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THE OMBUDSPERSON INSTITUTION OF KOSOVO

Guideline on protection against discrimination

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FOREWORD

Non-discrimination is human right, and therefore is an integral part of other human rights.

Discrimination is a serious and profound problem and causes harmful consequences for the entire society and slows down its development. We can fight against it if we can recognize it. The aim of this Guideline is to help readers to recognize discrimination and to use anti-discrimination mechanisms in the Republic of Kosovo as well as raising public awareness of discrimination, its harmfulness and its devastating effects on society.

In recent years, a major step forward has been made in improving and advancing the legislative and institutional framework for combating discrimination in the Republic of Kosovo; however, the establishment of a legal framework for the protection against discrimination does not imply the realization of the goal and efforts to achieve equality in rights. We are witnesses that social reality in Kosovo is characterized by coexistence, cooperation and tolerance, as well as ethnic and other stereotypes and prejudices, and also by high level of social distance towards certain national, religious and other minorities and gender sensitive groups, which significantly limits the achievement of the standards of equality in everyday life. Therefore, in order to achieve full protection from discrimination, all parts of society, for which the law sets specific tasks, should be included in full capacity. It is evident that in the realization of this task, the competent courts and the Ombudsman Institution have one of the most important roles, not only by effectively applying legal protection against discrimination in appropriate procedures, but also by promptly proposing amendments to inadequate legal solutions to the legislature.

This Guideline provides basic knowledge for recognizing and responding to discrimination. The aim of this Handbook is to provide a summary of all legal concepts, definitions and responses to complex issues relating to discrimination and protection against discrimination and to help readers to clearly distinct discrimination against other unlawful behaviors.

The Guideline is the work of the Ombudsperson Institution, Department for Protection against Discrimination.

All masculine terms used herein also include the male and female gender of the person to whom they relate.

1. The term discrimination and how to recognize it

The term discrimination derives from Latin term *discriminare* and means “separating” or “distinguishing”. Therefore, discrimination in the field of law represents any “illicit distinction”.

Discrimination is a socially unacceptable phenomenon because it represents a violation of the principle of equality, as one of the most important legal and moral principles. Discrimination is the opposite of equality, which implies the same treatment for all people, as well as equal opportunities for all.

This legally means that everyone is equal before the law, that everyone has the same rights and obligations, the same right to the protection of their rights and the right to equal treatment.

On the basis of the above, the essence of discrimination is reflected in unequal treatment of equals, and in equal treatment of unequal. In order for some behavior to constitute discrimination on legally protected grounds, the intention of the discriminator (a person who discriminates) is not of importance, i.e. whether the aim of discriminator was to discriminate or not, what counts, is the final result of such behavior i.e. whether such behavior is an act of discrimination.

The legally protected grounds relates to a personal character and represents a need to establish a causal link between adverse treatment and a legally protected grounds in order to implement the principle of equal treatment.¹ The personal characteristic on which discrimination is based is called the "basis of discrimination".

Protected grounds of discrimination according to European anti-discrimination law and domestic legislation are: nationality, or relation with any community, social origin, race, ethnicity, color, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds, in order to implement the principle of equal treatment.²

However, the provision or practices that are being applied does not necessarily relate to a "protected grounds". It is enough to refer to some kind of reason that cannot be differed from the protected grounds. The relevant courts gave a broad interpretation of the "protected grounds" that may include "discrimination by association ", that is, the case where the victim of discrimination does not have a protected characteristic. It may also include cases where a particular ground is interpreted abstractly.

The key causes of discrimination are different prejudices and stereotypes that people have towards certain groups of people.

¹See Article 1, paragraph 1 of the Law on the Protection from Discrimination no.05/L-21

²See Article 1, paragraph 1 of LPD

1.1. How can discrimination be performed and does every distinction constitutes discrimination

Discrimination can be caused by active or passive behavior; the first one can present an act of discrimination, and the second one allows certain behavior that could lead to discrimination. Discrimination can also occur in cases where different individuals or groups are treated equally, but mutual differences requiring a different treatment are not observed.

The term discrimination is often misused for denoting any form of violation of rights because discrimination is a violation of a precisely defined right, which is the right of equal treatment in all areas of social life.

It is necessary to emphasize that any distinction is not necessarily discrimination, as in some situations the distinction is justified and there is a reasonable justification for limiting or excluding certain rights or imposing certain obligations to a person or group of persons. So the key issue in such situations is the justification or unjustification of restrictions or depriving of certain rights or the imposition of certain obligations. The key criteria for identifying the justification or unjustification of these measures are: the goal or the consequence of certain procedures in the concrete case and the relationship between certain procedures in the specific case and the goal that it wants to be achieved with certain activities. The case, in which the purpose or effect of specific proceedings does not have a legitimate and reasonable justification, and when there is no relationship between specific actions on the one hand and the objective on the other, constitutes discrimination.

An example of justifiable differentiation: parking spaces for people with disabilities are specifically marked and are closest to the entrances to the public objects. While this is differentiation and the privilege of a group of people, in this case it is quite justified to ensure that persons with disabilities, because they are moving difficultly, provide easier and unimpeded approach to the objects and does not constitute discrimination.

The discriminator can be anyone, and any legal or natural person can also be the victim of discrimination.

Discrimination can occur in all areas of social life. The Law on the protection from discrimination in the Republic of Kosovo ³ lists some of the areas, e.g. work and employment, education and vocational training, health and social protection, judiciary, science, sport, art, culture, property rights, personal safety, but it is not limited to the aforementioned law but also to any other right provided for by applicable legislation.⁴

³ Law on the Protection from Discrimination no. 05/L-021.

⁴See Article 2, LPD

2. Discrimination and protection against discrimination in domestic legislation

Constitution of the Republic of Kosovo (Constitution) guarantees right to equal legal protection without discrimination on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status. However, principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.⁵ Also, many other provisions of the Constitution directly or indirectly concern the prohibition of discrimination.

The Constitution of the Republic of Kosovo establishes direct applicability of international agreements and instruments that guarantees human rights and fundamental freedoms and at the same time represents international legal framework of importance for the fight against discrimination. International instruments, directly applicable in Kosovo, constitute a part of the internal legal system of Kosovo, and in the case of conflict, have priority over provisions of laws and other acts of public institutions: Universal Declaration of Human Rights; European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; International Covenant on Civil and Political Rights and its Protocols; Council of Europe Framework Convention for the Protection of National Minorities; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child; Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.⁶ Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.⁷

Law on the Protection from Discrimination (LPD) establishes a comprehensive system of protection against discrimination in the Republic of Kosovo. This law defines discrimination as any distinction, exclusion, restriction or preference on any ground which has the purpose or impact of depreciation or violation of the recognition, enjoyment or exercise of human rights and fundamental freedoms guaranteed by the Constitution and other applicable legislations of the Republic of Kosovo.⁸

LPD applies to all acts or omissions, of all state and local institutions, natural and legal persons, public and private sector, who violate, violated or may violate the rights of any person or natural and legal entities in all areas of life.⁹

In addition to the LPD, a separate Law on Gender Equality guarantees, protects and promotes gender equality as a fundamental value for the development of a democratic society and defines general and special measures for the protection and guarantee of equal rights of women and men

⁵See Article 24 of the Constitution of the Republic of Kosovo,2008.

⁶ See Article 22 of the Constitution

⁷See Article 53 of the Constitution

⁸ See Article3, paragraph 2 of the LPD

⁹ See Article 2 of the LPD

and establishes responsible institutions and their powers. This law explicitly provides for prohibition of indirect or direct discrimination based on gender, and specifies gender-based violence as a specific form of discrimination. In addition to other institutional mechanisms, this law also determines important role of the Ombudsman, who is authorized to deal with cases related to gender discrimination.¹⁰

2.1. Types of discrimination according to the Law on Protection against Discrimination

Types of unequal treatment according to the LPD are as follows:

2.1.1. Direct discrimination is when one person is, has been or will be treated less favorably than another, in a comparable situation based on one or more "legally protected grounds".¹¹

Pursuant to jurisdiction of the European Court of Human Rights (ECHR), there must be a "difference in treatment of individuals in the same or relevant situation" that is "based on recognizable feature".¹²

"Difference in treatment" may refer to rejection, refusal, exclusion, and offer of less favorable conditions or worse services, failure to provide choice or opportunities.¹³ Except on the grounds of age, there is no general justification for direct discrimination.

In direct discrimination, the motive or intention of the discriminator is not relevant but only the question of whether a particular person has been placed in a more unfavorable position.

The essential elements of direct discrimination are: a favorable position in which a person or group of persons is placed, due to some of their personal characteristics, in relation to other persons in the same or similar situation who do not have that personal characteristic.

In the process of demonstrating direct discrimination, a "comparator" or a person in factually similar circumstances as a victim of discrimination is required, but the main difference between them is a "legally protected ground".

Example: in the Case of *Luczak v. Poland*, a French farmer who lived and worked in Poland complained that he had been denied access to a special social security system in Poland set up to support exclusively Polish farmers without right to access for foreign nationals. The ECHR agreed that the applicant was in a comparable situation with Polish farmers who had the right to use the privileges of that system because he had a permanent residence in Poland, where he paid

¹⁰ See Article 13 of the Law on the gender equality no 05/L020

¹¹ See Article 4 paragraph 1 item 1 of the LPD

¹² ECHR, *Carson and Others v. the United Kingdom* [GC] (no. 42184/05), 16 March 2010, p. 61. Analogously, ECHR *D.H. and Others v the Czech Republic* [GC] (no. 57325/00), 13 November 2007, p. 175; ECHR, *Burden v. the United Kingdom* [GC] (no. 13378/05), 29 April 2008, p. 60.

¹³ See ECHR, *Carson and Others v. the United Kingdom* [GC] (no. 42184/05), 16 March 2010, p. 61. Analogously, ECHR *D.H. and Others v the Czech Republic* [GC] (no. 57325/00), 13 November 2007, p. 175; ECHR, *Burden v. the United Kingdom* [GC] (no. 13378/05), 29 April 2008, p. 60.

taxes as well as domestic citizens, thus contributing to the financing of social security and since he had previously participated in the compulsory social security system.¹⁴

However, in the context of European Union law in the field of employment there is an exception that does not require an appropriate "comparator", in cases of discrimination due to pregnancy, because, biologically, man cannot be pregnant. In the rich legal practice of the European Court of Justice (ECJ), starting with the famous case of Dekker, it is already established that the damage suffered by pregnancy is considered as direct discrimination based on gender, and therefore there is no need for a comparator.¹⁵

Determining whether there has been direct discrimination, the provision or practice applied does not necessarily relate to the "protected grounds". It is enough to refer to some kind of grounds that cannot be different from the protected grounds. In fact, it is assessed whether the reason for the unfavorable treatment was a "legally protected grounds" that cannot be distinguished from the particular factor which is the cause of the complaint.

Example 1: in the *Maruko* case, the homosexual couple entered the "life partnership". After the death of his registered same-sex partner, the complainant wished to claim the 'survivor's pension' from the company that ran his deceased partner's occupational pension scheme. The company refused to pay, on grounds that survivors' pensions were only payable to spouses and the complainant had not been married to the deceased. The European Court of Justice accepted that the refusal to pay the pension amounted to unfavorable treatment and that this was less favorable in relation to the comparator of 'married' couples. The ECJ found that the institution of 'life partnership' in Germany created, in many aspects, the same rights and responsibilities for life partners as for spouses, particularly with regard to state pension schemes. It admitted that for the purposes of this case, life partners were in a similar situation to spouses. The ECJ then went on to state that this would amount to direct discrimination based on sexual orientation. Thus, the fact that they were unable to marry was in dissociable from their sexual orientation.¹⁶

Example: In *P v. S and Cornwall County Council*, the complainant was undergoing gender reassignment from male to female when she was dismissed by her employer. The European Court of Justice found that the dismissal constituted unfavorable treatment. As to the relevant comparator, the CCJ stated that 'where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavorably by comparison with persons of the sex to which he or she was deemed to be long before undergoing gender reassignment'. As to the grounds, although it could not be shown that the complainant was treated differently because he was a man or a woman, it could be shown that the differential treatment related to the concept of her sex.¹⁷

Direct discrimination is absolutely forbidden in a sense that cannot be justified by anything.

¹⁴ ECHR, *Luczak v Poland* (br. 77782/01), November 27, 2007.; see also, ECHR, *Gaygusuz v Austria* (no. 17371/90), September 16, 1996.

¹⁵ ECJ, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, case C-177/88 [1990.] ECR I-3941, November, 8 1990. Analog, ECJ, *Webb v EMO Cargo (UK) Ltd*, case C-32/93 [1994.] ECR I-3567, July 14, 1994.

¹⁶ ESP, *Maruko v Versorgungsanstalt der deutschen Bühnen*, case C-267/06 [2008.] ECR I-1757, April 1, 2008.

¹⁷ ESP, *P. v S. and Regional Council Cornwall*, case C-13/94 [1996.] ECR I-2143, April 30, 1996.

2.1.2. Indirect discrimination - when a seemingly impartial provision, criterion or practice puts, put or will put a person or a group of persons in an unequal position in relation to others, according to one or more legally protected grounds, unless such a provision, criterion or practice can be objectively justified by a legitimate aim, and the means to achieve that goal are appropriate and necessary.¹⁸

In order to be an objectively justified provision, the criterion or procedure must have a legitimate aim and must be an appropriate and necessary mean to achieve that goal. If this is not the case, it is indirect discrimination. It should also bear in mind that the provision, criterion or procedure can be objectively justified in one situation while in other they cannot be justified.

The first condition for determination of indirect discrimination is a seemingly neutral rule, criterion or practice.

Second condition for the determination of indirect discrimination is that a seemingly neutral rule, criterion or practice puts a person or a group of persons in an unfavorable position according to a certain legally protected grounds. Here, indirect discrimination differs from direct, because it is focused on the consideration of consequences, rather than on the different treatment.

And, as a third condition, similarly with direct discrimination, for proving indirect discrimination, a comparator, in order to determine whether a particular rule, criterion or practice impacts significantly more negative on a particular person than on others in a similar situation, is needed.

Example: in case D.H. and others v. Czech Republic, a series of tests were used to establish the intellectual capacity of pupils to determine whether they should be placed into special schools designed for children with special educational needs. Special schools were designed for children with intellectual and other learning disabilities. The same test was applied to all pupils who were considered for placement in special schools. As a result, Roma students were inherently more likely to perform badly on the tests – which they did – with the consequence that 50 % to 90 % of Roma children were educated outside the mainstream education system. The ECtHR found that this was a case of indirect discrimination.¹⁹

2.1.3. Harassment presents discrimination when occurs unwanted behavior (which includes, but not limited to undesirable sexual and/or psychological behavior) with the purpose or effect of violating the dignity of a person and of creating fearful, hostile, degrading, humiliating or offensive environment, under the legally protected grounds.²⁰

Harassment is a particular type of discrimination in the European Union's anti-discrimination directives and is considered discriminatory when: undesirable behavior occurs on any legal basis, • which aims or presents a violation of the dignity of a person, • with an effect of creating an intimidating, hostile, degrading, humiliating or offensive environment.²¹

¹⁸ Article 4, paragraph 1, item 2 LPD

¹⁹ ECtHR, D.H. and others v. Czech Republic [GC] (no. 57325/00), November 13, 2007 pg. 79.

²⁰ See Article 4, paragraph 1, item 3, LPD

²¹ See: Racial Equality Directive, Article 2.(3); Employment Equality Directive', Article 2.(3); Directive on Equal Access to Goods and Services, Article 2.(c); Gender Equality Directive, Article 2.(1)(c).

It is not necessary to have a comparator in order to prove harassment, because by the way it occurs, verbal, non-verbal or physical, and because of the potential consequences related to a violation of a dignity, it is an unwanted behavior.

Unwanted behavior may be any behavior, including spoken or written words or insults, images, graffiti, physical movements, mimicry, jokes, accusations or physical contact.

Example: In a case conducted before the Swedish court, a person wanted to buy a puppy. When the seller realized that the customer was a homosexual, he refused to sell him a puppy for the welfare of the animal, saying that homosexuals practice sexual intercourse with animals. The refusal to sell a puppy was considered as direct discrimination in the context of goods and services, and the Swedish court specifically ruled that it is about harassment based on sexual orientation.²²

2.1.4. Incitement to Discrimination - is considered discrimination on any legal protected grounds and includes any promotion of hatred when it is done on purpose.²³

Hate speech is socially unacceptable behavior because it encourages discrimination and can be the basis for various types of discrimination. Hate speech involves all forms of expression which spread, incites, promote or justify racial hatred, xenophobia, homophobia, anti-Semitism, sexism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin

It is important to know that not every expression of ideas, attitudes and opinions presents a hate speech, even when those ideas, attitudes and opinions for most people are unacceptable. As long as these attitudes do not encourage discrimination, intolerance and violence against individuals and groups because of their personal character, they can freely express.

In all EU anti-discrimination directives, it is stated that „incitement to discrimination “is considered „discrimination“.²⁴

Example: in the case *Bączkowski and Others v Poland*, the mayor of Warsaw made public announcement of a homophobic nature, stating that he would refuse permission to hold a march to raise awareness about discrimination based on sexual orientation. When the decision came before the relevant administrative body, permission was refused based on other reasons, such as the need to prevent clashes between demonstrators. The ECtHR found that the mayor's statements could have influenced the decision of the relevant authorities, and that the decision was based on the ground of sexual orientation, whereby the right to freedom of assembly with regard to the right to the liberty of discrimination was violated.²⁵

²² Court in Svei (Sweden), Ombudsman against Discrimination on the grounds of sexual orientation against A. S., case no. T-3562-06, 11 February 2008. English summary available at the European Anti-Discrimination Law Review, no. 8 (July 2009)pg. 69.

²³ See Article 4, paragraph 1, item 4 LPD

²⁴ Article 2 (4) of the Employment Equality Directive; Article 4 (1) of the Directive on Equal Access to Goods and Services; Article 2 (2) (b) of the Gender Equality Directive.

²⁵ ECtHR, *Bączkowski and Others v. Poland* (No. 1543/06), May 3, 2007.

2.1.5. Victimization, Victimization is a particular form of discrimination and occurs when a person suffers an adverse treatment or negative consequences in response to a complaint or action in order to apply the principle of equal treatment or when such person provides information, evidence or assistance in relation to the complaint procedure in case of discrimination.²⁶

Victim of discrimination is protected by the prohibition of victimization, but also third persons who are victims of discrimination have helped or are willing to help it, in order to obtain legal protection against discrimination.

In proving this type of discrimination, it is not necessary to identify the superiors in order to show that a person is subjected to adverse treatment as a result of the complaint procedure.

Example: A young man living with HIV/AIDS has initiated a procedure for the protection against discrimination since he is exposed to constant harassment at work. Other employees avoid contact with him; often give him negative comments and insults. And the management treats him in a similar way. After the initiation of the procedure for protection against discrimination, the director transfers him to another office, in which he will be alone.

2.1.6. Segregation, is deemed discrimination according to one of the legally protected grounds, including the protection of every individual who does not participate in a discrimination complaint but which for whom it is thought to have performed it and which occurs when a person or persons separated from others by natural persons, legal entities, or a combination of both, public sector, private sector or both, and this separation is done based on one of the legally protected grounds.²⁷

Briefly, segregation is any separation of people on the basis of different criteria, which are in conflict with the principles of human rights and freedoms.

Examples of segregation can be the separation Roma from non-Roma children in schools; the settlement of minority groups in the ghetto, including those cases that are not a direct state act, but the result of discriminatory policies of the state and local structures.

2.1.7. Discrimination based on association, is deemed discrimination on the one of the legally protected grounds, targeting people who do not belong to a particular group but are third parties that is associated with those groups.²⁸

Associative discrimination refers to a person who does not itself own a specific character, but is discriminated because (relatives or other relationships) is associated with a person who possesses such characteristic. Thereafter, some authors also prefer that such a form should be called "transferred" discrimination, since the consequence of possessing a certain feature is "transferred" to another person.

Example: In the case *Coleman*, the mother argued she suffered unfair treatment at work because she had a disabled son. Due to his disability, the mother was late to work and sought a vacation in accordance with her son's needs. Her requests were rejected and she had been threatened with dismissal, and this was accompanied by insulting comments on the account of the son-state. As

²⁶ See Article 4, paragraph 1, item 5 of the LPD

²⁷ See Article 4, paragraph 1, item 6 of the LPD

²⁸ See Article 4, paragraph 1, item 7, LPD

comparators, the European Court of Justice accepted her colleagues in similar jobs, concluding that the flexibility was provided to them when requested. The Court also accepted that in this case it was about discrimination and harassment based on a child's disability.²⁹

2.1.8. Failure in provision of a reasonable adaptation/accommodation for persons with disabilities -is deemed discrimination in the sense of a protected ground, unless when is an undue burden on the person who is obliged to provide accommodation/adaptation, when is not in contradiction with the legislation in force, by considering due to this purpose such factors as the use of available public resources, participation in social and public life and ensuring access to the workplace and suitable working conditions.³⁰

Example: In the case *Zehnalova and Zehnal v. Czech Republic* (2002), the applicants argued that their right to private life was violated without discrimination, because many public buildings were not equipped with access facilities for persons with disabilities (although it contains and Czech laws). Recalling on the Article 14 of the Convention in conjunction with Article 8, the applicant stated that, as a person with disabilities, she was discriminated against so that she could not enjoy the fundamental, guaranteed rights. The Court concluded that Article 8 was not applicable in this case, so and Article 14 was not applicable.³¹

2.1.9. Discrimination based on perception– is deemed discrimination on the basis of a presumed personal characteristic that a person does not have, but the discriminator considers that that person has that characteristic. So in the objective are placed, not persons who belong to a certain group, but third persons who are percept that belong to the group.³²

Example: When a person who has friends of homosexual orientation is also discriminated, because discriminator assumes that this person is also of a homosexual orientation.

2.1.10. Multiple discrimination occurs when discrimination is based on any combination of the legally protected grounds. Multiple discrimination and multiple grounds are interpreted in accordance with the circumstances.³³

Multiple discrimination is a severe form of discrimination because its negative consequences are much higher in relation to the victim.

2.1.11. Violation of the principle of equal rights and obligations. Violation of the principle of equal treatment on legally protected grounds shall be deemed as discrimination.³⁴

In order for unequal treatment to constitute discrimination, it is necessary to base on some personal characteristic, such as gender, sexual orientation, nationality, language, religion, etc. A

²⁹ ESP, *Coleman v. Attridge Law and Steve Law*, case C-303/06 [2008.] I-5603, July 17, 2008.

³⁰See Article 4, paragraph 1, item 8, LPD

³¹ ECtHR *Zehnalová and Zehnal v. Czech Republic* (No. 3862/97, 14/05/2002)

³²See Article 4, paragraph 1, item 9, LPD

³³See Article 4, paragraph 1, item LPD

³⁴See Article 4, paragraph 2, LPD

person is, therefore, exposed to unequal treatment precisely because of its personal characteristic, and not because of some of its character or personal traits, habits, etc.

The first requirement for determining a violation of the principle of equal rights and obligations is the deprivation of any right, or the imposing of some obligation on a person or group of persons, that in the same or similar situation are not deprived or imposed to others.

Second requirement for determining this type of discrimination is that the deprivation of right or the imposition of a duty is based on some of their personal characteristics.

The third condition is the unjustified goal or the consequences of the measures taken.

The fourth condition is the existence of a proportion between the measures taken and the goal pursued by the measures.

Sometimes it happens that the person is suffered unfair treatment, but such a behavior cannot be characterized as discrimination because it is not based on some personal characteristic of that person.

The list of personal characteristics listed in the Anti-Discrimination Law is fairly exhaustive but not closed, which is especially important because it allows its extension to some other personal characteristics not explicitly mentioned in the law.

2.2. Severe forms of discrimination

Discriminatory behavior that is motivated by more than one legally protected ground or which is committed more than once, or which has lasted for a long period of time or had harmful consequences especially for the victim, is considered severe form of discrimination.³⁵

2.3. Affirmative actions

Affirmative actions are undertaken measures in order to prevent or compensate unfavorably groups or persons related to any of the grounds.

The Constitution itself stipulates the implementation and adoption of the temporary measures necessary for the protection and advancement of the rights of individuals and groups that are not equal. Such measures can only be applied until the achievement of the purposes for which those measures are set. Such measures will not be considered an act of discrimination.³⁶

Affirmative measures according to LPD, in fact means a deviation from the fundamental principle of formal equality, but they are not considered discrimination and have a special legal basis and shall apply only until the achievement of the purposes for which those measures are set.³⁷

Affirmative actions are various legal and other measures that shall be undertaken in order to certain social groups, which are in fact in a subordinate position and whose position in the society is poor, reach real equality. For these reasons it is necessary to take certain affirmative

³⁵See Article 5, LPD

³⁶ See Article 24 I Article 58 Constitution

³⁷See Article 7, LPD

measures, giving these individuals some advantage in order to reach the same position as other citizens and create conditions for them to enjoy equal rights as other citizens.

Example: Kosovo's public institutions are obliged to take special temporary measures to accelerate the realization of concrete equality between women and men in those areas where there are inequities.³⁸ This is a special measure aimed at preventing and eliminating gender discrimination and achieving gender equality in the institutions of the Republic of Kosovo system, at all levels of legislative executive and judicial authorities, including other public institutions. It was introduced due to the participation of a small number of women in the institutions, decision-making and public life of Kosovo.

However, giving priority to a candidate who is a member of a less represented gender cannot be automatically and unconditionally, but can be ignored if the specific reasons of a candidate can be considered to be his/her advantage.³⁹

In Kosovo's legal decisions relating to "special measures" the use of the term "less represented gender", allows that this provision may apply to men - in the event that in the future there are many more women.

3. Protection against discrimination

By adopting the LPD, the Republic of Kosovo has established various mechanisms for protection in cases of discrimination and each of them has its purpose and goal. Some mechanisms are used to prevent repetition and elimination the consequences of discrimination in order to protect victims of discrimination, while others are being used in order to punish discriminator for what he has done. These mechanisms can be used individually or in combination depending on the need.

LPD on discriminatory behavior on legally protected grounds, as protection mechanisms, foresees the Ombudsperson Institution and judicial protection against discrimination.

3.1. Judicial protection against discrimination

Victims of discrimination may demand that on their rights and satisfaction shall be decided in appropriate court proceedings (litigation, criminal or Infringement procedure) before a competent court. A complaint for protection against discrimination may be submitted no later than five years from the date on which the injured party found out about the violation.⁴⁰

The LPD prescribes that the victim of discrimination may by a complaint in civil proceedings seek a legal protection against discrimination from the court. Associations, organizations or other legal entities may initiate or support legal proceedings on behalf of the complainants, upon

³⁸ See Article 5 I 6, Law on gender equality, no. 05/L-020

³⁹ Ibid.

⁴⁰ See Article 14, LPD

obtaining their consent, for the conduct of administrative or judicial procedures envisaged for the implementation of obligations under this Law.⁴¹

After establishing the discrimination, the court may decide the following: to prohibit the respondent further discriminatory acts, and to order the respondent to eliminate all discriminatory acts against the claimant; to decide and compensate for the material and non-material damage suffered by the discriminated person for discrimination, according to the claim for compensation; order interim measures in accordance with the provisions of the relevant civil procedure law, order a shorter period for enforcement, than prescribed by an appropriate law on enforcement proceedings, publish in the media a court decision confirming the violation of the right to equality treatment.

Unsatisfied party may file an appeal against a decision of the first instance within seven (7) days before the Appellate Court, in accordance with the relevant Law on Contested Procedure. The claimant, through a complaint for protection against discrimination, can point out several claims and determine what types of legal protection will require from the court.⁴²

Judicial proceedings in cases of discrimination should be handled in an urgent procedure.⁴³

Cases of discrimination that affect groups of persons can be initiated through group actions on their behalf by a non-governmental organization or Ombudsperson; in such cases no consent of the members of the group is required.

In this case, the claimant may ask the competent court: to decide that such conduct violated the right to equal treatment in relation to members of the group; to prohibit acts that violate or may violate the right to equal treatment or to perform actions that eliminate discrimination or its consequences in relation to members of the group, to publish in the media a decision establishing a violation of the right to equality in which case the respondent will cover the costs. A request for compensation for damages can only be requested on the basis of a judgment in case of a group action. Persons belonging to the mentioned group may file a claim and request compensation.⁴⁴

Victims of criminal offenses with elements of discrimination only have the possibility to contact the police and the competent prosecutor, while claimant is solely authorized to initiate the investigation and criminal proceedings by filing an indictment. Violations of the provisions of this law, in cases when they constitute a criminal offense are punishable under the provisions of the Criminal Code of the Republic of Kosovo.⁴⁵

For the misdemeanor legal protection against discrimination, the LPD provided for misdemeanor penalties in the "misdemeanor provisions".⁴⁶

⁴¹See Article 13, LPD

⁴²See Article 16, LPD

⁴³ Ibid

⁴⁴See Article 18, LPD

⁴⁵See Article 17, LPD

⁴⁶See Article 23, LPD

3.1. The burden of proof

When persons who believe that the principle of equal treatment has not been applied to them, bring evidence before an administrative authority or a competent court from which it can be presumed that there was direct or indirect discrimination. The burden of proof lies with the respondent, who needs to prove that there was no violation of the principle of equal treatment.⁴⁷

Which means that the claimant should only make it probable that discrimination has occurred and that the respondent placed him in a more unfavorable position because of his personal characteristic, that is, in relation to him, the principle of equality has been violated, thus the respondent discriminator is obliged to prove that this principle has not been violated by the concrete action. If the respondent fails, the court will decide that discrimination has been committed and that the principle of equality has been violated.

3.3. Protection against discrimination before the Ombudsperson Institution

The Ombudsperson Institution is an autonomous and independent state mechanism for the promotion of equality, monitoring and support of equal treatment without discrimination based on legally protected grounds.⁴⁸ The Ombudsperson deals with issues related to discrimination in accordance with the competent authorities stipulated in the Law on Ombudsperson⁴⁹ and the Law on the Protection against Discrimination.

The LPD stipulates that the Ombudsperson Institution (OI) is a key body in the fight against discrimination and has the following competencies: it receives and investigates complaints of persons, mediates, gives opinions and recommendations for specific cases of discrimination, provides assistance to victims of discrimination in filing complaints against discrimination and provides the necessary information to persons who have filed complaint in connection with their rights, obligations and possibilities of the court, as well as other means of protection; investigates or acts on any complaint or self-initiative (ex-officio) when there is a basis for the suspicion of discrimination by public sector entity; addresses the investigative and prosecuting authorities directly with a request in order to initiate investigations for violations and criminal offenses, and requests the initiation of applicable disciplinary proceedings; inform the public about cases of discrimination and take measures to promote equality, human rights and non-discrimination; monitor the implementation of this law and initiate changes to the provisions for the implementation and improvement of protection against discrimination; provide advices, instructions and support to public and private sector entities on best practices in promoting equality, adapting diversity and preventing discrimination based on the relevant gender equality law and this law and make recommendations for undertaking measures to promote equality, adaptation to diversity and/or combat discrimination; provide advices, support and guidance to non-governmental organizations and social partners on good and effective practices in combating discrimination and promoting equality, in particular organizations dealing with equality and non-discrimination issues; gives opinion on draft normative acts on protection against discrimination; collects statistical and other data, conducts studies, researches and trainings in relation to discrimination, cooperate with social partners, non-governmental organizations engaged in the promotion and protection of human rights, relevant mechanisms of other countries that deals

⁴⁷See Article 20, LPD

⁴⁸See Article 1 of the Law on Ombudsperson, No.05/L-019

⁴⁹See Article 16, of the Law on Ombudsperson, which specifies the competencies of the Ombudsperson.

with the promotion and protection of human rights, as well as institutions and registered religious communities in Kosovo; represents at least annual report to the Assembly of the Republic of Kosovo on the implementation of this law, and can also draft special reports for its implementation, may appear as a friend of the court (*amicus curiae*) in judicial proceedings related to issues of equality and protection against discrimination, can develop codes of good practices to combat discrimination and to promote equality, which can be used as a reference point in cases of discrimination.⁵⁰

3.3.1. Discrimination complaints before the Ombudsperson Institution

Any natural or legal person or group of persons may file a complaint before the OI in respect of any discriminatory conduct. The submission and consideration of complaints against discrimination by the OI is done in accordance with the procedures provided for in the Law on the Ombudsperson and in accordance with the special Law on Protection against Discrimination⁵¹ and the Law on Gender Equality⁵². Filing a complaint to the Ombudsperson is not a condition for initiating a claim and does not constitute an obstacle for the injured person to address the court or prosecuting authorities. Associations, organizations or other legal entities may initiate or support complaints on behalf of applicants, upon obtaining their consent, to conduct proceedings before OI.⁵³

The receipt, investigation and handling of complaints and requests for protection against discrimination is carried out by the Department for Protection against Discrimination, as defined by the Handbook on Internal Organization and Jobs systematization of OI.⁵⁴

Complaint can be submitted in person, in one of the OI offices, by post, by e-mail or by fax to the OI address, by phone call or OI complaint boxes in all places where persons are deprived of their liberty. The OI shall provide a complaint submission form and is also available on the OI's website. Complaints must be substantiated, and accompanied by relevant documentation. OI does not accept anonymous complaints or requests. The procedure before the OI is free of charge.

Upon completion of the processing of the cases and after it has been established that the discrimination has been committed, the Ombudsperson, in accordance with his competent authorities, issues and sends to the responsible institution an opinion or report with appropriate recommendations and measures to be taken in the specific case, in order to eliminate and prevent discrimination.⁵⁵

The Ombudsperson Institution oversees the responses of the public institutions regarding the implementation of the recommendations issued.

⁵⁰See Article 9, LPD

⁵¹Ibid

⁵²Article 13 of the Law on Gender Equality

⁵³See Article 12 and Article 13, LPD

⁵⁴Handbook on internal organization and jobs systematization OI 01-2016

⁵⁵For more detailed information, see Rules of Procedure OI02-2016, available at , <http://ombudspersonkosovo.org/pravni-akti>

If the administrative authorities or the officials concerned, following the recommendations of the Ombudsperson, fail to take appropriate measures within the given deadline or does not explain the implementation of the recommendations, the Ombudsman refers this matter to the Assembly of Kosovo and may issue a press release.

When it determines that no discrimination has been made in the particular case, the Ombudsperson in his decision gives an opinion in which he states his position.

The Ombudsperson may appear as a friend of the court (*amicus curiae*) in judicial proceedings relating to equality issues and protection of discrimination and give his opinion if it has been notified and dealt with the case concerned.

The LPD also specifies the role of another institutional body, i.e. the Office for Good Governance within the Office of the Prime Minister, in promoting and implementing the LPD and as a body that monitors the implementation of recommendations made by the Ombudsperson. Among other things, the LPD also establishes institutional mechanisms for protection against discrimination in ministries and municipalities.⁵⁶

⁵⁶ See Article 10 of the Law on Protection against Discrimination

4. Discrimination Prohibition Regulations

4.1. International regulations

The Charter of the United Nations, 1948.

The Universal Declaration of Human Rights

UN Convention on the Elimination of All Forms of Racial Discrimination, 1965,

The International Covenant on Civil and Political Rights, 1966,

The International Covenant on Economic, Social and Cultural Rights, 1966,

Convention on the Rights of the Child, 1989 –

International Convention on the Elimination of All Forms of Discrimination against Women, 1979,

UN Convention on the Rights of Persons with Disabilities, 2006,

The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2002.

European Charter for Regional or Minority Languages, 1992.

The Framework Convention for the Protection of National Minorities, 1994.

Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence,

The Oslo Recommendations regarding the Linguistic Rights of National Minorities, 1955,

Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity.

Recommendation R (97) 20, of the Committee of Ministers to member states on hate speech adopted in 1997

“Strasbourg Declaration on Roma“, Council of Europe High Level Meeting on Roma, Strasbourg, 2010.

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services of the Council of the European Union

Council Directive, 2006/54/EC of 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

4.2. Domestic regulations

Constitution of the Republic of Kosovo 2008

Law No. 05-L-021 on Protection against Discrimination

Law No. 05-L-20 on Gender Equality

Law No.05-L-019 on Ombudsperson

Law No.04/L-092 for Blind Persons

Law No.05/L-067 on the Status and Rights of paraplegic and tetraplegic persons

Law No.05/L-078 on amending and supplementing the Law No. 03/l-19 on training, professional rehabilitation and employment persons with disabilities

Law No. 05/L-025 on Mental Health

Law No. 03 / L-022 on material support to families of children with permanent disabilities

4.2.1. Appropriate provisions of the following regulations

Law No.04/L-131 on Pension schemes financed by the state

Law No. 04/L-081 on amending and supplementing the Law No. 02/L-17 on Social and Family Services

Law No. 02/L-52 on Preschool Education

Law No. 03/L-068 on education in the municipalities of the Republic of Kosovo

Law No. 04/L-032 on pre-university education in the Republic of Kosovo

Law No. 04/L-037 on Higher Education in the Republic of Kosovo

Law No. 05/L-018 on State Matura Exam

Law No. 04/L-125 on Health

Law No. 04/L-249 on Health Insurance,

Law No. 04/L-110 on Construction, Administrative Instruction No. 33/2007 on technical conditions of construction facilities for access of disability persons

Law No. 03/L-047 on the Protection and Promotion of the Rights of Communities and their Members in Kosovo

Law No. 02/L-37 on the Use of Languages

Law No. 03/L-212 on Labor

Law No.203/19 on protection of workers health and the working environment

Law No. 03/L-149 on the Civil Service of the Republic of Kosovo

Criminal Code, No.04/L-082

Law No.02/L-31 on Religious Freedom

Law no. 03 / L-182 on the Protection against Domestic Violence

Regulation No. 03/2017 on Institutional Mechanisms on Protection against Discrimination in Government and Municipalities

Regulation No.07/2012, on the Office of the Language Commissioner,

Regulation No. 13/2017, on the integration of repatriated persons and the management of repatriation programs

Administrative Instruction No.09/2016 for application of affirmative measures and quotes for enrolment of students from non-majority communities in public institutions of higher education

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Publications of the European Network of Legal Experts in the Non-Discrimination Field,

including the European Anti-Discrimination Law Review,

www.nondiscrimination.net/publications;

ANNEX

TEST FOR ESTABLISHING A CASE OF DISCRIMINATION

Below is an example of a test by which it can be identified whether the disputed proceeding relating to an act or omission or controversial measure against a person/group of persons, in a general or individual legal act, constitutes a violation of the principle of equal opportunities and has the features of discrimination.

Example: In order to identify discrimination that occurs in practice in the form of violation of the **principle of equal rights and responsibilities**, it is necessary to establish the following:

1. Identify the person/group of persons to whom the denial of a certain right or the imposition of a responsibility relates to. Whether it is an individual or a group of people?
2. Identify which legally protected grounds, or which personal characteristic is the ground of discrimination of an individual / group of persons, (nationality or connection with a community of social or national origin, race, ethnicity, colour, birth, origin, gender, gender orientation, sexual orientation, language, citizenship, religion and religious beliefs, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic heritage or some other grounds, in order to implement the principle of equal treatment).
3. Is the situation in which a person/group of persons is the same or similar in relation to other persons or is it the same treatment of a person/group of persons who are in different situations?
4. Is the objective pursued to be achieved by measures in accordance with legal and reasonable reasons, i.e. is it justified / unjustified?
5. Are there any proportions between the taken measures and the objective that is being achieved by the taken measures?

If it is established that the disputed treatment is justified by objective factors which are not in relation to any discrimination on the basis of a certain legally protected grounds, nor there is any connection of the person / group of persons with such ground, and if the disputed measure or act has a legitimate objective and it is also appropriate, if there is no other measure that can achieve the same legitimate objective, then these are objectively justified reasons that do not have the characteristics of discrimination. If this is not the case, such disputed treatment constitutes a violation of the principle of equal treatment and is characterized as discrimination.