на подаващия сигнал както по отношение на вътрешния канал – при работодателя, така и при външно подаване на сигнала. Изглежда възможно защита на интересите на подаващите сигнали единствено във възможността работодателят изобщо да не разбере самоличността на работника или служителя и така последният да се спаси от репресивни мерки. Що се отнася до останалите установени от законодателя мерки за защита срещу дискриминационно поведение на работодателя във връзка с подаден сигнал за нередност, то въпреки изобилието им, механизъм за упражняването им – предпоставки и ред за изпълнението им от посочените като компетентни органи липсва, което осуетява прилагането им на практика и тяхната ефективност.

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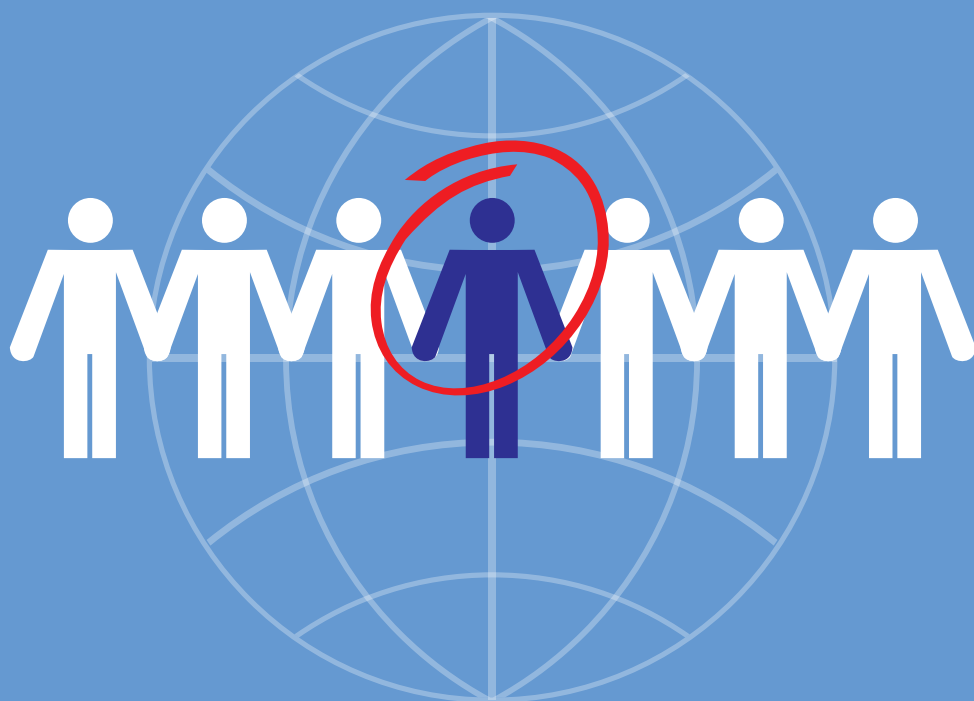
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