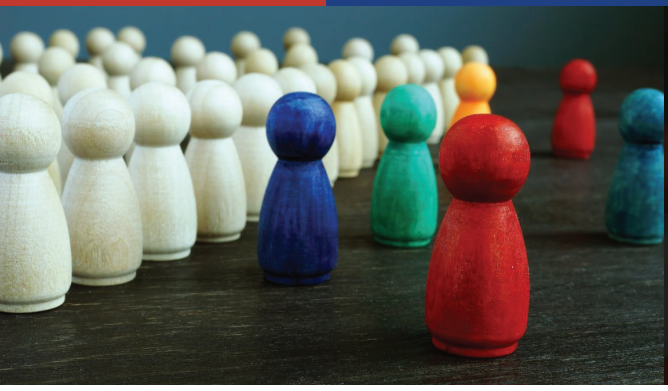
ANTI-DISCRIMINATION LAW



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List of acronyms

EU	European Union
ECRI	European Commission against Racism and Intolerance
ECHR	Convention for Protection of Human Rights and Fundamental Freedoms
ESC	European Social Charter (revised)
ECtHR	European Court of Human Rights
LEPD	Law on Employment of People with Disabilities
LEOWM	Law on Equal Opportunities of Women and Men
LPHWP	Law on Protection from Harassment inthe Workplace
LPPR	Law on Protection of Patients' Rights
LHC	Law on Health Care
LF	Law on Family
LSP	Law on Social Protection
LPPD	Law on Prevention and Protection against Discrimination
LSE	Law on Secondary Education
LPDI	Law on Pension and Disability Insurance
LLP	Law on Litigation Procedure
LLR	Law on Labour Relations
ISSA	International Social Security Association
CERD	Committee for Elimination of Racial Discrimination
CESCR	Committee for Economic, Social and Cultural Rights
CPD	Commission for Protection from Discrimination
CPPD	Commission for Prevention and Protection from Discrimination

CRC	Convention on the Rights of the Child
HRC	Human Rights Committee
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ICPRMWF	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRPD	International Convention on the Rights of Persons with Disabilities
ILO	International Labour Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MLSP	Ministry of Labour and Social Policy
OI	Ombudsperson of the Republic of North Macedonia (Ombudsperson Institution)
OSCE	Organization for Security and Cooperation in Europe
UN	United Nations
CFR	Charter of Fundamental Rights of the European Union
FCNM	Framework Convention on the Protection of National Minorities
CJEU	Court of Justice of the European Union
UDHR	Universal Declaration of Human Rights
CC	Constitutional Court of the Republic of North Macedonia

Content

Foreword

The purpose of the book entitled *Anti-Discrimination Law*[1] is to serve as a simple tool for students of law and for the academic community, and to provide guidance for the identification of essential elements and characteristics of anti-discrimination law within the international and national legal system, as well as within the institutional infrastructure for protection from discrimination. In addition, the book aims at providing more information about the concept of antigypsyism and its manifestation. Therefore, this book can be considered as a practical framework to assist the academic community and the students in this area.

The book focuses on providing skills and knowledge for future legal practitioners in view of equality law and the principle of non-discrimination, and also provides detailed information about the concept of antigypsyism. It puts emphasis on both theory and practice. This is for the reason that the ultimate goal of the protection of every right, including the right to equality, is the respective implementation on the national level, as well as addressing the violation of the respective right in our society, so that victims of discrimination are enabled to seek justice through adequate and efficient legal remedies. To that end, practical tools and advice on the application of international standards and national legislation for protection from discrimination should be made available to future lawyers.

The book is written in simple language, and the intention is to provide explanations about concepts and legal institutes on anti-discrimination especially for individuals who are not specialized in this area. Readers are introduced to this academic area of study through analysis of the essential elements of equality law and the principle of protection from discrimination; analysis of international and national standards on how those are respected; protection and guarantees on the part of the state; and finally, analysis of discrimination in various areas, especially concerning the area of labour relations, deemed as being the most prevalent in cases of discrimination. In its revised, second edition, the book will conceptualize antigypsyism as a social

[1] Second edition, by the authors Zhaneta Poposka, Lazar Jovevski and Julius Rostas, (the first edition, by the authors Zhaneta Poposka and Lazar Jovevski was supported by the OSCE Mission in Skopje)

phenomenon, as a form of racism directed towards Roma[2] and other associated groups such as Sinti, Travellers, Ashkali, Egyptians, etc and will analyse its translation into the legal field. The book abounds in numerous cases of jurisprudence, especially from the European Court of Human Rights and the Court of Justice of the European Union, as well as comparative examples, especially from EU member-states.

The book consists of 9 chapters and many subsections, divided in four parts, and elaborates the following: 1. Right to equality; 2. Protection from discrimination principle; 3. Areas where discrimination occurs; 4. Protection from discrimination in international law; 5. Protection from discrimination in the national legal system; 6. Characteristics of discrimination in labour relations; 7. Special protection for certain groups in labour relations and 8. Antigypsyism. Given the dynamic development of anti-discrimination, we hope that this book will serve as guide in this academic area of studies for students and future legal practitioners.

Skopje, November 2023

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[2] The term "Roma and Travellers" is used at the Council of Europe to encompass the wide diversity of the groups covered by the work of the Council of Europe in this field: on the one hand a) Roma, Sinti/Manush, Calé, Kaale, Romanichals, Boyash/Rudari; b) Balkan Egyptians (Egyptians and Ashkali); c) Eastern groups (Dom, Lom and Abdal); and, on the other hand, groups such as Travellers, Yenish, and the populations designated under the administrative term "Gens du voyage", as well as persons who identify themselves as Gypsies. The present is an explanatory footnote, not a definition of Roma and/or Travellers.

Peer review of the textbook on Anti-Discrimination Law

The book "Anti-Discrimination Law" – second edition, by the authors Zaneta Poposka, Lazar Jovevski and Iulius Rostas, aims to serve as a comprehensive guide and practical framework for students of law and the academic community, aiming to provide clarity on the essential elements and characteristics of anti-discrimination law within both international and national legal systems. This second edition gives a fundamental reading in the fields of equality, discrimination, prevention, protection and sanction. The book is notably structured with the intention of being accessible to practicing lawyers but also to individuals who may not be specialized in this field. In terms of content and structure, it represents a whole in which the problem of protection against discrimination is elaborated from several scientific and etymological aspects. The use of simple language facilitates the understanding of intricate legal concepts, making it an invaluable resource for those entering the academic study of anti-discrimination law. The emphasis on theory and practice highlights the authors' commitment to preparing future legal practitioners with the necessary skills and knowledge in the realms of equality law and the non-discrimination principle.

In addition to the general preview of the essential elements and characteristics of the anti-discrimination law, the authors, in this revised second edition, enhance a special part that focuses on the complex concept of antigypsyism, shedding light on its manifestations and offering insights into its legal implications. The book takes a progressive step by conceptualizing antigypsyism as a specific form of racism directed towards Roma. The authors explore the translation of antigypsyism into the legal field, enriching the content with numerous jurisprudential examples, particularly from the European Court of Human Rights and the Court of Justice of the European Union. Comparative examples from EU member- states further enhance the depth of the analysis.

Structure of the book

The eight chapters are logically organized into four parts, covering fundamental aspects such as the right to equality,

the protection from discrimination in international and national legal systems, characteristics of discrimination in labour relations, special protections for certain groups in labour relations, and, importantly, antigypsyism.

The methodological approach section signals the authors' commitment to a rigorous and systematic examination of anti-discrimination law, enhancing the academic value of the content. Bearing in mind the theme of the book, the authors use adequate academic research methods for the design of this book. The normative method is used to interpret the normative acts in this specific area, whilst the comparative-legal method is used for the purpose of drawing conclusions about legal solutions on the international level that ensure protection from discrimination, and measures which are taken to improve the status of affected groups in the society. The authors also have a comprehensive analysis of case law on relevant international and national jurisdictions that deal with cases of discrimination.

The book simultaneously emphasizes theory as well as practice. The ultimate goal of defending all rights includes the right to equality. Implementation of those rights at the national level, and addressing instances in which those rights are violated in our society, allows victims of discrimination to seek justice through effective and sufficient legal channels. With this book, future and current professionals gain access to useful resources and guidance on applying national and international laws and standards for protection against discrimination.

Content of the book

In Part I, the authors focus on the right to equality and the protection from discrimination principle. This part is logically structured into three detailed chapters that delve into concepts such as equality, forms in which discriminations occurs, and areas where discrimination occurs.

In the first chapter, Right to Equality, the authors give a preview of the concept of equality by first marking the difference of formal and substantive equality, but also the binding connection between equality and the prohibition of discrimination. In the following subsections of this chapter, the authors give a broad elaboration of discrimination, the grounds of discrimination, and assess stereotypes and prejudices. The grounds of discrimination are presented in Table no.1, thus correlating the grounds with the international instruments. Presenting the grounds of discrimination in this manner is very convenient for legal practitioners and students, in order to have a clearer overview of the grounds of discrimination in the different international instruments. Stereotypes are explained through special breakdowns correlated with case law, in order to give an all-inclusive summary of the different stereotypes. In the following part, the related concepts of hate speech, prejudice-motivated crimes (hate crime) and racial profiling are presented in a narrative manner, also correlated to the case law of the ECtHR. This breakdown of related concepts adds depth to the analysis.

In the second chapter, the authors reflect on the forms of discrimination: direct and indirect discrimination, harassment, calling, inciting and instructing to discriminate, reasonable accommodation, segregation, victimization and multiple and inter-sectional discrimination.

The first part of this chapter deals with specific focus on direct discrimination and its three constituent elements. The authors emphasize that these elements must be

present in order to determine that this type of discrimination occurred, with the notion that different legislations differently regulate the area where discrimination can occur, some more narrowly than others do. This part is strengthened with cases from practice on national and international levels, but is also examined by emphasizing certain parts that include the crucial elements of direct discrimination. After gaining the necessary knowledge for direct discrimination, the authors continue with the other forms where discrimination occurs, explaining the abovementioned concepts in an extensive manner so that students and practitioners receive appropriate information for forming their general knowledge of these different grounds.

In the third chapter, the authors reflect upon the areas where discrimination can occur. By first explaining the discrimination that can occur in education, the authors make a step forward, elaborating antigypsyism in education--or unmasking discrimination of Roma people in the educational systems--and correlate this practice with case law in which discrimination has been confirmed. In the following subsections, the authors elaborate upon discrimination in access to goods and services, and then in access to social and health protection, drawing a parallel with international standards and the national solutions.

Part II explores protection from discrimination on both the international and national levels. The authors effectively navigate through international instruments and frameworks, including those of the United Nations, the Council of Europe, and the European Union. The inclusion of specific directives and general policy recommendations adds practical relevance to the theoretical discussions.

In the fifth chapter, the authors navigate the national legal framework of relevant laws in protection from discrimination, thus elaborating first the constitutional protections, and then all the relevant laws and other regulations. In this context, the authors first start by delving into the constitutional safeguards against discrimination. The analysis scrutinizes how fundamental rights and principles are enshrined in the constitution to provide a solid foundation for protection against discriminatory practices. A detailed analysis follows on the specific legislation designed to prevent and address discrimination. The book critically assesses the strengths and limitations of the Law on Prevention and Protection against Discrimination, offering valuable insights into its practical application. The examination extends to the Law on labour relations, as a *lex generalis*, exploring how this law contributes to the broader framework of protection against discrimination in the workplace. Special attention is given to gender equality, with a thorough exploration of the Law on Equal Opportunities of Women and Men. The legal landscape is further examined by considering supplementary regulations that play a role in the overall framework for protection against discrimination, with the note from the authors that despite the fact that all these laws include anti-discrimination clauses, they are mostly criticized for the failure to harmonize the terminology and legal instruments, the different solutions they provide, and the inconsistent system of protection in various areas and on various grounds.

The second part of this chapter examines the institutional Framework for Protection from Discrimination. This section methodically examines the quasi-judicial paths available for individuals facing discrimination. The Commission for Prevention and Protection from Discrimination, the Ombudsperson Institution, and the legal representative for procedures establishing unequal treatment of women and men, are analyzed in detail

with examples that can sharpen the students' and practitioners' vision in regard to quasi-judicial protection. The book then shifts focus to judicial remedies, outlining the various legal actions available to victims of discrimination, supported with examples from case laws. The discussion encompasses the particulars of shifting the burden of proof, explaining it alongside citations of a great number of decisions of the ECtHR, and the use of evidence, including statistical evidence and situation testing, in discrimination cases.

Part III, dedicated to discrimination in labour relations, is particularly insightful. The authors cover various dimensions, including characteristics of discrimination, psychological harassment (mobbing), and special protections for specific groups, such as women workers, child workers, and workers with disabilities. The integration of national and international perspectives enriches the content and makes it applicable in diverse legal contexts.

The sixth chapter opens with a critical analysis of discrimination and the often-complex justifications offered in the context of labour relations. Through a careful examination of legal principles and precedents, the authors shed light on the distinctions of discrimination in the workplace. The book then turns its attention to the pervasive issue of psychological harassment at work. The authors categorize and dissect various forms of mobbing, providing insights into their implications within the national context. A detailed exploration follows, evaluating the effectiveness of national solutions in addressing psychological harassment at work and mitigating its impact on employees. The chapter further traces the evolution of anti-discrimination legislation in labour relations, analyzing the effectiveness of national solutions in fostering a fair and inclusive work environment.

In chapter seven, titled Special Protection for Certain Groups in Labour Relations, the authors investigate the challenges and successes in ensuring equal opportunities and pay for women in the workplace. Special protections, including prohibitions on underground working and night work, are examined in detail. The unique challenges faced by women during pregnancy, childbirth, and maternity are examined, with a focus on legal provisions designed to safeguard their rights in the labour market.

The chapter – Protection of Child Workers, navigates through national solutions aimed at protecting child workers, and evaluating the efficacy of legal measures in safeguarding the rights and well-being of young employees. Here the authors analyze matters related to discrimination from the aspect of two categories of questions: First, prohibition for juveniles entering labour relations until they reach a certain age and, Second, ensuring their enhanced rights when entering labour relations until they reach the age of maturity. Then authors explore international standards and national solutions for protecting workers with disabilities. The concept of reasonable accommodation is dissected, along with a discussion on the open labour market versus protective workshops. The challenges and protections for older workers are precisely examined, comparing international standards with national solutions to ensure dignified and equitable treatment in the workplace.

This part of the book concludes with a sensitive exploration of the persistent struggle faced by the Roma community in the labour market. According to the authors, the challenges faced by the Roma on the labour market are numerous and often multi-layered and systemic. The authors emphasize discriminatory practices and advocate for comprehensive solutions to address this ongoing issue.

The concluding part, Part IV, explores the critical concept of antigypsyism. The detailed examination of terminology, definitions, origins, manifestations, and mechanisms provides readers with a deep understanding of this complex issue. This chapter provides the readers with an understanding of the concept of antigypsyism from the legal aspect. Hence, the chapter explores the current state of research and debate surrounding the racism directed towards the Roma, as well as relevant case law of the European Court of Human Rights, national courts, and national equality bodies, and other judicial or quasi-judicial institutions.

The book concludes with a comprehensive bibliography, underlining the authors' commitment to academic scholarship. The inclusion of diverse sources, books, academic papers, international instruments, national legal frameworks, jurisprudence from the ECtHR and from national courts, reports, etc. further enhances the book's credibility.

In summary, "Anti-Discrimination Law" stands out for its meticulous organisation, clear presentation of concepts, and the integration of practical examples. The book is a valuable resource for students, legal practitioners, policy makers, and anyone seeking a deep understanding of the multifaceted aspects of anti-discrimination law and the challenges associated with antigypsyism.

The inclusion of practical tools and advice on applying international standards and national legislation for protection from discrimination is a commendable aspect of the book. The authors' commitment to bridging theory and practice is evident throughout, providing readers with not only theoretical knowledge but also insights into the real-world applications of anti-discrimination law.

"Anti-Discrimination Law" is a valuable contribution to the academic study of anti-discrimination law. Its simplicity, practical focus, and comprehensive coverage make it an essential resource for students and future legal practitioners seeking to navigate the complexities of this evolving field. The authors' dedication to addressing discrimination and promoting justice is evident, and the book stands as a relevant and timely guide in the dynamic landscape of anti-discrimination studies.

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Introduction

1. Subject matter and goal

Discrimination is a concept without any fixed and unchangeable borders and it should be analysed as such. In contemporary societies, the law is seen as a powerful tool to construe the social reality and enable the inclusion of all people in the modern societal life. Nowadays, the law is used to address discrimination on any ground which results from different, less favourable treatment of individuals with certain protected characteristics, and which derives from people's attitudes based on stereotypes and prejudices for those individuals, as well from stigma, and the social environment and structure. Nevertheless, the existence of legislation itself does not bring about the desired goal. Namely, in order to ensure the desired effect, the legislation should be accompanied by other additional measures, such as: raising public awareness, capacity building for responsible institutions, and detailed legislative and policy analysis.

Presently, discrimination is a phenomenon which occurs in all spheres of social life, and states are taking drastic measures to tackle it. It occurs in various forms, whereby states specify discrimination as: direct discrimination which is not subject to justification, indirect discrimination which is subject to justification, and obligation for reasonable accommodation, harassment, instructions to discriminate, segregation, multiple discrimination, etc. Additionally, special attention will be paid to the forms of discrimination within labour and labour relations. These forms in which discrimination occurs are the topic of discussion in this book. In addition, the book will provide information about antigypsyism and its manifestations.

The main goal of this book is to discern the concept of discrimination and to provide explanations of all emergent forms and their respective specifics. Also, the book examines what types of differentiation made on certain protected characteristics shall be considered as discrimination, and which are the foreseen exceptions to this rule. Furthermore, it explains discrimination on various discrimination grounds and how this matter interferes in the corpus of human rights and freedoms, both on international and national levels. In this context, a very significant segment is the explanation of the legal treatment of discrimination in international law as well as in specific national legal systems, from a comparative aspect. Specifically, it

examines what is undertaken by legislation in order to prohibit discrimination, the negative obligation not to take action (prohibition of discrimination) and the positive obligation to take action, that is, to take positive steps so that individuals with certain protected characteristics are put in more favourable positions in society to ensure their equal opportunities (measures of distributive justice). Systemic discrimination towards Roma on the grounds of ethnicity is specifically addressed in the final chapters of the book.

Furthermore, this monograph makes a serious attempt to draw conclusions about the international standards for protection from discrimination and how those are reflected in the national legal system. Accordingly, it discusses the protection from discrimination in the systems of the United Nations, the Council of Europe, and the European Union. The jurisprudence of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR), and the European Committee of Social Rights (ESC) shall be analyzed to see what progress has been made in the interpretation of the norms of *inter alia* directives, the European Convention on Human Rights (ECHR) and the European Social Charter, in order to ensure the promotion of protection from discrimination. Examples from the existing national quasi-judicial and judicial practice are also presented, making this book a valuable resource not only for students, but also for legal practitioners as well.

The text further specifies the areas and ways in which discrimination occurs. Discrimination in labour relations is analyzed with special emphasis, and due consideration will be made to the special protection of certain categories of workers, such as women, children and youth, people with disabilities, older workers, and Roma as specific categories of workers. The issue of discrimination in employment, promotion and equal pay is a basic theme of labour anti-discrimination law, as well as the special protection of certain categories of employees (women, young people, older workers, people with disabilities or Roma) within the framework of the prevention of discriminatory forms in labour relations.

Finally, the text elaborates in detail antigypsyism as a pervasive social issue and one of the most powerful mechanisms of Roma exclusion. Namely, by understanding the historical racism and discrimination directed at the Roma community the book explains, through its differing manifestations, how this is shaping the present difficulties faced by the Roma in Europe. The structure of the chapter contains sections on terminology, definitions of antigypsyism, its origins, the main manifestations and mechanisms of antigypsyism, the features of antigypsyism, and conclusions.

2. Methodological approach

Given the above-stated objectives and subject matter, adequate academic research methods were used for the design of this book. The normative method is applied in the analysis of regulations, i.e. national (primary and secondary law) and international regulations (conventions, charters, directives, general recommendations, "soft" law), which stipulate the prohibition of discrimination and the principle of equality, but which also deal with antigypsyism specifically. The legal-analytical method is used to interpret the normative acts in this specific area. The comparative-legal method is used for the purpose of drawing conclusions about legal solutions on the international level that ensure protection from discrimination, and measures which are taken to improve

the status of affected groups in the society. From this perspective, the comparative method is especially relevant to reach the final conclusions and recommendations for possible legislative and administrative measures, either through the adoption of new laws or by changing the existing legislation (which would be required from the state), as well as possible legislative solutions that would fit into the overall legal system of the state and the principles of the social system.

A meaningful role in this monograph is given to the analysis of the case law of several relevant international and national jurisdictions that deal specifically with cases of discrimination, including cases of systemic discrimination against Roma. These bodies use the case law to interpret the norms and to discern meaning in the legal rules applied, thus setting the limits of the considered legal instruments, such as the scope of certain discrimination grounds, protected groups, various forms of discrimination, exceptions from discrimination, objective justification of discrimination, shifting the burden of proof in cases of discrimination, etc. The case law provides rationales about most of the legal instruments which quite often fail to provide precise regulation, and under such circumstances, these bodies acquire an enhanced role. The statistical method is used especially to analyze the phenomenon of multiple discrimination.

Academic literature, as well as international, foreign and national legal acts and documents, have been used for the design of this monograph. Also, the Internet was used as a tool to explore international courts' databases, as well as portals of the national equality bodies and networks of independent experts which are generally active in the area of protection from discrimination.

PART ONE

Right to Equality and Protection from Discrimination Principle

Chapter I

Right to Equality

1. Concept of equality

The right to equality is the underlying principle of human rights, which is based on the equal value and dignity of all human beings. This principle is articulated in all international and regional human rights instruments.

However, when speaking about equality, one should distinguish between *formal* and *substantive equality*. Namely, *formal equality* or, sometimes referred to as legally provided equality, implies formal recognition that all people are entitled to the same rights and freedoms, as guaranteed by law, and to the equal application of laws by state authorities. Such an understanding of equality is based on Aristotle's maxim that equals should be treated equally and unequals unequally (Aristotle, Ethica Nicomachea, V.3), i.e. based on the symmetrical approach. It is assumed that this type of equality is achieved if all people according to the existing legal framework are equal in the enjoyment of their rights and freedoms, irrespective of the outcome, whereby the notion of such equality excludes indirect discrimination.

On the other hand, substantive equality assumes a much broader interpretation of the notion of equality, and implies the implementation of legal, formal equality in everyday life, whereby results and effects from the application of laws, policies and practice should not be discriminatory. Special consideration is given to the diversities of certain protected groups, such as for instance in cases of pregnancy (on the ground of sex). Therefore, substantive equality is an indicator of possible inconsistencies in the application of the formal, i.e. legal, equality.

The purpose of a democratic society is primarily to ensure substantive equality. This type of equality is most clearly expressed in the theory of multidimensional inequality, which is currently prevailing, and focuses on the existence of multidisciplinary individual and group identities which result in the enhanced vulnerability of the protected individual and/or group that appears in interdependency with complex structural social factors.

However, in today's world, we should all aim towards achieving inclusive equality, as a new model of equality developed throughout the practice of the Committee on the Rights of Persons with Disabilities

of the United Nations. Namely, in its General Comment No. 6, the Committee embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups, and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity. The Convention is based on inclusive equality (paragraph 11).

Conceptually, equality and the prohibition of discrimination may be seen both as positive and negative formulations of the same principle. Although legal instruments are formulated to stipulate the subject of prohibition, i.e. discrimination, yet, this prohibition serves to ensure the achievement of the ideal of equality, which is, in fact, the purpose of this prohibition.

For instance, the Commentary on the provisions of Protocol No. 12 to the European Convention of Human Rights and Fundamental Freedoms stipulates that: „... the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists" (paragraph 15).

One can conclude that the principles of equality and the prohibition of discrimination not only require equal treatment in similar situations, but also different treatment in different situations. This position is clearly stated in the case law of the ECtHR in the case *Thlimmenos v. Greece* (paragraph 44), thus, underlining that the purpose of anti-discrimination law is not only equality of opportunities, but also equality in the outcome.

For example, the Committee on the Rights of Persons with Disabilities, in the case of *H.M v. Sweden*, noted that a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the CRPD can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different (paragraph 8.3). In this case, the Committee notes that the State party, when rejecting the author's application for a building permit, did not address the specific circumstances of her case and her particular disability-related needs. The Committee therefore considered that the decisions of the domestic authorities to refuse a departure from the development plan in order to allow the building of the hydrotherapy pool were disproportionate and produced a discriminatory effect that adversely affected the author's access, as a person with disability, to the health care and rehabilitation required for her specific health condition (paragraph 8.8).

The legal definition of the term discrimination implies unequal treatment based on certain personal features or characteristics, i.e. the grounds of discrimination, which include unjustified classification and differentiation in certain legal contexts. In the field of human rights, the notion of discrimination assumes differentiation in the enjoyment of rights

based on different legal (or informally embedded) grounds and principles. As explained below in Chapter 2, according to the ECtHR approach, differential treatment in the absence of an objective and reasonable justification amounts to discrimination, in cases where it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim to be achieved.[3] From another side, according to EU law, direct discrimination cannot be justified, and only explicitly enumerated exceptions exist when we talk about direct discrimination. From the other side, indirect discrimination undergoes a test of objective justification. Discrimination can be intentional and unintentional; it may result from individual action or from certain state policy; and it may even occur as part of the legal framework. Irrespective of the type of discrimination, it always includes different, or more specifically, less favourable treatment of certain members of a group only because of protected characteristic and characteristic that s/he shares with the respective group, unlike other members of the society. Also, this derives from the etymological meaning of the notion "discrimination", which originates from the Latin word *discriminare*, *discriminatio*, and the translation means making difference, differentiation, classification. Most often such differentiation is based on existing stereotypes and prejudices for certain groups of people. However, any differentiation does not necessarily mean discrimination. Discrimination is only that differentiation which is not based on pursuing a legitimate goal, or, if the legitimate goal exists, the differentiation is not proportional to the desired legitimate goal, as underlined by the ECtHR in the *Case relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium* (paragraph 10). In the East *African Asian v. the United Kingdom*, the Commission stated that the immigration legislation that applied in the present case discriminated against the 31 applicants, all citizens of the United Kingdom and Colonies residing in Kenya or Uganda being of Asian origin and not being citizens of those states, on the grounds of their colour or their race (paragraph 207); and that this was so severe that it constituted an interference with their human dignity which, in the special circumstances, amounted to degrading treatment in the sense of Article 3 of the ECtHR (paragraph 208).

2. Grounds of discrimination

The scope of anti-discrimination law is determined by two elements, that is: the definition of grounds for discrimination, and the protection of each of the grounds separately (the extent of protection depends on the justification and the exceptions specified in the law for each of the grounds).

The following definition shall be used in this book: **Discrimination ground is a protected characteristic on which any prohibited difference in treatment may not be based, and it can be either a personal characteristic or status or a presumed or associated personal characteristic or status, by which an individual or group of individuals are identified with a certain race, skin colour, ethnic background,**

[3] The ECtHR in cases of discrimination looks at the prohibited ground as suspect or non-suspect, and the margin of appreciation that may vary as strict, very strict or large, and will vary according to the circumstances, the subject-matter and the background of the case. For more information see: European Court of Human Rights. 2022. 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

language, nationality, sex, gender, sexual orientation, religion, belief, education, intellectual and physical disability, age, family or marital status, health status, etc.

Various terms are used for "ground of discrimination". In addition, the following terms are used: protected ground, protected characteristic, badge of differentiation, ground for protection, discrimination ground, etc. (Kotevska, 2013).

According to the European Court of Human Rights, the ground for discrimination shall be a "personal characteristic (status) according to which individuals or groups of individuals differ among each other" (*Kjeldsen, Busk Madsen and Pedersen v. Denmark*, paragraph 56). According to another definition, the ground for discrimination shall mean a characteristic of an individual which should not be considered relevant in terms of different treatment or in enjoyment of certain benefits.

Table No.1: Grounds of discrimination in international law[4]

Instrument	Grounds	Article(-s)	Open-ended list of grounds
UDHR	race, skin colour, sex, language, religion, political or other affiliation, national or social background, property, birth	2(1)	Yes
ICERD	race, skin colour, origin, or national or social background	1	Instrument against discrimination
ICCPR	race, colour, sex, language, religion, political or other opinion, national or social background, property status, birth	2	Yes
	Sex	3	No
	race, colour, sex, language, religion, political or other opinion, national or social background, property status, birth	26	Yes
ICESCR	race, colour, sex, language, religion, political or other opinion, national or social background, property status, birth	2(2)	Yes
	Sex	3(3)	No
CEDAW	sex, gender, age, disability	/	Instrument against discrimination
CRC	race, skin colour, sex, language and religion, political or other affiliation, national, ethnic or social background, property status, disability, origin	2(1)	Yes
CRPD	disability, sex, age	/	Instrument against discrimination
ECHR	sex, race, skin colour, language, religion, political or other opinion, national or social background, national minority, material status, birth	14	Yes
	Equality of marital partners	CH.7, Art.5	No
	sex, race, colour, language, religion, political or other opinion, national or social background, belonging to a national minority, property, birth	CH 12, Art. 1(1)	Yes

[4] See: Kotevska, B. 2013. Guide on discrimination grounds. OSCE Mission to Skopje and Commission for protection from discrimination.

Instrument	Grounds	Article(-s)	Open-ended list of grounds
ESC (Rev.)	race, skin colour, sex, language, religion, political or other affiliation, nationality or social background, health, ethnic minority, birth	E	Yes
EUCFR	sex, race, colour, ethnic or social background, genetic characteristics, language, religion or belief, political or any other opinion, belonging to a national minority, ownership, birth, disability or sexual orientation	21 *see whole Chapter III - Equality	Yes

Discrimination grounds are quite often foreseen in an open-ended list of grounds; however, there are documents where discrimination grounds are elaborated in an exhaustive list, such as in the secondary law of the EU. The ECtHR includes a prohibition based on a list of non-exhaustive grounds of discrimination that has been extensively developed by the jurisprudence of the ECtHR, including on "other status"[5]. On the other hand, the secondary law of the EU focuses on exhaustive lists of six grounds (and additionally nationality), and the practice from the CJEU shows that the Court does not allow for other grounds to be invoked based on the EU law but strictly those refereed to explicitly in the Directives.

Nevertheless, the practice shows that states find it difficult to define the grounds of discrimination or they consider them as self-explanatory. Therefore, courts shall be required to explain the meaning of each ground of discrimination. During the process of defining the discrimination grounds, national courts are guided by the jurisprudence of international courts.

Depending on how the grounds are specified in the legal framework of a particular state, there are three models to specify the grounds of discrimination:

- *General prohibition model:* The main feature of this model is the existence of general provision for protection of equality for all before the law. In those countries, the determination of the protected grounds is to be decided by the courts. Such a model exists in the United States of America and Canada.
- *Closed model:* Discrimination is prohibited only with respect to strictly prescribed grounds. Protection from discrimination may be extended to other grounds only through legislative changes, and not through the courts' or other bodies' case law. This model exists in the European Union (based on directives: explanation given below), and in the United Kingdom and Sweden.
- *Open model:* Discrimination is prohibited and several grounds of discrimination are listed; however, it is an open-ended list which includes the phrase "and other ground or status", "grounds such as", etc. Under this model, courts and bodies have a certain freedom in determining which personal characteristic or status may be considered protected under the open model. This is the model of the ECtHR, the Charter of Fundamental Rights of the EU, and in our country.

[5] The words "other status" have generally been given a wide meaning (*Carson and Others v. the United Kingdom*, paragraph 70) and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (*Kiyutin v. Russia*, paragraph 56; *Clift v. the United Kingdom*, paragraph 56). The practice of the Court shows inclusion under this category of grounds such as: age, health and disability, sexual orientation and gender identity, parental and marital status, immigration status, status related to employment, being a prisoner, place of residence, membership of an organization, and similar circumstances

It is important to keep these three models in mind, in order to determine the importance of the definitions of grounds in a given system for protection against discrimination, depending on the model, but also to determine the degree of freedom of interpretation given to the courts.

Discrimination ground as a protected characteristic may be either inborn or acquired. For instance, sex is an inborn characteristic, but disability can be either inborn or acquired, while age is an acquired characteristic. The personal self-identification principle with a certain group should be taken as a decisive factor in determining the person's belonging to a certain group. A protected characteristic can also be either unchangeable or changeable. The characteristic may realistically exist, but is can also be assumed. For instance, one individual can have a determined sexual orientation as a real characteristic, and can be discriminated against even if the concrete sexual orientation does not exist, but the discriminator assumes that the individual has the respective characteristic or status. In this case, the decisive factor will be the perception of the potential discriminator, who assumes that the individual belongs to given group with such characteristics or status, irrespective of whether or not that is true.

If the unequal treatment of a certain individual is because they are related to another individual who has some of the personal protected characteristics or status, such discrimination against that individual shall be considered as discrimination by association. For instance, someone is not allowed to enter a coffee bar because of their religion; his or her companion might not be of the same religion, but will not be allowed to enter the coffee bar only because of being in the company of an individual of that religion. In the case *Weller v. Hungary*, the ECtHR found discrimination on grounds of parental status amounting to a violation of Article 14, as the first applicant was a father who was denied the award of a benefit to which only mothers, adoptive parents, and guardians were entitled.

The protection of individuals who are closely related to a person with a disability--and therefore may be discriminated against--is compatible with the tendency in European Union law, and can be further verified by the judgement of the CJEU in the case *Coleman v Attridge Law* where the Court ruled that the Directive 2000/78/EC on equal treatment in employment and occupation, prohibits direct discrimination against a mother of a child with disability, when such discrimination is based on the disability of her child (discrimination by association). Discrimination by association is expressly mentioned in several national legislations, such as in: Ireland, Sweden, Austria, Bulgaria and France. In our country, discrimination by association is not explicitly regulated.

For example, in the case *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot discriminatsia*, the CJEU considered that there was discrimination on the ground of ethnicity, although the applicant explicitly claimed that she was not of Roma origin, but she was a victim of discrimination together with the residents of a district where the applicant had a grocer's shop, district inhabited mainly by persons of Roma origin. Namely, in 1999 and 2000, CHEZ RB installed the electricity metres for all the consumers of that district on the concrete pylons forming part of the overhead electricity supply network, at a height of between six and seven metres, whereas in the other

districts the meters installed by CHEZ RB are placed at a height of 1.70 metres, usually in the consumer's property, on the façade or on the wall around the property. The applicant complained in particular that she was unable to check her electricity metre for the purpose of monitoring her consumption and making sure that the bills sent to her--which in her view overcharged her--were correct. The Court stressed that the principle of equal treatment to which that directive (2000/43/EC) refers applies not to a particular category of person, but by reference to the grounds mentioned in Article 1 thereof, so that that principle is intended to benefit also persons who, although not themselves members of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds (paragraph 56).

Finally, a protected characteristic may appear in multiple forms, that is, an individual is unequally treated on several grounds in different intervals. If discrimination occurred on several grounds at the same time, one can speak about cumulative discrimination. If discrimination occurred on several grounds at the same time, and the respective grounds were interrelated and inseparable, one can speak about intersectional discrimination.

For example, in the case of *S.B. and M.B. v. Republic of North Macedonia*, concerning two Roma women who were limited in their access to gynaecological services due to their ethnicity, the CEDAW in its decision, emphasized that discrimination against women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, sexual orientation and gender identity, and that discrimination based on sex or gender may affect women belonging to such groups to a different degree or in different ways to men. State parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned (paragraph 7.3). CEDAW observed that the authors were treated differently from other women of reproductive age who did not belong to ethnic minority groups, and who were seeking gynaecological services at the same time (paragraph 7.4). CEDAW noted the authors' contention, which remained unrefuted by the State party, that the courts lacked an understanding of the phenomenon of discrimination and of the vulnerability of Roma women in society; despite the evidence of unequal treatment, the courts failed to establish that the gynaecologist had demonstrated a discriminatory attitude and to provide redress (paragraph 7.5); thus imposing discrimination on grounds of sex, gender and ethnicity.

3. Stereotypes and prejudices

Stereotypes and prejudices for certain groups in the society serve to limit the individual choices for anyone belonging to a given group, and can amount to subordination, inequality, discrimination, stigma, hate speech, and ultimately to violence motivated by hatred.

Prejudice and stereotype have multiple definitions and meanings. The American Psychological Association (APA) Dictionary defines prejudice as "1. a negative attitude toward another person or group formed in advance of any experience with that person or group. Prejudices include an affective component (emotions that range from

mild nervousness to hatred), a cognitive component (assumptions and beliefs about groups, including stereotypes), and a behavioural component (negative behaviours, including discrimination and violence). They tend to be resistant to change because they distort the prejudiced individual's perception of information pertaining to the group. Prejudice based on racial grouping is racism; prejudice based on sex is sexism; prejudice based on chronological age is ageism; and prejudice based on disability is ableism. and 2. any preconceived attitude or view, whether favorable or unfavorable".[6] Stereotype is defined by APA Dictionary as "a set of cognitive generalizations (e.g., beliefs, expectations) about the qualities and characteristics of the members of a group or social category. Stereotypes, like schemas, simplify and expedite perceptions and judgments, but they are often exaggerated, negative rather than positive, and resistant to revision even when perceivers encounter individuals with qualities that are not congruent with the stereotype." One of the main differences between stereotypes and prejudice is that stereotypes are cognitive, while prejudice is affective. Stereotypes are beliefs about a group, while prejudice is an attitude toward a group. Another difference is that stereotypes can be either positive or negative, while prejudice is always negative. A third difference is that stereotypes can be implicit or explicit, while prejudice is usually explicit. Implicit stereotypes are automatic and unconscious associations between a group and some attributes, while explicit stereotypes are conscious and deliberate beliefs about a group.

Prejudices and stereotypes about different groups of individuals are deeply rooted in everyday life. Prejudices are considered as antipathy based on incorrect and inflexible generalization, which can be either expressed or felt, and aimed towards a group of people with a protected characteristic as a whole, or towards an individual with a certain protected characteristic, only due to being a member of a given group. One might say that prejudices towards certain individuals are the hidden force behind the exclusion of that group of people from economic opportunities and social life, in general. Based on prejudices and stereotypes, some individuals are not seen as separate members of the society who, in fact, need to be judged on an individual level. On the contrary, they are seen as members of the respective social group, and that perception is created through certain beliefs and attitudes of the majority, mainly based on such prejudices and stereotypes.

One can raise the following question: how does discrimination happen on a certain discrimination ground or protected characteristic? Namely, prejudices (which are considered on two levels, i.e. the action taken and the interpretation of the respective action) and stigma towards members of certain group with a protected characteristic, which are inappropriate because of their humiliating nature, are always related to a real or assumed abnormality or atypicality. That usually refers to disability, chronic disease, old age, homosexuality, or affiliation with a minority group such as non-majority religion, ethnic background, etc. Regardless of whether the perception is positive or negative, it helps to separate the people with a protected characteristic from the others which, on the other hand, is considered unacceptable. A protected characteristic is not a criterion per se in order to single out and differentiate. It only reflects some other characteristic, which is considered

[6] American Psychological Association 2015. APA Dictionary of Psychology Second Edition. Washington, D.C., p. 822.

to be essentially related to and dependent on the existence or inexistence of the protected characteristic. In other words, the respective characteristic is used as an indicator for many other characteristics which are assumed to be related. This topic is part of key discussions related to the protection from discrimination on various grounds. In many cases, using the protected characteristic to assume that other characteristics are (in)existent (experience, capability, motivation, productivity, competitiveness, etc.) may be wrong, or at least questionable. For these reasons, one of the main goals of anti-discrimination legislation is to eliminate such assumptions. In lieu of such generalization, it is proposed that the characteristics, i.e. capabilities of an individual, are individually assessed.

Sometimes, neglecting the existence of a protected characteristic functions in the same particular manner, i.e. neglecting the diversities of the individual with a protected characteristic and his/her needs and capacities, can also amount to discrimination. For instance, neglecting the fact that people with physical disability use wheelchairs to move instead of walking, or that blind people read the Braille alphabet instead of black & white text, gives rise to issues of inaccessibility which, in return, amount to exclusion of these individuals from societal life.

When stereotypes are generalized, individuals are associated with concrete attributes only because they are members of the respective group, and the fact that any individual is unique is derogated. In this way, stereotypes unreasonably affect the members of certain groups with protected characteristics, hence, producing incorrect indicators about their capabilities. Therefore, they need to be banned by way of drafting legislative solutions that prohibit discrimination on various grounds, as well as by challenging them through the case law.

The abundant case law of the ECtHR in cases of discrimination elaborates stereotypes based on gender and sex, ethnic and racial origin, disability, HIV-positive status, sexual orientation, as well as religion and belief. Some of these are further explained below.

Gender stereotypes. The case law of the ECtHR in cases of discrimination singles out two types of gender stereotypes that may raise concerns. The *first* group of stereotypes and prejudices are based on the idea of male superiority and female inferiority, and this is the reason for the widespread practice of coercion and violence, in particular in the form of domestic violence as one way to control the woman. The *second* group of stereotypes refers to certain stereotyped social roles that these two groups have in the society, i.e. the mother as figure that takes care of children and elderly family members, and the father as the one who earns a living and financially supports the family.

The idea behind the male superiority and female inferiority as a stereotype, in the case *Opuz v. Turkey*, led to widespread practice of coercion and violence as one way in which the man controls the woman (paragraph 75), as well as showing tolerance of this phenomenon by the state authorities, although it is contrary to international standards. According to the applicant's allegations, the national legislation in Turkey is discriminatory because the life of a woman in Turkey is treated as inferior in the name of family unity, and furthermore, the Civil and Criminal Code treats women as second-class citizens, i.e. a woman is primarily seen as the property of society and of men in the family (paragraph 178). In this context, the Court, having found violation of Article 14 in conjunction with Articles 2 & 3 of the Convention, stated "Bearing in mind

its finding above that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence "(paragraph 200).

The case *Eremia v. Moldova* is very similar, where the patriarchal and discriminatory attitudes increase women's vulnerability to violence and abuse. In this context, domestic violence is, in particular, widespread, largely condoned by society and does not receive appropriate recognition among officials, society and women themselves, thus resulting in an insufficient protective infrastructure for victims of violence. (Paragraph 37). The authorities, having failed to perform their positive obligation and to protect the applicant from domestic violence and, moreover, to punish the perpetrator, violated Article 14 in conjunction with Article 3 of the Convention. The Court held that the authorities do not fully appreciate the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women (paragraph 89).

The stereotypization of men and women is largely according to their traditional gender roles, which, in response, results in a lack of support for individuals who do not fully embody the respective stereotype, that is, traditional gender roles. This is clearly presented in the case *Konstantin Markin v. Russia*, where the two stereotypes underlying the present case were, firstly, the traditional idea that women were responsible for the household and children, with men earning money outside the home and, secondly, the idea that fighting and military service were for men rather than for women. Gender role stereotypes locked women into the home and men out of it, thereby disadvantaging both sexes (paragraph 119 and 120). In this case, the Court found a violation of Article 14 in conjunction with Article 8 of the Convention, thus condemning gender stereotypes, especially with regard to child care (paragraph 143). The Court further reiterates that the advancement of gender equality is today a major goal in the member states of the Council of Europe and, in particular, references to traditions, general assumptions, or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on the grounds of sex. For example, States are prevented from imposing traditions that derive from the man's primary role and the woman's secondary role in the family (paragraph 127).

In addition to this case, the Court found violations of the Convention in many other cases and held that stereotypes and prejudices are not adequate justification for discriminatory treatment. For example, in the case *Zarb Adami v. Malta*, the Government's explanation that exemption from jury service might be granted to persons who had to take care of their family--whereby more women than men could successfully rely on such a provision--as well as the idea that "for cultural reasons" defense lawyers might have had a tendency to challenge female jurors, were not sufficient for the Court to justify the different treatment based on gender (paragraph 81 and 82). The argumentation is based on the stereotypical perception of the woman as the only one who takes care of children and elderly family members,

and therefore the Court found a violation of Article 14 in conjunction with Article 4 paragraph 3 line (d) of the Convention.

Ethnic/racial stereotypes. The case law of the ECtHR gives special emphasis to the stereotypes affecting Roma inter alia in the education sector, through various cases of Roma segregation in schools and in classes for children with disability; but also, in treatment by the police, in sterilization cases, free speech cases, in harassment and the administration of justice, and thus emphasizing their inferiority, which is fully stigmatized. An interesting notion is how the Court brings together the stereotypes and prejudices which are persistent for quite some time and have become institutionalized, which then inevitably result in stigmatization of the whole group, that is, Roma. This emergent process in education is then reflected in all other areas of societal life, thereby cementing this group on the margins of the society. There are numerous cases regarding this matter which are further elaborated below, some clearly pointing out the biases, and some reflecting on the compounding effects of biases and stigma that shape the reality of the entire group.

In the case *D.H. v. The Czech Republic*, the Court reaffirms that difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure (paragraph 184). Furthermore, the ECtHR accepts that Roma are a special type of marginalized and vulnerable minority group that requires special protection according to the Convention, and concludes that due to segregation "they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population." (paragraph 207). The same logic is applied in the case *Sampanis and Others v. Greece* and *Sampani and Others v. Greece*. In the latter case, the ECtHR stresses the racist attitudes of parents of non-Roma children influencing the passivity from the municipal and prefectural authorities, stating that "is the attitude of the municipal and prefectural authorities who, for fear of provoking new incidents from the local population hostile to the Roma, remained inactive in response to calls from the school director and the Ombudsman requesting that Roma students be integrated into ordinary schools and benefit from courses adapted to their educational and linguistic level" (paragraph 100).

The case *Horvath and Kiss v. Hungary* goes one step further, and states that due to culturally biased school assessment, Roma are continuously systematically categorized as people with moderate mental disability and segregated in special schools for children with disability, and as a result their stigmatization persists. In all these cases, the Court found violations of Article 14 in conjunction with Article 2 of Protocol No.1, i.e. indirect discrimination. Although the Court underlines that prejudices are a source of discrimination in the discussion about restrictions to fundamental rights that affect vulnerable and historically discriminated groups, yet, the findings of the Court are very mild with regard to the acknowledgement of the impact that such attitudes and practices, based on prejudices, can have in such cases.

Finally, in the case *Elmazova and Others v. North Macedonia*, related to 87 Roma applicants, children and their parents, that claimed segregation of Roma students in two state primary schools in Bitola and Shtip, by placing them in a school that was claimed to be only for Roma and in classes in which only Roma studied. The

ECtHR built its reasoning on previous case law, as stated above, and found a violation of Article 14 in connection with Article 2 of Protocol No. 1 of the ECHR. What is noteworthy is that the Court stresses that one of the obligations of the State is to deal with the opposition shown by the parents of non-Roma children. The Court notes that "even though the school acknowledged the existence of segregation and took certain measures to tackle the problem, still all its attempts and suggestions, including the redistribution of pupils in the classes, did not materialise mainly because of the opposition shown by the parents of non-Roma children" (paragraph 77). Thus, although there was no intention on the part of the State, the Court considered that the state has an obligation, primarily, to take positive and effective measures to correct the actual inequality of the applicants and to prevent the continuation of discrimination that resulted from their overrepresentation in the respective school, and thereby break the cycle of marginalization and enable them to live as equal citizens from the early stages of their lives.

As to the police treatment of the Roma, in the case *Petropoulou-Tsakiris v. Greece*, the Court analysed the statements made by the police director, suggesting that complaints submitted by Roma people are exaggerated and part of their regular tactics, and found that this type of generalising statement perpetuated harmful stereotypes about the Roma community, which is a form of discrimination and a violation of their human rights (paragraph 65). Thus, the Court finds that the failure of the authorities to investigate possible racial motives for the applicant's ill-treatment, combined with their attitude during the investigation, constitutes discrimination with regard to the applicant's rights, which is contrary to Article 14 taken in conjunction with Article 3 in its procedural basis (paragraph 66).

Also, in the case of *Lingurar v. Romania*, the Court considered that the manner in which the authorities justified and executed the police raid shows that the police had exercised their powers in a discriminatory manner, expecting the applicants to be criminals because of their ethnic origin. The applicants' own behaviour was extrapolated from a stereotypical perception that the authorities had of the Roma community as a whole. The Court considers that the applicants were targeted because they were Roma and because the authorities perceived the Roma community as anti-social and criminal. The authorities automatically connected ethnicity to criminal behaviour, thus their ethnic profiling of the applicants was discriminatory (paragraph 76). The same reasoning was used by the Court in the case of *Stoica v. Romania*, where the Court found violation of Article 14 taken in conjunction with Article 3 due to the racial motives behind the police officers' actions.

Issues of prejudice and stereotyping against Roma are also addressed in the context of vulnerability, such as in the sterilisation case of *V.C v. Slovakia* and *I.G and Others v. Slovakia*, where the Court ruled that forced sterilization is a violation of Article 3, which prohibits torture or inhuman and degrading treatment, and Article 8, which protects the right to private and family life, without examining separately the complaint under Article 14 of the ECtHR. Still, in a dissenting opinion Judge Mijovic stresses the link between the practice of sterilization and the biases against Roma stating "Finding violations of Articles 3 and 8 alone in my opinion reduces this case to the individual level, whereas it is obvious that there was a general State policy of sterilisation of Roma women under the communist regime (governed by the 1972 Sterilisation Regulation), the effects of which continued to be felt up to the time of the facts giving

rise to the present case. Additionally, and in order to illustrate that not many things had changed regarding State policy towards the Roma population, in its third report on Slovakia ECRI stated that public opinion towards the Roma minority remained generally negative. Furthermore, ECRI expressed particular concern about reports indicating that Roma women had been, on an ongoing basis, subjected to sterilisation in some hospitals without their full and informed consent. The fact that there are other cases of this kind pending before the Court reinforces my personal conviction that the sterilisations performed on Roma women were not of an accidental nature, but relics of a long-standing attitude towards the Roma minority in Slovakia. To my mind, the applicant was 'marked out' and observed as a patient who had to be sterilised just because of her origin, since it was obvious that there were no medically relevant reasons for sterilising her. In my view, that represents the strongest form of discrimination and should have led to a finding of a violation of Article 14 in connection with the violations found of Articles 3 and 8 of the Convention." (paragraph 4 of the dissenting opinion).

As to the existing prejudices in the administration of justice, in case of *Moldovan and Others v Romania* (no.2), the ECtHR found *inter alia* violation of Article 14 taken in conjunction with Articles 6 and 8 due to the length and result of domestic proceedings brought by Roma villagers following the killing of fellow Roma and the destruction of homes. The Court stated that "It notes first that the attacks were directed against the applicants because of their Roma origin. The Court is not competent *ratione temporis* to examine under the Convention the actual burning of the applicants' houses and the killing of some of their relatives. It observes, however, that the applicants' Roma ethnicity appears to have been decisive for the length and the result of the domestic proceedings, after the entry into force of the Convention in respect of Romania. It further notes the repeated discriminatory remarks made by the authorities throughout the whole case determining the applicants' rights under Article 8, when rejecting claims for goods or furnishings, and their blank refusal until 2004 to award non-pecuniary damages for the destruction of the family homes. As to the judgment of 24 February 2004, confirmed by the Court of Cassation on 25 February 2005, the decision to reduce the non-pecuniary damages granted was motivated by remarks related directly to the applicants' ethnic specificity" (paragraph 139).

From another side, in the case of *Cakir v. Belgium*, when a Belgian citizen with Turkish origin claimed that he was subjected to ill-treatment on the basis of racist prejudice during his arrest and while held in police custody[7], the ECtHR *inter alia* found a violation of Article 3 in conjunction with Article 14 in that the Belgian authorities had not carried out all the necessary measures to examine whether the police officers' conduct had been discriminatory.

Intersectional discrimination. A stereotype related to the status of a woman of African origin, who works as a

[7] The applicant had mentioned racist remarks allegedly made against him by the police officers, specifically "dirty wog ('*métèque*'), you're nothing but a wog and you'll always be one", "you're nothing but a bloody towel-head ('*bougnoule*'), and you'll always be one". Yet, in his submissions inviting the *chambre du conseil* to find that there was no case to answer, the Crown Prosecutor did not express an opinion on this part of the complaint, considering that the actions which could be categorised as offences under the law of 30 July 1981 were equivalent to those covered by the other charges. On 17 October 2000 the *chambre du conseil* endorsed the prosecutor's submissions and, on 26 April 2006, the Indictments Division found that the prosecution was time-barred, a fact which had lead the Court in the earlier part of its judgment to find that there had been a violation of Article 3 (page 3-4 of the judgement)

prostitute, is subject of the case law of the ECtHR, compared to women of "European phenotype" who also work in prostitution. In the case B.S. v. Spain, the Court found violation of Article 14 in conjunction with Article 3 of the Convention, because the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute. The authorities thus failed to take all possible steps to ascertain whether or not a discriminatory attitude by the police (racist comments with offensive content based on gender and ethnic background) might have played a role in the events (paragraph 62).

From another side, in the case *Carvalho Pinto de Sousa Morais v. Portugal*, the ECtHR decided that there was a violation of Article 14 from the ECtHR (prohibition of discrimination), as well as Article 8 (right to private and family life). The case concerned a woman who complained that due to a medical error during a gynecological intervention, she was unable to have sexual intercourse, and therefore requested compensation of damages in court proceedings. Firstly, she was awarded 80,000 Euros, and the second-instance court reduced the amount to 50,000 Euros on the grounds that sexuality is not such an important aspect of the life of a fifty-year-old woman and mother of two children, compared to a younger woman. Previously, national courts awarded two men aged 55 and 59 who were victims of a medical error of a similar nature 224,459 Euros and 100,000 Euros respectively, on the grounds that the fact that the men could not have normal sexual intercourse affected their self-esteem and resulted in serious psychological trauma. In their reasoning, the domestic courts reflect the traditional idea of female sexuality which is tied to reproduction, birth and the raising of children and neglects the importance of the physical and psychological fulfillment of women. Because of this, the ECtHR considered that there is discrimination on grounds of gender in close connection with the age of the applicant.

Stereotypes towards people with disabilities. In the case *Alajos Kiss v. Hungary*, people with mental disabilities were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualized evaluation of their capacities and needs (paragraph 42). This consideration of the Court is quite important, and clearly shows its position that the prejudices towards the people with disability are often institutionalized in legally justified stereotypes, that allow for complete social exclusion of these people by law. The ECtHR further stated that "if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question" (paragraph 42). The Court concluded that "the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny" (paragraph 44).

Stereotypes for HIV-positive people. The case law of the ECtHR also considers stereotypes towards people with certain health status. In two of the cases, it refers to the group of HIV-positive people where the whole group is stigmatized by creating a false nexus between the transmission of HIV and the individual's irresponsibility, thus enforcing other forms of stigma and discrimination, such as racism, homophobia or misogyny. As

in the cases of racial discrimination, the Court once again makes clear the link between prejudices, stereotypes and stigma towards a certain group. In the case *Kiyutin v. Russia*, this stereotype is distinctly stated. Namely, the Court expressly concludes that "Ignorance about how the disease spreads has bred prejudice which, in turn, has stigmatized or marginalized those who carry the HIV virus… and as consequence, considers that people living with HIV are a vulnerable group with a history of prejudice and stigmatization and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status." (paragraph 64). Similarly, in the case *I.B. v. Greece*, the Court stated that HIV-positive persons have to face a whole host of problems, not only medical, but also professional, social, personal and psychological, and above all sometimes also deeply rooted prejudices even among the most highly educated people (paragraph 80). In both cases, the Court found violation of Article 14 in conjunction with Article 8 of the Convention.

Stereotypes against LGBTI. There are numerous cases of discrimination on the ground of sexual orientation which originate from existing stereotypes for the LGBTI community, such as an inability to have stable relationships or to raise children due to their lifestyle, having in mind the best interest of the child. Both stereotypes are challenged by the Court.

The position of the Court that "Differences based solely on considerations of sexual orientation are unacceptable under the Convention" is included in the case law, especially in the cases *Vallianatos and Others v. Greece* (paragraph 77) and *X and Others v. Austria* (paragraph 99). In the case Vallianatos, the Court unequivocally confirms that "same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples" (paragraph 81). In the case *X and Others v. Austria*, concerning the exclusion of same-sex couples from adoption of the child by the second parent, the Court reiterated that the State, in its choice of means designed to protect the family and to secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life (paragraph 139). In both cases, the Court found violation of Article 14 in conjunction with Article 8 of the Convention.

In addition, stereotypes about the conduct of people with homosexual orientation who serve in the army, are separately analyzed in the case *Smith and Grady v. the United Kingdom*, where they were dismissed from the armed forces due to their homosexuality. The stereotype here is that the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces (paragraph 95). In its defense, the Government maintained that homosexuality raised problems of a type and intensity that race and gender did not (paragraph 102). The Court disagreed with such an attitude and found violation of Article 8 of the Convention.

Religious stereotypes. The case law of the ECtHR underlines the stereotypes which presuppose the superiority of majority religions to minority religions and asserts the inferiority of minority religions, in

particular with regard to the religious movement of Jehovah's Witnesses, a special social minority group that follows certain rules in life. Namely, in the case *Hoffmann v. Austria*, the Court analyses whether granting the parental rights to the father who is a Catholic, compared to the mother who belongs to the Jehovah's Witnesses, solely on the ground of the mother's religion, is in accordance with Article 14 of the Convention. Claims that the educational principles of the Jehovah's Witnesses would result in social isolation of the children, in that they discouraged all intercourse with non-members, all expressions of patriotism (such as singing the national anthem) and religious tolerance, as well as a ban on blood transfusions, might give rise to situations in which their life or their health would be endangered (paragraph 10), are clearly expressed in this case. However, the Court disapproved of such a position and stressed that "a distinction based essentially on a difference in religion alone is not acceptable" (paragraph 36), and found violation of Article 8 of the Convention in conjunction with Article 14 of the Convention.

Similarly, in the *Case of 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, the Court found violation of Article 14 in conjunction with Articles 3 and 9 of the ECtHR. Namely, "Having examined all the evidence in its possession, the Court observes that, in the instant case, the refusal by the police to intervene promptly at the scene of the incident in order to protect the applicants, and the children of some of their number, from acts of religiously-motivated violence, and the subsequent indifference shown towards the applicants by the relevant authorities, was to a large extent the corollary of the applicants' religious convictions" (paragraph 140). The Court considered that "the negligent attitude towards extremely serious unlawful acts, shown by the police and the investigation authorities by the police on account of the applicants' faith, enabled Father Basil to continue to advocate hatred through the media and to pursue acts of religiously-motivated violence, accompanied by his supporters, while alleging that the latter enjoyed the unofficial support of the authorities" (paragraph 141).

Also, in the case *Tonchev and Others v. Bulgaria*, involving information circulated to schools by the municipal authority containing pejorative and hostile remarks about the Evangelical denomination to which the applicant associations and pastors belonged, led to violation of Article 9 of the ECtHR.

4. Related concepts

4.1. Discrimination and hate speech

Incrimination of hate speech is generally related to racism, xenophobia, anti-Semitism, chauvinism and homophobia, as well as to the concept of discrimination. Discrimination implies less favourable treatment of an individual or group of individuals, who are in a comparable situation, on certain discriminatory grounds, without any objective or reasonable justification thereof. Thus, the concept of discrimination refers to the less favourable treatment or the effect of such treatment of an individual or group of individuals on some of the discrimination grounds, that is, protected characteristics, in comparison with other people in the society. According to the Principles and guidelines for a comprehensive approach to combating hate speech which is an Appendix to Recommendation CM/Rec(2022)16 of the Committee of Ministers

to member States on combating hate speech, hate speech is understood as all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status such as "race", colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation (paragraph 1.2). In other words, hate speech, is a form of expression designed to promote hatred on a variety of grounds. It can also include the action to provoke or incite discrimination, while hate speech itself may also be seen as discrimination. For instance, in the case Aksu v. Turkey, the ECtHR in its consideration of whether or not there are elements of the case to be reviewed from the aspect of prohibition of discrimination, decides whether the respective publications with expressions and comments that convey anti-Roma feelings have "discriminatory action or such effects".

In its case law, the ECtHR developed several elements that constitute hate speech: intention, content/context of expression, and prohibited effect. The explanation is provided below.

Intention for spreading hatred towards certain group. Hate speech implies expression behind which is the intention to incite, promote or justify hatred towards people belonging to certain group (racial, religious or ethnic group, LGBTI community, etc.). The intention to incite or promote intolerance, racism, homophobia, violence and other hatred should be distinguished from the intention to inform the general public about matters of common interest (in the case *Jersild v. Denmark*, documented representation of a racist organization shall not be considered as hate speech, but rather as intention to present a social phenomenon of common interest to the general public).

Content/context of specific expression. The determination of whether specific expression is to be considered as hate speech depends on the content of the expression, as well as the specific circumstances of the case, i.e. it is not only the content, but also the context of the specific expression that matters. For instance, whether the statement was made by a politician, journalist, artist, or ordinary citizen; the circumstances under which the statement was made; at which place and at what time; etc.

Effects/prohibited results of hate speech. In addition to compromising the dignity of the individual/s addressed, hate speech is also considered as speech with a capacity to result in disturbed public peace and order, or in violence, such as immediate incidents, or, fueling violence among certain groups in the society, and hate crimes towards individuals who were previously targeted by hate speech. Prohibited effects shall include all social detrimental consequences made by such expression, whereby provoking hatred towards others shall be considered to suffice, even though real actions that cause far-reaching consequences have not taken place.

In the case of *Budinova and Chaprazov v. Bulgaria* (paragraph 94) the Court reiterated having previously held that sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups deserve no or very limited protection under Article 10 of the Convention, read in the light of Article 17 (as in *Seurot v. France* (dec.); *Soulas and Others v. France*, paragraphs 40 and 43-44; and *Le Pen v. France* (dec.) which concerned

generalised negative statements about non-European and in particular Muslim immigrants in France; *Norwood v. the United Kingdom* which concerned statements linking all Muslims in the United Kingdom with the terrorist acts in the United States of America on 11 September 2001; *W.P. and Others v. Poland* (dec.) and *Pavel Ivanov v. Russia* (dec.), which concerned vehement anti-Semitic statements; and *Féret v. Belgium*, paragraph 71, which concerned statements portraying non-European immigrant communities in Belgium as criminally- minded).

In the ECtHR's case-law, the use of hate speech was often treated based on weighing between competing interests at stake, such as freedom of expression, protected by Article 10 of the ECHR, and protection of private life, under Article 8. Where the allegation is that a public statement about a social or ethnic group has affected the "private life" of its members within the meaning of Article 8 of the ECtHR, the Court enlisted several factors for deciding whether that is indeed so: (a) the characteristics of the group (for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatisation, and its position vis-à-vis society as a whole); (b) the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype); and (c) the form and context in which the statements were made, their reach (which may depend on where and how they have been made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity. The Court emphasized that the interplay between all these factors leads to the ultimate conclusion on whether the "certain level" required under the case of *Aksu v. Turkey* (paragraph 58) and the "threshold of severity" required under the case of *Denisov v. Ukraine* (paragraphs 112-14) has been reached, and on whether Article 8 is thus applicable (*Budinova and Chaprazov v. Bulgaria*, paragraph 63).

This means that one can use the provisions of the Law on Prevention and Protection against Discrimination (LPPD) from 2020 in combating discriminatory speech, or more specifically, Article 9 which refers to calling, inciting or instructing to discriminate and Article 10 which refers to prohibition of harassment and degrading treatment on a discriminatory ground, which has the aim or effect to violate the dignity of a particular individual or group of persons or to create a threatening, hostile, degrading or humiliating environment, approach or practice. The Commission for Prevention and Protection uses both articles to find discrimination in cases where bias and discriminatory speech is used, as explained throughout the book.

Furthermore, there is a difference between defamation and libel and discriminatory and hate speech as elaborated in the extract below, taken from the publication *Freedom of expression and hate speech*.

> Hate speech is prohibited for the harm it causes. It, above all, harms the dignity of the individual as a member of a group. And causing harm to the dignity of the individual cannot be simply characterized as insult or defamation.
>
> Pursuant to the Law on Civil Liability for Insult and Defamation dated 2012, insult occurs when the person with the intention to humiliate, by means of a statement, behaviour, publication or in any other manner, expresses a demeaning opinion for another person that harms his/her honour and reputation. Defamation, on the other hand, means that a person presents or disseminates, before a third party, false facts harming the honour and

reputation of another person, with the intention of harming his/her honour and reputation, while knowing or has been obliged to know and may know that the facts are false.

Protected category under the Law on Civil Liability for Insult and Defamation are natural persons, legal entities, group of individuals, as well as a deceased person, while as regards hate speech, only one characteristic is protected, which is determined by the group itself, or denial/negationism of a particular event, which is/was of significant influence on the characteristic of the group itself, is prohibited (denial/negationism of the Holocaust or other event of that type).

Insult and defamation are a scourge on the society due to the harm they cause to the victim in the eyes of others. They harm their social status, as well as their reputation. Unlike insult and defamation, hate speech humiliates the individual for a certain characteristic that may not be perceived as socially unacceptable (race, gender, ethnicity, religion), meaning that his/her self-respect is harmed. Such as when, for instance, a person publicly states that another person is dishonest, unintelligent or immoral, that other person is or can be insulted with such statement, but when the very same public statements are related to his/ her identity characteristics (for instance, ethnicity, gender or sexual orientation), that person is offended in a very different way, in other words, that person is humiliated.

An identical situation is seen at differentiating between hate speech and defamation. When a person presents false facts about another person before third parties, that person may be defamed, but if such false facts are intended to discredit as regards his/her inherent nature, in that case we are talking about hate speech. In fact, it is true that hate speech can insult/defame a particular individual. However, they are not insulted as an individual, but rather as a member of a particular community, with which they share certain identity characteristics. This is called "indirect rejection" – not a direct rejection of the individual, but rather a rejection of the group to which that individual belongs, which group, on the other hand, sets the manner in which the individual shapes his/her life as a human being. It changes the key components of his/her self-understanding, such as gender, race or culture, into the object of ridicule and attack. This is the source of harming the dignity or the humiliation caused by such speech. Thus, the manner in which the individual expresses him/her self as a human is rejected. Hence, such an individual is rejected as a human.

These differences between hate speech and insult and defamation lead to differences in judicial protection and determining the damage compensation. Unlike insult and defamation which are treated under the civil law, hate speech is treated under the criminal law which also means expression of social condemnation of racism, religious, ethnic and other forms of intolerance. In fact, incrimination/regulation not only shows the boundaries between what is allowed and what is prohibited, but also shows what is condemned and what is accepted in the society. Regulating the hate speech under the criminal law sends a message that equality and respect of cultures and other (identity) differences are among the highest values in the society.[8]

4.2. Discrimination and prejudice-motivated crimes (hate crime)

The notion of prejudice-motivated crimes (hate crime) implies criminal acts in which the perpetrator is motivated by biases or prejudices towards the victim's belonging

[8] See: Mihajlova, E., Bachovska, J., Shekerdjiev, T. 2013. Freedom of expression and hate speech. OSCE Mission to Skopje, p.35-36..

to a group, or in other words, towards the racial, ethnic, religious, etc. identity of the victim. The motivation to commit crime does not always entail personal hatred for the individual or the group, and can be based on certain bias and attitude that certain individual/group is "harmful "for the society. For instance, LGBTI people are harmful for the moral system of the state.

A crime to be considered as hate crime must include two elements, i.e. *first*, to be an ordinary criminal act and *second*, there is biased motivation to commit the crime. The first essential element of hate crime, i.e. the ordinary criminal act, is an element that is missing in cases of discrimination. That is to say, if the motivation or the contents of bias are removed in a case of discrimination, there will be no crime. Nevertheless, discrimination may serve as evidence for a committed hate crime. Or in other words, action motivated by prejudices before, during or after the commission of the crime, may serve as evidence for the perpetrator's motivation and usually it is part of the criminal investigation for hate crime. For instance, that would be the ethnic offending that preceded or accompanied a physical assault, or writing graffiti with racist content on a religious building that was damaged. Also, in case a group of Roma people were not allowed to enter the swimming pool, one can speak about discrimination; however, if they were also subjected to physical assault and bodily injuries only because they wanted to enter the swimming pool, one can speak about hate crime. On the other hand, the intention is irrelevant to prove the existence of discrimination.

The practice has shown that any failure to resolve discrimination, which is based on prejudices and negative stereotypes, through the anti-discrimination law, is largely prone to result in prejudice-motivated crimes (hate crimes). Namely, in the case *Begheluri and Others v. Georgia*, ECtHR stated that the discriminatory motive of the assailants, whether private individuals or state agents, in perpetrating their attacks against the applicants – all of whom were Jehovah's Witnesses – was evident from the widespread prejudices and the scale of the violence in Georgia at the material time (paragraphs 142 and 179). Furthermore, such discriminatory attitudes amounted to a situation where, despite being aware that the attacks were likely motivated by religious hatred, the authorities allowed the possible religious motivation behind the attacks to be ignored in the investigations, thus, there was a systematic practice on the part of the Georgian authorities of refusing to adequately and effectively investigate acts of violence against Jehovah's Witnesses (paragraph 144). This was considered as unacceptable by the Court and therefore it found violation of Article 3 of the Convention and concluded that the relevant authorities were ineffective in preventing and stopping religiously motivated violence, thus it created a climate of impunity, which ultimately encouraged other attacks against Jehovah's Witnesses throughout the country (paragraph 145). Having conducted an analysis about the violation of Article 14 of the Convention, the Court expressly stated its position that "treating religiously motivated violence and brutality on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights" (paragraph 173). The Court found violation of Article 14 in conjunction with Articles 3 and 9 of the Convention.

In the same context is the case *Angelova and Iliev v. Bulgaria*, where the Court reiterates the importance of the racial motives of the perpetrator of the crime, which in this particular case the authorities failed

to take into consideration and to conduct an effective investigation (paragraph 105). What is interesting about this case is that the Court notes in this respect the widespread prejudices and violence against Roma during the relevant period and the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the authorities' ability to protect them from the threat of racist violence (paragraph 116). The Court confirmed the violation of Article 14 in conjunction with Article 2 of the ECtHR. As stated in the Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, the Court has examined cases of violence based on the victim's: gender (*Opuz v. Turkey; Eremia v. the Republic of Moldova; Halime Kılıç v. Turkey; Tkhelidze v. Georgia*); race and ethnic origin (*Nachova and Others v. Bulgaria, Moldovan and Others v. Romania* (no. 2), *Škorjanec v. Croatia*, *Makuchyan and Minasyan v. Azerbaijan and Hungary*, *Adzhigitova and Others v. Russia*); religion (*Milanović v. Serbia*, *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*); political opinion (*Virabyan v. Armenia*); and sexual orientation (*Identoba and Others v. Georgia*, *M.C. and A.C. v. Romania*). In those cases, the ECtHR has found violations of Article 14 taken in conjunction with Article 2 (*Nachova and Others v. Bulgaria*, *Angelova and Iliev v. Bulgaria*), Article 3 (*Eremia v. the Republic of Moldova*, *B.S. v. Spain, Abdu v. Bulgaria*), Article 6 and Article 8 (*Moldovan and Others v. Romania* (no. 2)) of the Convention. The Court has examined cases of violence caused by discriminatory attitudes under both the substantive and procedural prong of the relevant Articles.[9]

In the case *Identoba and Others v. Georgia*, ECtHR reaffirms the conclusion made in the case *Smith and Grady v. the United Kingdom*, where it is stated that "treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3" by adding that discriminatory remarks and insults must in any event be considered as an aggravating factor when considering a given instance of ill-treatment in the light of Article 3 of the Convention (paragraph 65). The Court in its analysis of the case states that the attack on LGBTIQA+ activists during the march to mark the International Day Against Homophobia was instigated by those with a hostile attitude towards the LGBTI community in Georgia. Furthermore, that violence, which consisted mostly of hate speech and serious threats, but also some sporadic physical abuse in illustration of the reality of the threats, rendered acute the fear, anxiety and insecurity experienced by all thirteen applicants (paragraph 79). According to the Court, having regard to the reports of negative attitudes towards sexual minorities in some parts of the society, the law-enforcement authorities were under a compelling positive

[9] The Court's task under the substantive limb of Articles 2 or 3 is to establish whether or not discriminatory attitudes towards the group to which the victim belongs, or allegedly belongs, was a causal factor in the impugned conduct of the authorities (*Stoica v. Romania*, paragraph 118). The authorities' duty to investigate the existence of a possible link between discriminatory attitudes and any act of violence is an aspect of their procedural obligations arising under Articles 2 and 3 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 (*Nachova and Others v. Bulgaria*, paragraph 161). State authorities have the additional duty to take all reasonable steps to unmask any discriminatory motive and to establish whether or not discriminatory hatred or prejudice may have played a role in the events (*Angelova and Iliev v. Bulgaria*, paragraph 115). Failing to unmask discriminatory motives and treating violence and brutality induced by discrimination on an equal footing with cases that have no discriminatory overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (*Šečić v. Croatia*, paragraph 67).

obligation to protect the demonstrators (paragraph 80). What is interesting about the case is that the Court, by establishing violation of Article 3 in conjunction with Article 14 of the Convention, warns that "in the absence of such a meaningful investigation, it would be difficult for the State to implement measures aimed at improving the policing of similar peaceful demonstrations in the future, thus undermining public confidence in the State's anti-discrimination policy" (paragraph 80).

In the case *Škorjanec v. Croatia*, the applicant and her partner of Roma origin were assaulted by two individuals who uttered anti-Roma insults. The ECtHR stressed that the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence, which was part of the responsibility incumbent on States under Article 3 taken in conjunction with Article 14, also concerned acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possessed a particular status or protected characteristic.

4.3. Discrimination and racial profiling

As defined in the ECRI's General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, racial profiling means "The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities". Furthermore, the Explanatory Memorandum to the Recommendation, regarding paragraph 1 of the Recommendation, reads: "34. iii) ... Research has shown that racial profiling has considerably negative effects. Racial profiling generates a feeling of humiliation and injustice among certain groups of persons and results in their stigmatisation and alienation as well as in the deterioration of relations between these groups and the police, due to loss of trust in the latter..."

A typical example of a violation of the right to equality, without violation of any other right, is the racial profiling, which as a phenomenon is also witnessed in our country. In the case of racial profiling, for example, at a border crossing, the right to equality is violated with the profiling on grounds of ethnicity, for example being Roma, without the need for violation of the right to free movement. Namely, the very fact that members of a certain ethnic community, for example Roma, are targeted more often than others when crossing a border with a request for additional documents, or a delay or prolongation of the questioning to establish if the person fulfils the requested criteria to cross the border, that itself constitutes discrimination. In such cases, the victim may not be restricted in his/her travel by being denied entry to or exit from the territory of the country of which they are a citizen, but the very fact that they have been subject to certain unequal treatment because of their race or ethnicity, constitutes discrimination.

For example, the Basic Court Skopje 2, with judgment P4 1228/13 of 11.04.2014, established that the state, i.e. the Ministry of Internal Affairs, as a defendant, violated the right to equality of a citizen of Roma ethnicity, by not allowing him to cross the state border of 12.06.2013. The same judgment was confirmed by the judgment of the Appellate Court in Skopje with the judgement GŽ 5169/14 from 09/23/2015.

In the case GŽ-183/18, which was led by the Macedonian Association of Young Lawyers, the judgment establishes that the defendant - the Ministry of Internal Affairs - violated the plaintiff's right to equality by not allowing him to cross the state border on 27.06.2014 and obliged the defendant to pay him compensation for pecuniary and non-pecuniary damage for the violation of personal rights. The plaintiff, a Macedonian citizen of Roma ethnicity who was supposed to travel to Sweden to visit his relatives and who had a letter of guarantee of his intention to visit, was informed that he could not cross the border because they, as Roma, were going abroad only as asylum seekers, and he was escorted by police officers from the airport to the entrance itself (Judgment GŽ-183/15 from 09.03.2015 of the Appellate Court in Shtip, P5 no. 2/14 from 26.11.2014 of the Basic Court Kočani).

And the Appellate Court in Bitola, in the case GŽ-2086/16, confirmed the judgment of the Basic Court in Bitola, which determined that the defendant violated the right to equality in treatment and violated the right of free movement of the plaintiffs by not allowing them to leave the territory of the State on 14.09.2015. (Judgment GŽ-2086/16 from 12/12/2016 of the Court of Appeal in Bitola, P4-130/16 from 10/03/2016 from the Basic Court in Bitola)

These are cases taken from a series of cases in which domestic courts have found a violation of the right to equality due to racial profiling and also in relation to the right to free movement on grounds of ethnicity and/or race (see: Poposka and al, 2023).

The case of *Memedova and Others v. North Macedonia*, concerns border incidents in 2014 when the applicants, all of Roma ethnicity, were not allowed to leave the country, amid measures taken by the Ministry of Internal Affairs to strengthen border controls of citizens leaving North Macedonia who were potential asylum seekers in the European Union. In this case the Court found violation of Article 2 of Protocol No. 4 (freedom of movement) and violation of Article 14 taken in conjunction with Article 2 of Protocol No. 4 concluding that neither the Government nor the domestic courts provided an objective and reasonable justification for the different treatment to which the applicants had been subjected at the border. The foregoing considerations are sufficient to enable the Court to conclude that the first, second, third, and fourth applicants were discriminated against because of their Roma origin when they were prevented from crossing the State border (paragraph 99).

Chapter II

Forms in which discrimination occurs

1. Forms of discrimination

The legal definition of the term discrimination implies unequal treatment based on certain personal features or characteristics, i.e. grounds of discrimination, including unjustified classifications and differentiations in a given legal context. Discrimination by default includes different, less favourable treatment of certain individuals with a protected characteristic, unlike the other members of the society. Nevertheless, differentiation does not necessarily mean discrimination. Discrimination shall be considered only that differentiation which does not have a legitimate aim, or, if there is legitimate aim, the respective differentiation is not proportional to the desired legitimate aim.

Discrimination occurs in several forms; however, it usually occurs as direct and indirect discrimination, regardless of whether or not that is legally prescribed in law or derives from case law.

The United States of America is an example where the distinction between direct and indirect discrimination results from case law, especially of the US Supreme Court, where direct discrimination is considered as discrimination with unequal treatment (*disparate treatment discrimination*), and indirect discrimination is considered as discrimination with unequal effect (*disparate impact discrimination*). See: *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 1993.

Harassment, instructions to discriminate, victimization and reasonable accommodation are more recent emergent forms of discrimination, which are mainly present in the EU anti-discrimination legislation. In a purely national context, in addition to an instruction to discriminate, it can be observed that calling and inciting to discrimination are also included. There are also severe forms of discrimination such as multiple, intersectional, repeated and continued discrimination.

2. Direct discrimination

Direct discrimination means different and less favourable treatment of a person with a protected characteristic, unlike a person in the same or a similar situation, and which is merely due to a protected

characteristic, i.e. discriminatory ground. Also, this form of discrimination may involve the absence of any different treatment in a different situation, when that is imposed by the circumstances in order to equalize the factual inequalities. In general, direct discrimination is based on the concept of formal equality that requires equal treatment to equals and unequal treatment to unequals. Or, in other words, direct discrimination, essentially, requires the application of the same treatment, and prohibits the less favourable treatment among individuals, which is then considered as discriminatory.

Practical advice:
The test *'if it wasn't for'* will often help to identify direct discrimination. If it wasn't for my ethnic background, would they treat me like this? Is this unequal treatment the result of my age? Can you identify that behind the unequal treatment is some stereotype related to my religion or belief, my sex or gender, my health status, sexual orientation or something similar? It can be very likely that it is a matter of direct discrimination.

Direct discrimination includes three constituent elements, which are mutually related and must be present in order to determine that this type of discrimination occurred, that is: *first*, there is less favourable treatment of the individual; *second*, in comparison with another individual in a similar situation; and *third*, the reason being the existence of a discriminatory ground regarding the respective individual (prohibited ground). Note that different legislation may differently regulate the area where discrimination can occur, some more narrowly than others do. North Macedonia opted for a broad area of coverage within the LPPD.

In the core of direct discrimination is the first constituent element, that is, less favourable treatment of the individual with a protected characteristic, such as, for instance: forbidden access for Roma to a swimming pool; Muslim women forbidden to enter a restaurant; unemployment due to the given sexual orientation of the individual; exclusion from the mainstream educational process or segregated education due to disability or ethnicity; the non-provision of adequate medical service and health care for people living with HIV; dismissal from work of an older worker; etc.

For example, in Cyprus, the Ombudsperson in his review of a complaint, conducted an analysis of the criteria for enrollment in the state nursing schools and established a discrimination on the ground of disability. That is, entry criteria were applied, such as: good health, not less than 1,53 m height, weight not exceeding 35 % of the average weight, excellent sight and hearing, and no stuttering, which were reviewed in correlation with the administrative measure for enrollment of 2% students with disability from all enrolled students, in accordance with the law. This proved to be completely impractical, because instead of students with disability, the enrolled students had diabetes, thalassemia, etc. In the findings, the Ombudsperson established that such enrollment criteria are considered to be direct discrimination on the ground of disability, and they need to undergo changes in terms of how the personal characteristics of the applicants would influence their student achievements, and not their future achievements as employed nurses.

Working on a concrete complaint, the CPPD determined direct discrimination against members of the Roma community

on the grounds of ethnicity, belonging to a marginalized group, social origin and property status in the area of access to goods and services committed by the Municipality of Kavadarci for not providing for clean drinking water. CPPD recommended to the Municipality of Kavadarci to provide access to clean water in the settlement inhabited predominantly by Roma. If there are legal obstacles to the legalization of the settlement, the Municipality should provide a temporary solution that will enable access to clean water for all Roma families living in this settlement. (*Complaint number 08-305/1* from 08.10.2021, Opinion from 13.04.2022).

In the case of *Moraru and Marin v. Romania*, the Court found violation of Article 1 of Protocol No. 12 to the ECtHR stating that not giving the two applicants the option to continue to work past their retirement age and until they reached the retirement age set for men constituted discrimination based on sex which was not objectively justified or necessary in the circumstances (paragraph 123). Furthermore, the Court reiterated that "very weighty reasons would have to be put forward before it could regard a difference of treatment based on the ground of sex as compatible with the Convention, and that the margin of appreciation afforded to States in justifying such a difference is narrow" (paragraph 116).

The second element of direct discrimination is also considered to be its key element, and that is the existence of comparator, i.e. people in the same or a similar situation, and the only difference being the absence of the protected characteristic of the individual who is compared to the person discriminated against. Finding a comparator in cases of direct discrimination is not a controversial issue; however, sometimes, it does prove to be difficult. For instance, in cases of discrimination on the ground of age, it might be difficult to identify the real age groups in order to prove the unequal treatment. Also, in cases of discrimination on the ground of disability, it is not easy to find a comparator because the protected group itself is so diverse (there are various types of disability, such as: physical, mental, sensory and intellectual, each with their own specifics), so it would be difficult to differentiate who among the protected group is affected by the alleged discriminatory treatment.

For example, this is explicitly shown in one of the cases reviewed by the Hungarian equality body (Equal Treatment Authority), where it found violation of the equality principle. The winners of the golden medal from Hungary at the 21st Summer Olympic Games for deaf people, complained that they did not receive the financial award, unlike the winners of the Summer Olympic and Para-Olympic games from 2008, who received a financial award from the sports state authority. The sports state authority believed that it enjoys discretionary right concerning the granting of financial awards. While analyzing the case, the Equal Treatment Authority, concluded that there is no reasonable justification for the unequal treatment both from financial or sporting aspect, and instructed the state authority to eliminate the effect from its action by granting the financial award to the Olympic game winners. An interesting fact is that the comparison was made between two different groups of people with disability, i.e. one group with sensory (impaired hearing), and the other with mental and intellectual (Para-Olympics) disability (Equal Treatment Authority, *Decision EBH no.9/2010*).

In cases of racial, ethnic and religious discrimination, it may be relevant to avoid comparison with other minority racial, ethnic or religious individuals or groups, but rather an individual or group from the majority. In cases of multiple discrimination, the best comparator may not be the person who belongs to the majority group from each aspect. Finding the best comparator depends on the social attitudes towards various minority groups. For example, the best comparator for a Roma woman of the Muslim religion in south Bulgaria, who tries to prove ethnic discrimination, may be a Turkish woman of the Muslim religion, rather than a Bulgarian woman of the Orthodox religion. In some countries, discrimination may be established through comparison with one ideal standard of treatment, such as behaviour that implies respect for human dignity.

CPPD determined direct continued intersectional discrimination on the grounds of gender, race, belonging to a marginalized group, ethnicity and social origin committed against Roma women living on the territory of the Shuto Orizari Municipality was committed by the Ministry of Health in the area of health insurance and health care. Over a long period of time, almost 8,000 Roma women of reproductive age were left without access to primary gynecological-obstetric health care on an equal basis with women living in other municipalities in the city of Skopje. (*Complaint no. 08-121/1* from 18.02.2022, Opinion from 16.08.2022).

In one case from 2012, the Ombudsperson Institution found discrimination on the grounds of political (and ethnic) affiliation in a public enterprise in Kumanovo Municipality. Namely, "the supervisor, a member of the ruling political option and a member of the majority community, did not allow a member of the Municipal Council, otherwise a member of the Roma community and a member of another political party, to participate in the sessions of the Council". Following the actions taken by the OI and the recommendation to the director of the public enterprise to take action to stop the obstruction, the recommendation was accepted (OI, 2012 Annual Report, pp. 66-67).

In view of the requirement for an adequate comparator, cases of pregnancy are one exception in the anti-discrimination legislation. That is to say, CJEU in its case law[10] stipulates that less favorable treatment is based only on the fact that a person is pregnant, and therefore it is qualified as direct discrimination on the ground of sex, and there is no need for finding a comparator.

In order to overcome the difficulties in finding a comparator, some jurisdictions, such as Hungary, also use a hypothetical comparator in order to determine if the protected characteristic is the decisive factor for the less favourable treatment of the respective individual. Given the hypothetical comparator, the complainant is not required to show that s/he received less favourable treatment than another particular individual. On the contrary, the hypothetical comparator means that given authority (equality body, court etc.) should analyze how the comparator "would have been treated" in a similar situation.

The third element of direct discrimination refers to the existence of causality between the discrimination ground and the less favourable treatment. For the third element of direct discrimination to be fulfilled, one

[10] See: Dekker v. Stichting Vormingscentrum voor Jong Valwassenen (VJVCentrum) Plus, Case C-177/88, [1990] ECR I-3941, 8 November 1990; Webb v. EMO Air Cargo (UK) Ltd, Case C-32/93, [1994] ECR I-3567, 14 July 1994

should answer the following question: would the respective individual be less favourably treated if s/he did not have the protected characteristic? If the answer is affirmative, one can conclude that the less favourable treatment was caused on a discriminatory ground.

Restrictions for men to accompany hospitalized children in the public medical institutions in the country is a systemic problem faced by male parents/custodians. This inability is considered as discrimination against men on the ground of sex, as well as discrimination against women on the ground of their gender, because it strengthens the stereotypical perception of the woman's social role, solely as mother and caregiver. This problem was raised for the first time in 2011 when the Ombudsperson Institution raised the issue in public, thus stating that this is discrimination on the ground of sex. In this period, the reaction of the Ombudsman mainly referred to the changes to the Rulebook on the content and manner of exercising rights and obligations from mandatory health insurance, according to which only the mother was given the right to accompany a hospitalized child. The respective discriminatory provisions underwent changes in the Rulebook so that male parents/custodians were given the opportunity to accompany children who are hospitalized. Nevertheless, the provision is not put in place by the public medical institutions, i.e. hospitals with children's departments. This is further verified by the case registered under Number 0615 in the archive of the Helsinki Committee, which was reported to the Helsinki Committee in 2015 by a male parent who was not allowed to stay with his hospitalized child in the children's clinic in Skopje, on the account that there are no conditions to accommodate male individuals to accompany children. In order to investigate whether the situation persists, the Helsinki Committee supported by the OSCE Mission to Skopje, conducted a situation testing of this problem in 2015. The findings of the testing proved the existence of discrimination.

In the *Luczak v. Poland*, before the ECtHR, a French farmer in Poland considered that he was discriminated against on the ground of nationality because he did not have access to a special social security regime, which was guaranteed only to Polish nationals (less favourable treatment on the grounds of nationality). The Court found direct discrimination in view of the fact that the applicant was in a comparable situation with Polish farmers, had a residence in Poland, paid taxes like citizens and contributed to filling in the social security budget, and was also part of the general social security regime. Accordingly, the unfavourable treatment on grounds of his nationality had no justification and thus the Court considered that constitutes discrimination.

2.1. Justification for direct discrimination

Justification for direct discrimination may vary depending upon whether one speaks about the anti-discrimination legislation of the European Union or the anti-discrimination law arising from the ECtHR. Namely, EU anti-discrimination legislation allows for the justification of direct discrimination only in exceptional cases, that is: measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of

public order and the prevention of criminal offences, for the protection of health, and for the protection of the rights and freedoms of others. (Article 2(5)); *genuine and determining occupational requirement* (Article 4(1)) when the person's religion or belief constitute a genuine, legitimate and justified occupational requirement (Article 4(2)); as well as in special cases aiming at adoption of affirmative measures (Article 7). That is, direct discrimination may be justified only when aimed towards the realization of a specific goal, as provided for in the anti-discrimination directives. However, all these specific exceptions are merely an articulation of the general exception, and were adjusted for the area of employment and labour relations. The three exceptions, along with their elements and specifics, are explained further in the text.

2.1.1. Protection of people's health and safety

The justification for direct discrimination for the purpose of protecting people's health and safety can be found in the anti-discrimination legislation of many countries, in particular on the following grounds: disability, health status, age, etc. Nevertheless, this exception requires a narrow interpretation.

In the case *Shtukaturov v. Russia*, the ECtHR found violation of Article 8 of the European Convention on Human Rights, given the fact that the interference with the private life of the applicant (who was completely incapacitated for an unlimited period of time, without the right to reviewing the decision, except upon request by the custodian), when less drastic measures, tailored to the respective individual, could have been taken, is unproportional to the legitimate goal of Russia, that is, the protection of people's health and safety (Shtukaturov v. Russia case, Application No.44009/05, from 27 March 2008). One may conclude that whenever this exception is applied, it must be supported by some rationale in order to be taken as relevant.

2.1.2. Genuine and determining occupational requirement

One special possibility to justify differentiation on some of the discriminatory grounds is the genuine and determining occupational requirement. Although it is theoretically accepted that the performance of certain tasks shall very rarely depend on the existence or inexistence of a certain protected characteristic of the individual; yet, in such cases, if the respective protected characteristic is used as a criterion for the selection of a candidate, one cannot speak about discrimination, but justified differentiation. Even so, an employer cannot easily utilize such a possibility, as it will have to be proved that, "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". According to the Court of Justice of the European Union, there are certain occupations that fall under this exception, such as for example: the occupation of an actor/actress. Namely, in the case *Commission v. Germany*, the Court listed some occupations that stipulate a genuine and determining occupational requirement, among which is the occupation of a dancer, according to which there is an open possibility not to employ a person with a disability when that person would be required to dance (Commission v. Germany case, Case 248/83 [1985], ECR

1459, from 21 May 1985). This exception may be applied to all grounds of discrimination, but it is believed that it would be most often applied to justify differentiation on the grounds of age, disability, race, or ethnic origin, etc. In any way, the employer is faced with a difficult task to prove the existence of a genuine and determining occupational requirement, for the reason that a protected characteristic itself is not a precise indicator of the individual's in/ability to perform a certain profession, while most often the differentiation itself or such criteria are based on existing stereotypes or prejudices.

Recital 18 of the Preamble to the Directive 2000/78/EC, explained below, provides for a more specific importance of this exception, and refers to certain public services with regard to safety and security, and reads as follows: "This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services". Despite the meaning that some of these positions require exceptional physical capacity, they may be inaccessible for individuals with certain types of disability, as well as for elderly adults on the ground of the legitimate goal "protection of safety and security".

With regard to religion or belief, this exception is diversified and covered in Article 4 paragraph 2, that is, discrimination is allowed on the ground of religion or belief by employers who are religious organizations (employers with a religious ethos). This exception should be narrowly interpreted.

2.1.3. Affirmative measures

Special cases in which affirmative measures[11] were pursued, can be considered as exceptions from the existence of discrimination, and serve as well-known concepts for combating discrimination and achieving substantive equality in the society. *Affirmative measures* are measures pursued by the state and public authorities, as well as natural persons and legal entities, which are or will be justified, and shall be pursued until complete factual equality is ensured.Affirmative measures are beneficial for an individual, group of individuals or community and/or aim to protect marginalized groups, i.e. to eliminate or reduce factual inequalities bearing in mind that the differentiation is justified and proportional to the goal, but also to ensure the natural development and effective realization of their right to equal opportunities compared to other individuals, groups of individuals or communities. Examples for such measures are the equal representation of all ethnic communities in the state and public administration, regular quotas as well as employment incentives for people with a disability or people of certain age groups (young, older people, etc.).

Affirmative measures need to be specific, time-bound and targeted and also aimed to challenge the prejudices against individuals who were, in fact, discriminated against, for the purpose of eliminating the existing inequalities and ensuring their prevention in future.

[11] There is various terminology used for the meaning of affirmative measures, such as: in the UN System they are called special measures, in the EU System they are called *specific measures or positive actions*. At other places, they may be called *affirmative measures* or *affirmative actions*.

Therefore, these measures should not be seen only as a political tool, but as a binding obligation for the realization of the right to equality.

According to the General comment No. 6 (2018) on equality and non-discrimination of the CRPD, the specific measures adopted by States parties under article 5 (4) of the Convention must be consistent with all its principles and provisions. In particular, they must not result in the perpetuation of isolation, segregation, stereotyping, stigmatization or other discrimination against persons with disabilities. Thus, States parties must consult closely with and actively involve representative organizations of persons with disabilities when they adopt specific measures (paragraph 29).

It is worth noting the question on the proportionality of affirmative measures, which is .rigorously examined by the CJEU in the cases *Kalanke, Marschall and Abrahamsson*, which concern the judicial review of the respective affirmative measures in the context of gender equality (Kalanke v. Freie Hansestadt Bremen, Case C-450/93, [1995] ECR I-3051, from 17 October 1995, Marschall v. Land Nordrhein-Westfalen, Case C-409/95, [1997] ECR I-6363, from 11 November 1997, and Abrahamsson and Leif Anderson v. Elisabeth Fogelqvist, Case C-407/98, [2000] ECR I-5539, from 6 July 2000). However, the Court, by and large, is prudent, and its approach does not allow for affirmative measures to rise above the fair treatment principle, that is, the substantive equality among the groups must not prevent equality among individuals. During the reexamination of these measures, the Court designed a test comprised of three steps, that is: in the *first step*, measures must assist to overcome the existing situation of inequality between the protected group and the other group in the society; in the *second step*, measures must respond to the test of adequacy, i.e. those measures should ensure overcoming the specific situation of lower representation of the affected group towards the others in certain areas of social life; and in the *third step*, such measures should not derogate from the principle of fair representation, which is the biggest challenge for the justification of affirmative measures. CJEU, however, allows for diversity in the choices made on a national level regarding the adequate affirmative measures taken by the member-states, as long as they are justified, appropriate and proportional.

In the *Mahlburg* case, the CJEU found discrimination and a violation of the principle of proportionality. The job candidate was a pregnant woman and applied for employment as a nurse for an indefinite period, with most of the work to be done in operating rooms. She was refused with the argument that working in operating rooms and exposure to dangerous substances would have a harmful effect on the baby. However, the Court did not accept this argument. The Court, in particular, proceeded from the fact that it was employment for an indefinite period, while her inability to work in the operating rooms was only temporary, due to her pregnancy. With that, the Court found a violation of the principle of proportionality. According to the Court, this refusal is disproportionate considering that her inability to work is temporary, and she is refused employment for an indefinite period of time.

Unlike the anti-discrimination law of the European Union which allows for only three exceptions to the justification for direct discrimination, according to the ECtHR, there is a general possibility for the justification of different treatment. This is

also valid for some EU member-states, such as: Finland, Portugal, Spain, Cyprus, Estonia, France and Great Britain. This solution may pose a problem since a broad possibility to justify discriminatory treatment puts into question the efficiency of the protection from a serious form of discrimination, such as direct discrimination. The positive aspect in this context is that this possibility for justification may result in a strictly understood need to find a comparator, which is one of the three essential elements of direct discrimination.

For example, there is a law adopted in Canada which stipulates that bodies and organizations performing public authorizations and having more than 100 employees, must implement programmes for affirmative measures in the case of lower representation.

Table No. 2: Exceptions to direct discrimination[12]

TYPE OF EXCEPTION	GROUND	EXAMPLE
Genuine and determining occupational requirements (GOR)	All grounds	It may be lawful to employ a Black actor to play the role of Othello or a Chinese chef in an authentic Chinese restaurant, or a woman who is a prima ballet dancer for a ballet performance
Affirmative measures	All grounds	Disability quotas in employment, extra language classes for minority racial or ethnic groups, financial incentives to promote employment of young and/or older workers.
Employers with religion or belief-based ethos	Religion or belief	It is lawful to employ only a member of given religious community to be head of a denominational school.
Armed forces and other specific occupations not covered	Disability and age	National law may provide that it is lawful not to employ a person over a certain age or with a certain disability as a soldier.
Family benefits	Sexual orientation	It is lawful to exclude same-sex partners from family benefits if same-sex couples can also get married in the member state.
Health and safety	Disability	It is lawful not to employ a disabled job seeker if his employment would inevitably lead to a breach of fire regulations.
Age related exceptions	Age	It may be lawful to set maximum restrictions on the age of recruitment for certain occupations. NOTE: this exception was subject to a number of challenges before the CJEU, including on maximum and minimum age requirements for pilots and firemen.
Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others	Disability, age, sexual orientation, religion or belief	National law may allow a registrar of births, deaths and marriages to be laid off if s/he refuses to conclude marriages of same-sex partners on the ground of his or her religious convictions.

[12] See: Farkash, L., Petrovski, S. 2012. Handbook for training judges on anti-discrimination legislation. OSCE Mission to Skopje..

The ECtHR have found that measures resulting in a difference in treatment between men and women were justified in order to compensate women for existing inequalities. In the case of *Andrle v. the Czech Republic*, the applicant complained that, unlike for women, there was no lowering of the pensionable age for men who had raised children. The Court found that this measure was objectively and reasonably justified so as to compensate women for the inequalities (such as generally lower salaries and pensions) and the hardship generated by the expectation that they would work on a full-time basis and take care of children and the household. It further held that the timing and the extent of the measures taken to rectify the inequality in question had not been manifestly unreasonable and that, consequently, there had been no violation of Article 14 of the ECHR in conjunction with Article 1 of Protocol No. 1.

3. Indirect discrimination

Indirect discrimination is a far more complex concept, which developed in some later stage when it was proved that even the equal treatment of individuals under given circumstances may produce inequality in results. That is to say, indirect discrimination exists when some kind of apparently neutral provision, criterion or practice has a special unfavourable effect on individuals with a certain protected characteristic unlike the others, unless such provision, criterion or practice is objectively justified with a legitimate goal and measures that are appropriate and necessary to achieve the goal. In general, indirect discrimination is based on the concept of substantive or material equality, where not only the treatment is *per se* relevant, but also, the effect of such treatment, which should not reflect differently (less favourably) on the people with the certain protected characteristic. Therefore, some legal systems, and especially the American, recognize this concept as discrimination with unequal effect *(disparate impact discrimination)*.

For example, in the case *Waters v. Public Transport Corporation*, the Australian Supreme Court found that the decision to replace the ticket collectors from tram-cars with a system of validator machines is indirect discrimination against people with disability, for the reason that those people used ticket collectors to assist them to enter and exit the tram-cars. Also, ticket validation machines would be problematic for people with impaired sight and arm dexterity/people with reduced ability to functionally use arms, who may also be prevented from using this type of public transportation (Waters v. Public Transport Corporation, HCA 94, [1991]).

Indirect discrimination entails three mutually related elements which must be present if one claims that this type of discrimination took place, that is: *first*, the existence of apparently neutral provision, criterion or practice; *second*, which has a disproportional negative effect on a given group of individuals with a protected characteristic (discriminatory ground); and *third*, in comparison with other individuals in a similar situation who do not have the respective protected characteristic.

The first element, i.e. the existence of apparently neutral provision, criterion or practice, means that it does not directly differentiate on some discriminatory ground. For example, the Supreme administrative court of Bulgaria, in one case, found that the provisions of the

Regulation on implementation of the national law on education, that prohibits the students from completing the same degree of secondary education twice, indirectly discriminates against students with mental disability. According to the Court, this apparently neutral provision has a less favourable effect on people with disabilities, for the reason that they have fewer opportunities to acquire professional qualifications and to find employment afterwards, which will contribute to their social inclusion on equal grounds with others.[13] According to the ECtHR case law, indirect discrimination may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, has a particular discriminatory effect on a particular group (*Biao v. Denmark*, paragraph 103; *D.H. and Others v. the Czech Republic*, paragraph 184; *Sampanis and Others v. Greece*, paragraph 67).

Although the policy or measure at stake may not be specifically aimed or directed at a particular group, it might nevertheless discriminate against that group in an indirect way (*Hugh Jordan v. the United Kingdom*, paragraph 154). Indirect discrimination does not necessarily require a discriminatory intent (*Biao v. Denmark*, paragraph 103). Moreover, indirect discrimination may arise from a neutral rule (*Hoogendijk v. the Netherlands*), from a de facto situation (*Zarb Adami v. Malta*, paragraph 76) or from a policy (*Tapayeva and Others v. Russia*, paragraph 112).

The second element of indirect discrimination is that the above stated, apparently neutral provision, criterion or practice, has a disproportional effect on a given group of people with protected characteristics. The key difference between direct and indirect discrimination is that the focus shifts from the treatment to the effect of that treatment. An interesting fact that deserves particular consideration is the way to measure the negative, i.e. disproportional negative effect of a given provision, criterion or practice on people, on the given discriminatory ground. Difficulties arise in view of the qualitative determination of that part of the group which is negatively affected by the given provision, criterion or practice. Different national legislations as well as case law provide interpretations on this matter; however, as a matter of principle, this form of discrimination requires that a significant part of the group is negatively affected by the respective provision, criterion or practice. For example, the law in Poland requires that the whole group, or a significant part thereof is affected, while in Great Britain evidence will be required to prove that a given measure puts the individual and the affiliated group in a less unfavorable position. Nevertheless, experiences have shown that it would be better to avoid giving proof of the specific percentage of disproportionality in the effect of a certain neutral provision, criterion or practice on people with a protected characteristic.

In the case *Horváth and Kiss v. Hungary*, concerning two young Roma applicants who were diagnosed with mild mental disability as children and therefore sent to a "special" school, the European Court of Human Rights found indirect discrimination on the part of the state. In this particular case, the Court carefully examined if, and to which extent, special protective measures were applied to prevent misdiagnosis which, in turn, is the reason for sending children to special schools or classes with curricula that may be detrimental to their future educational

[13] See: Supreme Administratuve Court of Bulgaria, Decision 1964, from 15 February 2010. The judgement was pronounced on the appeal of the Decision No.87, from 28 May 2009

process. The Court held that Roma children are overrepresented in "special" schools as consequence of the apparently neutral measure which was not specially targeting Roma, but disproportionally affected them as a vulnerable group. The ECtHR held that this disproportionate effect is noticeable even if the policy or the testing in question may have a similar effect on other socially disadvantaged groups as well. (paragraph 110). The Court established that the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in regular schools, and where they were isolated from the general population. As a consequence, they received an education which did not offer the necessary guarantees stemming from the positive obligations of the State to undo a history of racial segregation in "special" schools. Furthermore, the Court held that the education provided might have compounded their difficulties and compromised their subsequent personal development, instead of helping them to integrate into the ordinary schools and develop their skills (paragraph 127) (Horvath and Kiss v. Hungary, App. No. 11146/01, from 29 January 2013).

In the case *D.H*, elaborated above, the Grand Chamber states that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence (paragraph 188). The judgement continues by elaborating that the Court observed that the statistics presented by the applicants were not disputed by the Government and that they had not produced any alternative statistical evidence, stating that "In view of their comment that no official information on the ethnic origin of the pupils exists, the Court accepted that the statistics submitted by the applicants may not be entirely reliable. It nevertheless considers that these figures reveal a dominant trend that has been confirmed both by the respondent State and the independent supervisory bodies which have looked into the question." (paragraph 191).

The third element of indirect discrimination refers to the existence of comparator. For example, in the case *Jolanta K. v. Carrefour Polska*[14], the applicant, a person with impaired sight, was not allowed to enter a shop with her guide dog which was adequately marked, for the reason that according to the internal rules of *Carrefour*, dogs were not allowed in the shop. In the amicable resolution of the case, *Carrefour* obligated itself to pay damage compensation to the applicant, and to change the internal rule (apparently neutral, but with a significant unfavourable effect on people with impaired sight) to allow the entrance of blind people with their guide dogs, as long as the guide dogs are adequately marked.

In a case in which the applicants claimed that in accordance with the existing legal regulations, women owners of agricultural holdings, registered individual farmers, do not have the right to compensation for wages during absence from work due to pregnancy, childbirth and maternity, i.e. paid maternity leave, as well as paid sick leave (together with the male farmers), the CPPD found indirect, prolonged and intersectional discrimination on grounds of sex, gender, personal status (farmers from rural areas) and belonging to a

[14] See: Regional Court of Warsaw, Jolanta K. v. Carrefour Polska Sp.z.o.o, complaint filed on 6 May 2008.

marginalized group carried out by the Ministry of Health. In its argumentation, the CPPD considered that individual farmers, who are compulsory health insurers, based on the intersectional grounds of sex, gender, personal status and belonging to a marginalized group, are placed in a less favourable position compared to other compulsory insurers who fully exercised their rights deriving from the same health insurance. The CPPD considered that in this case it is a matter of prolonged discrimination - as a severe form of discrimination - because it was carried out continuously, and uninterruptedly, for a long period of time. (Complaint no. 08-574/1 from 07.11.2022, Opinion from 02.03.2023).

3.1. Justification for indirect discrimination

Indirect discrimination is the subject of a general possibility to justify different treatment, regardless of whether it concerns the antidiscrimination legislation of the European Union, or one that arises from the ECtHR. Specifically, any differentiation may be justified based on the proportionality test, i.e. it pursues a legitimate goal and the differentiation is proportionate to the goal. As construed by the ECtHR, "... a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized" (*Religionsgemeinschaft der Zeugen Jehovas v. Austria*, paragraph 87 and *Burden v. United Kingdom*, paragraph 60). Therefore, the Court will proceed to a so-called "proportionality test" divided into two steps: *Firstly*, it will examine the existence of a legitimate aim and, *secondly*, it will check the proportionality *stricto sensu* of the difference in treatment.

The general proportionality test does not provide clear guidance to institutions authorized for protection from discrimination (courts, equality bodies, Ombudsperson) in terms of what can be accepted as a legitimate goal in order to justify differentiation on a given protected characteristic, as well as situations when the requirement for proportionality between the differentiation and the pursuing of the goal, is met. Hoping for some concrete answers, the test itself leaves quite a lot of space to the institutions to decide whether the test meets the requirement or not, having in mind the relevant circumstances of the case.

With regard to the existence of a legitimate goal, the case law of the CJEU reveals that it would rarely accept justification for different treatment based on certain attitudes of the management related to the employer's concern about economic implications Contrary to this notion, the Court would accept a situation in which different treatment is based on a broad understanding of the objectives of social policy, or employment policy, with certain fiscal implications. In that case, the CJEU would allow broad margin of discretion to the member-states. On the other hand, according to the jurisprudence of the ECtHR, in order to justify a difference in treatment, in the first place States have to show that there is a "link" between the legitimate aim pursued and the differential treatment alleged by the applicant. For example, the Court found that there was no link between the aim of preserving family unity and the bearing of a joint family name based on the husband's name, resulting in a lack of justification of the obligation on married women to bear their husband's surname (*Ünal Tekeli v. Turkey*, paragraph 66). The ECtHR would

rarely accept justification for different treatment when it concerns matters closely related to personal dignity, such as discrimination against private and family life, and would accept it if the different treatment is based on a broad social policy, especially when the policy generates some fiscal implications. In such a case, the ECtHR would allow a broad margin of appreciation to the member-states, i.e. the discretionary right of the states to decide about the justification of different treatment. Whenever there is narrow margin, the ECtHR accepts reexamination by a higher instance. One can note that the states have various experiences on this matter, however, the automatic exclusion of a certain group by invoking some legitimate goal is uncharacteristic for most of those countries.

According to the Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, the Court has identified a number of aims that can be considered acceptable for the application of Article 14, such as:

- achieving the effective implementation of a policy developing linguistic unity (*the Belgian linguistic case*);
- legal certainty of completed inheritance arrangements (*Fabris v. France*);
- restoration of peace (*Sejdić and Finci v. Bosnia and Herzegovina*, paragraph 45);
- protection of national security (*Konstantin Markin v. Russia*, paragraph 137);
- providing a public service wholly committed to the promotion of equal opportunities and requiring all its employees to act in a way which does not discriminate against others (*Eweida and Others v. the United Kingdom*, paragraph 105);
- maintenance of economic stability and restructuring of the debt in the context of a serious political, economic and social crisis (*Mamatas and Others v. Greece*, paragraph 103);
- facilitation of rehabilitation of juvenile delinquents (*Khamtokhu and Aksenchik v. Russia*, paragraph 80);
- protection of women against gender-based violence, abuse and sexual harassment in the prison environment (*Khamtokhu and Aksenchik v. Russia*, paragraph 82); or
- protection of the environment.

Finally, the aims indicated by the States to justify differential treatment may be considered legitimate only if certain safeguards are put in place, and it is the ECtHR's task to examine whether such safeguards exist at each stage of the implementation of the measures, and whether they are effective.

As far as the second part of the justification/exception is concerned, the CJEU in the case *Bilka-Kaufhaus GmbH v. Weber Von Hartz*, which refers to gender discrimination, stated that appropriateness shall imply the inexistence of other measures to pursue the legitimate goal and impose less interference with the right to equality. In other words, such inequality implies the minimal level of damage that is required to pursue the given goal. Necessity is valued by considering whether the goal that is to be achieved is sufficiently relevant to justify the interference on this level. These two elements are very important to prove proportionality; and the Court should always take into consideration whether the decision-maker could have achieved the same legitimate goal by some other form or measure, and not the measures that disproportionally affect a particular group due to its protected characteristic.

The CJEU considered the issue of indirect discrimination in the *Hilde Schönheit* case, assessing whether discrimination exists when pensions for part-time employees were calculated according to a different rate than the rate provided for full-time employees. The different rate existed even though full-time and part-time employees would have the same number of hours worked, but in different time intervals. Thus, this rate was considered as a neutral rate, which was applied equally to all part-time workers. However, considering the fact that about 88% of part-time employees were women, the effect of this neutral norm, i.e. rate, was such that it had a disproportionately negative effect on women in comparison with men. With that in mind, the CJEU established indirect discrimination on grounds of sex. The CJEU dismissed the argument of the Government, which claimed that the measure in question was a corrective of the pension system, which tried to make it fair between its members. The CJEU did not consider that such an argument can justify indirect discrimination on the grounds of sex.

According to the ECtHR's case law, States enjoy a certain margin of appreciation. The scope of that margin will vary according to the circumstances, the subject-matter and the background of the case. The ECtHR has indicated some areas where the State's margin of appreciation remains rather wide, such as for example: assessing public interest on social or economic grounds, general measures of social strategy, and property. On the other hand, the Court has also identified certain grounds of discrimination where such a margin is reduced. Indeed, the Court has held time and again that no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin was capable of being objectively justified in a modern democratic society built on the principles of pluralism and respect for different cultures (*D.H. and Others v. the Czech Republic*. paragraph 176; *Sejdić and Finci v. Bosnia and Herzegovina*, paragraphs 43-44). Similarly, differences in treatment on the basis of gender or sexual orientation may only be justified by very weighty reasons (*Konstantin Markin v. Russia*, paragraph 127; *Schalk and Kopf v. Austria*, paragraph 97). One of the criteria used by the ECtHR to define the State's margin of appreciation in discrimination cases is the existence and the extent of a consensus among States on the issue at stake.

4. Harassment

Harassment is a more recent emergent form of discrimination, which is mostly present in the European Union anti-discrimination law and which was introduced to enable more rational protection. Although harassment used to be considered as a specific manifestation of direct discrimination, yet it was singled out as separate emergent form of discrimination in the anti-discrimination directives..

ECHR does not expressly prohibit harassment, but considers it as a breach of substantive rights, and in conjunction with violations of Article 14 of the Convention. That is, harassment may be viewed, for instance, from the aspect of violation of Article 3, Article 8 or Article 11 of the Convention (*Bączkowski and Others v. Poland*, and *Paraskeva Todorova v. Bulgari*a).

The case of Oganezova v. Armenia concerned an aggressive homophobic campaign and harassment of a well-known member of the LGBT community in Armenia, culminating in an arson attack on a bar she co-owned. In the following weeks, she and her staff were intimidated and harassed by groups of people gathered outside the bar and the property was vandalised. Parliamentarians and high-ranking politicians made intolerant statements, publicly endorsing the actions of the perpetrators of the arson attack. The applicant was also subjected to death threats and abuse, including online hate speech, leading her to permanently leave Armenia and request asylum in Sweden. The Court found that the authorities had failed to protect the applicant from harassment as well as to carry out an effective investigation into the incidents.

Harassment on discriminatory grounds entails two constituent elements, that is: *first*, the occurrence of an unwanted act which is related to a discriminatory ground and/or the creation of an intimidating, hostile, degrading or offensive setting; and *second*, there is an intention or effect to compromise the dignity of an individual with a protected characteristic. Unwanted conduct can mean any type of conduct, including speech or writing or maltreatment, pictures, graffiti, gestures, facial expressions, mimicry, jokes or physical contact. An incident of sufficiently serious extent may be considered as harassment. Unlike in direct and indirect discrimination, there is no need for finding a comparator in order to prove harassment.

This illustrates the fact that harassment is wrongful given the form it takes (verbal, non-verbal or physical abuse) and the potential effect it might have (violation of human dignity). It is worth noting that when determining the existence of harassment, the Court relies on the victim's alleged perception about the given act. For instance, in the case *Coleman*, CJEU found violation of the EU Directive on equal treatment in employment and occupation, for the reason that harassment was established on the ground of disability, or more specifically, towards a mother of a child with disability, and that was solely based on the disability of her child.

Furthermore, even if the victim does not experience the effects of the harassment, yet, harassment can be determined if the complainant, in fact, is the subject of the act being reviewed. It can be illustrated through an example of the former Commission for Protection from Discrimination, that is, the Commission determined harassment on the ground of sexual orientation because of the contents in the textbook for secondary education on the subject "Pedagogy" which inappropriately reflect

homosexuality (Commission for Protection from Discrimination, No.13/11 from 22 March 2011).

In the case *P4 no. 775/19* before the Basic Civil Court - Skopje, a violation of the right to equality and dignity with discrimination and harassment and the creation of a humiliating environment was established on 19.12.2017. The discriminator - the Inter-Municipal Centre for Social Work of the City of Skopje - violated the right to equality of six minors on the grounds of their ethnicity and belonging to a marginalized group as children who visited the Day Centre for street children. (Judgement P4 no. 775/19 of 22.04.2021 of the Basic Civil Court - Skopje).

Finally, in view of harassment at the workplace, the directives do not provide for clear answers about the employer's responsibility when harassment was experienced from another worker or from third parties, for example, buyers. As stated before, most of the EU member-states regulate this matter in their national legislation, by expressly specifying the responsibility of the employer for the conduct of his employees; however, this is done in varying forms and variable intensity. For example, there are countries that also prescribe special obligation for the employer to take measures for prevention or correction whenever harassment was experienced, such as Germany, Ireland, Sweden, the United Kingdom and Croatia.

For instance, the case law in the United Kingdom in the case *Mairowski v. Guy's and St. Thomas's NHS Trust* shows that it is the employer's responsibility for the conduct of his employees, especially when a worker experiences harassment from another worker, inasmuch as it is related to the performance of tasks at the workplace. See: House of Lords, UKHL 34, IRLR 695, Mairowski v. Guy's and St. Thomas's NHS Trust, from 12 July 2006.

Sexual harassment is singled out as a separate type of harassment both in the national law and in European legislation. It is primarily related to labour and labour relations, having in mind the stereotypical role of women's inferiority, the position of power which is used to pressure for sexual activities, as well as the increasing susceptibility of women to this type of harassment. Presently, protection from sexual harassment equally applies to both genders and the different sexual orientations of the victims of harassment.

Acting upon a complaint, CPPD determined that with the presented content in a certain show through sexual objectification of the appearance of the complainant, the presenter caused a violation of her dignity and created a threatening, hostile and humiliating environment, thereby committing sexual harassment on grounds of sex and gender in the area of public information and media. CPPD recommended that the controversial content be removed and that the presenter publicly apologize in his show and refrain from presenting content that causes anxiety in the future (*Complaint no. 08-343/1* from 20.06.2022, Opinion from 15.09.2022).

5. Calling, inciting and instructing to discriminate

Calling, inciting and instructing to discriminate means any action taken by an individual, directly or indirectly, to call, incite, cause, encourage, instruct or induce another person to discriminate against. Calling, inciting and instructing to

discriminate entails the direct and indirect calling upon, encouraging, instructing or inducing another person to discriminate against someone.

In the case of *Timishev v. Russia*, the ECtHR noted that a senior police officer ordered traffic police officers not to admit "Chechens". As, in the Government's submission, a person's ethnic origin is not listed anywhere in Russian identity documents, the order barred the passage not only of any person who actually was of Chechen ethnicity, but also of those who were merely perceived as belonging to that ethnic group. It was not claimed that representatives of other ethnic groups were subject to similar restrictions. In the Court's view, this represented a clear inequality of treatment in the enjoyment of the right to liberty of movement on account of one's ethnic origin.

As is the case with harassment, there is no need for finding a comparator in order to prove calling, inciting and instructing to discriminate.

For instance, night club owners give instructions to doorkeepers that they should not allow the entrance of visitors based on their race, or property owners give instructions to real estate agents not to lease or sell their property to ethnic minorities. Also, there are examples when employers give instructions to agencies for part-time jobs, not to consider employees over certain age.

In one case before the Bulgarian courts, a member of parliament, in several statements, verbally attacked Roma, Jews and Turks, as well as foreigners in general. The comments stated that these communities in Bulgaria hinder Bulgarians from running their own country, committed crimes, deprived Bulgarians of their rights to health care, and other similar accusations. With these statements, citizens were urged to prevent the state from becoming a "colony" of these groups. In this case, the Regional Court in Sofia found harassment and an instruction to discriminate (Regional Court in Sofia, *Decision number 164 for civil dispute 2860/2006* of June 21, 2006).

Under the EU anti-discrimination directives, explained further in the text, the instruction to discriminate was singled out as separate form in which discrimination occurs, even though directives fail to define its scope. In Bulgaria and Croatia, for example, only the premeditated instruction to discriminate shall be considered as discrimination, while in other countries there is no such restriction. Furthermore, if this form of discrimination is to be considered relevant, it should not be only limited to the instructions which have a mandatory nature, but also include situations when excessive preference is demonstrated or incitement to treat less favourably certain groups of people merely because of their protected characteristic. It is very likely that this form of discrimination will evolve through the case law of the international, as well as the national, courts in the following period. Some EU member-states have not yet transposed the Directive 2000/78/EC that stipulates that the instruction to discriminate is a separate form of discrimination. For example, on 20 November 2009, the European Commission communicated a reasoned opinion to the UK concerning the wrongful implementation of the Directive 2000/78/EC, since the national legislation fails to include a clear prohibition for the instruction to discriminate. The case law, especially in the case *Weathersfield Ltd (t/a Van & Truck Rentals) v. Sargent*, explicitly proved that although the instruction to discriminate is not expressly stipulated,

it still falls under the special form of discrimination – "less favourable treatment due to protected ground". This deficiency was eliminated with the adoption of the new Law on Equality from 2010 which expressly prohibits this particular form of discrimination.

In the *Complaint No. 0801-157/1* dated 19 July 2017, the complainant states that a particular person with his Facebook status offends members of the Roma community. In the Facebook text, the word "gypsy" is used, which etymologically has the meaning of an unclean person, who should not be touched, who deals with magic and fortune-telling. There were more than 120 comments on the status, which, in general, had a negative and disturbing content towards the members of the Roma community. Due to this status and the context in which was written, the formed CPD, in its Opinion number 0801-157 from 26.09.2017, found harassment (due to the disturbing consequences that such a text has towards the members of the Roma community), as well as calling, inciting and instructing and inciting to discrimination.

6. Reasonable accommodation

The concept of equality entails also the different treatment of unequals. This is the founding base of the legal institute – reasonable accommodation. This legal institute applies mainly with regard to people with disabilities. According to Article 2 of the UN Convention on the Rights of People with Disabilities (CRPD), reasonable accommodation shall mean "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". Although the obligation for reasonable accommodation occurs and is equally important in all areas of society, it is predominantly present in the area of labour relations. The purpose of every such accommodation, especially in this area, is to enable a person with a disability to have effective access to employment, to participate or to be promoted at work, as well as to be enabled vocational guidance programmes or additional education. The type of accommodation that is most appropriate can be decided only through individual analysis that takes into account the situation of the person with a disability, as well as the respective employment, work or training. Thus, reasonable accommodation is always related to an individual assessment and individual solution, and does not imply identical solutions for the whole group. Therefore, reasonable accommodation does not cover a whole group of people with disabilities *per se*, but a particular person with a disability and her/his needs.

Nonetheless, the obligation for reasonable accommodation is not infinite, but it is also subject to certain restrictions. One of the most difficult questions is how to set the limits for this obligation, which varies on a case-by-case basis. The solutions provided by law cannot cover a complete and exhaustive list of all types of reasonable accommodation that would be proposed to employers. In any case, there should be one general definition accompanied with an illustrative list of the types of reasonable accommodation, such as, for instance: reduced office hours, reduced scope and type of assignments, procedure for returning to employment, access to

parking lots, adequate procedures for interviewing candidates for employment or testing, etc.

The Committee on the Rights of Persons with Disabilities in its jurisprudence, in the case *Gemma Beasley v. Australia*, and as in the case *Michael Lockrey v. Australia*, stated that the State party has not taken the necessary steps to ensure reasonable accommodation for the author and concludes that the refusal to provide Auslan interpretation or steno-captioning, without thoroughly assessing whether that would constitute a disproportionate or undue burden, amounts to disability-based discrimination, in violation of the author's rights under article 5 of the Convention (paragraph 8.4 and paragraph 8.5 respectfully).

In addition, in the case *F v. Austria*, the CRPD stated that non-installation of the audio system by the State party when extending the tram network resulted in a denial (for persons with sensory disability) of the access to information and communication technologies and to facilities and services open to the public on an equal basis with others, and therefore amounts to a violation of articles 5 and 9 of the Convention (paragraph 8.7).

Also, there are many examples of this type that come before the national courts. For instance, one particular case reviewed by the equality body in Cyprus refers to the applicant with impaired sight, who took the exam for becoming a civil servant. He requested additional time to complete the test and was allowed an additional 30 minutes; however, that time was then deducted from the time allowed for a break to all individuals who took the exam. The equality body, in its opinion concluded that there is no standardized procedure that will be applied to value whether and when reasonable accommodation should be made. In addition, the equality body held that this was not sufficiently provided in the concrete case, that is, conditions were not created that will enable the applicant to compete on equal ground with the others, thus emphasizing the understanding that unequals should be treated differently, that is, more favourably (Equality Body Cyprus, Ref. A.K.I. 37/2008, from 8 October 2008).

Complaint no. 2447/17 submitted by a citizen who could not exercise his right to vote independently with the help of Braille, unaccompanied by a personal assistant. Namely, on the day of voting, he did not receive an auxiliary voting template from the Electoral Board, so he had to vote with an escort. According to the information of the President of the Electoral Board, the voting templates for blind people were not delivered with the voting material. OI has recommended that it is necessary to provide the Braille templates to all voting places so that blind people can exercise their right to vote independently and on equal basis with others (OI, 2017 Annual Report, p. 120).

Also, no matter what the definition of the obligation may be, it implies giving preference to the consideration of opportunities for people with disabilities on an individual basis, and encompasses various ways in which it can be ensured. The reasonable accommodation in the area of employment and labour relations, includes three processes: the process of applying for a certain job or training; the process of performing the work, including the working premises; and the enjoyment of the benefits and privileges from employment.

In the judgment of the French court in the case *Boutheiller*, the Court found violation of the obligation for reasonable accommodation for people with disability on the part of the Ministry of Education. The applicant, a person in a wheelchair, took legal action against the Ministry of Education for not having assigned him to a certain position for the reason that the respective job was situated in an inaccessible building. The applicant was offered a job in the other department that was accessible for people in wheelchairs. The state justified its decision on the account that it is not in the public interest to invest funds in the renovation of premises in order to meet the obligation for reasonable accommodation for people with a disability. The Court held that such an obligation cannot be reduced merely on the basis of certain attitude of the management, such as "interest of public service", and established violation of the obligation (Rouen Administrative Court, Boutheiller v. Ministère de l'éducation, Judgment No.0500526-3, from 24 June 2008).

The obligation for reasonable accommodation should be seen as an element of the non-discrimination principle, but as different from the affirmative measures. Naturally, one raises the following question: if reasonable accommodation is seen as part of the anti-discrimination framework, does it entail only the negative obligation, i.e. the unjustified non-provision of the reasonable accommodation which is considered to be discrimination, or also the positive obligation, i.e. the right to accommodation? Article 5 of the Directive 2000/78/EC, explained further in the text, which stipulates that the obligation for reasonable accommodation creates the positive obligation, and even though it fails to expressly include the provision that unjustified non-provision of reasonable accommodation is considered as discrimination. This position is held in the legislation of almost all EU member-states, except for some member-states which opted for the stipulation of the negative obligation, such as: Sweden, Belgium, Austria and Luxemburg.

As previously explained, people with disability who are capable and qualified to perform certain employments are the ones who can benefit from reasonable accommodation. Determination of this criterion implies a dual approach. First, a determination of the basic elements of the working position/job (which is done on case-by-case basis) and assessment of whether the person with disability is qualified to perform the work by use of reasonable accommodation, and second, specify the exact reasonable accommodation required.

Based on comparative considerations, in order to be able to determine whether there is reasonable accommodation, one can apply the test comprised of two phases, that is: *first*, establish if the accommodation is appropriate/ reasonable, i.e. is it possible and does it respond to the needs of the affected person (is the person with disability enabled to do the work on regular basis?) and whether it is necessary; and *second*, will the accommodation result in a disproportional burden for the employer? The test is presented in the Explanatory Memorandum to the Act on Equal Treatment on Grounds of Disability and Chronic Illness in the Netherlands. Specifically, reasonable accommodation is viewed separately from the matter of disproportional burden, since the focus is on the potential to ensure equal opportunities for people with disability, and not on the costs.

On the other hand, when speaking about "disproportional burden" one should bear in mind that the justification of the obligation for reasonable accommodation is not based on the employer's economic productiveness, but on the equality of opportunities for people with disability. Different legislations prescribe different elements which are applied to evaluate whether the costs for the accommodation were proportional or not.

The following elements are common for most legislations, that is:

- Nature and cost of accommodation;
- Overall financial costs, including the benefits from the accommodation, for example in Bulgaria, Cyprus, Finland, France, Germany, Ireland, Malta, Spain and the UK;
- Overall financial resources of the affected legal entity, for example in Austria, Finland, Ireland, Malta, Slovakia and the UK, and
- Type of activity of the legal entity, including the structure and type of the labour force.

Furthermore, due attention is given to the fact that the reasonable accommodation would bring some external benefits, such as, for instance: increased access to goods and services for the consumers with disability. Eventually, it needs to be taken into account that not all employers can be treated identically, as higher criteria should apply for larger legal entities compared to smaller legal entities, and the same refers to the public versus the private sector. The public sector should be the model that is followed by the private sector, but also a source of financial and other assistance to secure reasonable accommodation for people with disability. The options for financial assistance and other support to secure reasonable accommodation for people with disability are stated as criteria in, for example, Austria, Cyprus, Finland, France, Germany, Ireland, Malta, Netherlands, Portugal, Spain, Slovakia and the United Kingdom. However, an interesting fact is that different legislations prescribe different levels of reasonable accommodation, as well as different extents of assistance and support provided by the state.[15]

According to the ECtHR's case law, the protection of persons with disabilities includes an obligation for States to ensure "reasonable accommodation" to allow persons with disabilities the opportunity to fully realise their rights, and a failure to do so amounts to discrimination (*Çam v. Turkey*, paragraphs 65-67; *Enver Şahin v. Turkey*, paragraph 60; *G.L. v. Italy*, paragraph 62). The Court has considered that "reasonable accommodation" may take a variety of forms, whether physical or non-physical, educational or organisational, in terms of the architectural accessibility of school buildings, teacher training, curricular adaptation or appropriate facilities; any such definition, however, being in principle placed on the national authorities, and not the Court.

The case *Çam v. Turkey*, referred to the refusal of the applicant - a visually impaired girl - to enroll as a student at the Turkish National Music Academy. Even though Ms. Cham demonstrated adequate abilities to play the Turkish flute (saz) and passed the entrance exam, she was rejected by the Dean's Office because the music courses were not accessible to visually impaired persons and required her to provide a certificate issued by the medical administration that she can follow them. The ECtHR observed that the refusal to enrol the applicant in the Music Academy

[15] See: Poposka, Z., Shavreski, Z., Amdiju, N. 2014. Guide for reasonable accommodation. OSCE Mission to Skopje and Commission for protection from discrimination.

was based solely on the fact that she was blind and that the domestic authorities had at no stage considered the possibility that reasonable accommodation might have enabled her to be educated in that establishment. That being the case, the Court considered that the applicant was denied, without any objective and reasonable justification, an opportunity to study in the Music Academy, solely on account of her visual disability. It therefore finds that there has been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 (paragraph 69).

In 2021, the CPPD adopted a general recommendation for the promotion and protection of the human rights and dignity of convicted persons with disabilities and respect for their physical and mental integrity during the serving of sentences in penitentiary and correctional institutions. At the same time, among other things, CPPD recommended that the Bureau for the Execution of Sanctions should prepare an action plan for measures and activities, and to provide financial resources to enable full infrastructure accessibility to and in the facilities where convicted persons with disabilities are housed, which will ensure their freedom of movement with medical devices, as well as measures and activities for the reconstruction of sanitary facilities and appropriate hygienic conditions in them. In addition, the CPPD recommended to the managers of the penitentiary and correctional institutions to ensure that the facilities in which the ambulances providing health care for convicted persons are located, are fully accessible for persons with disabilities, and equipped with health equipment adapted to the needs of persons with disabilities. Finally, it was recommended to ensure unhindered access to secondary and tertiary health care for persons with disabilities (General Recommendation from 03.12.2021). In addition, the same year – 2021, CPPD adopted one more general recommendation in relation to the grounds of disability, recommending that the State Election Commission - in the shortest possible time - take all the necessary actions in the direction of ensuring the accessibility and reasonable accommodation of the polling stations, which will enable equal access to persons with physical disabilities to and in the polling stations throughout the country (General Recommendation from 03.12.2021).

Former CPD, in *Opinion number 07-922* of 03.27.2014, found discrimination on the grounds of disability in access to goods and services. The case concerned a 17-year-old person with a combined disability who cannot leave his family house without an escort for a long period of time because there is no curb or sidewalk at the exit from the yard, that is, he immediately exits onto the busy street itself. Although the father and grandfather of the person addressed the municipality several times with the request to place curbs and a sidewalk on the street around the house, the municipality did not take any action. Due to non-action and non-construction of the sidewalk for a period longer than 3 years, CPD found discrimination. For the same case, a court procedure was conducted in which the Basic Court Delchevo, with judgment *P-4 no. 14/2014* from 05.03.2015 found discrimination.

7. Segregation

Segregation implies a systemic form of discrimination, that poses problems in the society, and therefore, addressing segregation is considered to be in the public interest. However, there is no uniform approach in terms of whether segregation can be considered direct discrimination, indirect discrimination, or a *sui generis* form of discrimination.

Within the competencies based on its unique concept of discrimination, ECtHR is driven by the concept of segregation that was developed by the European Commission against Racism and Intolerance (ECRI). In its General Policy Recommendation No. 7, ECRI defines segregation as "the act by which a (natural or legal) person separates other persons on the ground of race, skin colour, language, religion, nationality or national or ethnic background without an objective and reasonable justification, in conformity with the proposed definition of discrimination". The main elements of the definition are as follows: *first*, separation of an individual or group of individuals, *second*, from other individuals/groups in comparable situations, and *third*, without their informed consent/request and without being explicitly allowed by law. For example: the separation of Roma children from non-Roma children in the school, special sections of the coffee shop for guests with a different ethnic origin, failure to ensure inclusion of person with a mild mental disability in the educational process, forced concentration of population from a certain ethnic community or religious group in one part of the settlement, etc.

The first element of segregation is the physical separation. It also derives from the etymological meaning of the word segregation, from the Latin expressions "separate" (lat. *se*) and "from the herd" (lat. *greg*), thus creating the verb that means separation, partition or segregation (lat. *segregare*). Thus, the main element of segregation is the physical separation of persons. For example, separation on grounds of gender may not constitute discrimination (segregation), as long as members of both sexes, receive the same services or the same quality of service, and there is an objective and legitimate justification for the separation. However, in cases where there is duplication, and the members of the groups do not receive the same services or same quality of that concrete service and there is no objective justification for it, then it is a question of segregation. *Oršuš and Others v. Croatia* found that the temporary placement of children in a separate class on the ground that they lack an adequate command of the language is not, as such, automatically contrary to Article 14 of the Convention. Importantly, the Court held that when such a measure disproportionately or exclusively affects members of a specific ethnic group, then appropriate safeguards must be put in place. It was further highlighted by the Court that language difficulties were not adequately addressed simply by placing the applicants concerned in a Roma-only class.

Taking into account the importance of the prohibition of racial discrimination, even with the actual consent of the persons concerned, the ECtHR held that no waiver of the right not to be subjected to racial discrimination can be accepted, because it is not only for a personal right that can be waived, as it would be counter to an important public interest (*D.H. and Others v. Czech Republic*, [GC] App. no. 57325/00, Judgement of 13 November 2007, paragraphs 202-204).

The former CPD, in cooperation with the OSCE Mission to Skopje, in 2014, conducted research to determine if Roma children are segregated in the educational process. The research showed evident high percentage of segregated Roma children, in the period from 2010-2014, both in regular schools as part of the regular and special classes, and also in special schools, which amounts to indirect, systemic and persisting discrimination. The problem is most prominent in the following municipalities: Stip, Kocani, Bitola, Kisela Voda, Kumanovo, Vinica, Prilep, Delcevo, Kavadarci and Bitola, but the percentages in other municipalities should not be neglected. Based on research data, in the course of the 2010/2011 school year, the categorized Roma children in regular classes accounted for 63% in Vinica and 77.78% in Stip in the special classes. The same trend was noticed during the 2011/2012 school year. The highest percentage was noticed in Vinica with regard to regular classes – 65 % -- and in Stip with regard to special classes: 78.38%. During the 2012/2013 school year, the percentage was highest in Stip regarding the regular classes – 35.29 % and in Prilep regarding the special classes, 66%. During the 2013/2014 school year, in regular classes, the highest was the percentage of categorized Roma children in Delcevo – 55.55% -- while the highest percentage with regard to special classes was noticed in Prilep, 63%. Given that the analysis includes the 2010/2011 school year as a starting year and 2013/2014 as the final year, in general, one cannot notice a significant downward trend in the number of categorized Roma children in regular classes. Also, no decline was noticed in Stip, where the percentage is quite high, as well as in Debar: 33%, and in Vinica, 63%. The changes are most evident with regard to special classes, which is a positive indication, having in mind the aim to enhance the downward trend in special classes compared to regular classes attended by categorized children.

Also, there is a noticeable trend of insignificant decline in the number of categorized Roma children, and an insignificant decline in the number of those children attending special classes, while their number, at the same time, is increased in regular classes. Despite the increase in the number of Roma children in regular classes as part of the ongoing process of inclusion, considering that a child who is categorized with mild mental disability and attends a regular class, still receives instructions based on special lower quality programme and with a tailored approach (such individualized approach is not applied to every child), leads to the conclusion that segregation persists in certain latent forms. Given its existence, in this case it is considered to be indirect discrimination.

This example is based on the research report from Ananiev, J. 2014. Segregation of Roma children in the educational process (research report). OSCE Mission to Skopje and Commission for Protection from Discrimination.

For more information in relation to cases of segregation on the grounds of ethnicity in the educational process from the ECtHR, please see: Chapter I: Right to equality, part 3. Stereotypes and prejudices, specific section on *Ethnic/racial stereotypes* and Chapter VIII: Antigypsyism, part 4. Manifestations.

CPPD, in two of its opinions, in cases nos. 08-89/1 and 08-92/1, considered that the primary schools "Gjorgji Sugarev" in Bitola and "Goce Delchev" in Stip violated the right to education of Roma children through segregation, thus determining indirect discrimination. In the case of *Elmazova and Others v. North*

Macedonia, explained above, the ECtHR in its judgment referred to the opinion of the Commission. At the same time, CPPD adopted the General Recommendation No. 08-244/1, recommending to the competent authorities of the Units of the local self-government to undertake activities for consistent compliance with the acts of catchment zones in their municipalities, which would aim at the desegregation of Roma children. (Complaint No. 08-89/1 from 08.10.2021, Opinion from 03.02.2022, Complaint No. 08-92/1 from 09.02.2022, Opinion from 13.04.2022 and General Recommendation No. 08-244/1 from 27.04.2022).

After receiving information through the media that contained information about the probable segregation of a female pupil with disabilities in a primary school in Gostivar, CPPD made a decision to initiate a procedure for protection against discrimination *ex officio*. Namely, the information said that after a petition signed by the parents of the student's classmates, she and her educational assistant were transferred to an inappropriate room, without adequate heating, in order to conduct the teaching. Acting on the subject, members of the CPPD held a meeting with the mayor and representatives of the local self-government government, as the founders of the school, who organized a joint meeting with the parents - signatories of the petition, as well as with all the professional staff in the school, included in the school's inclusive team. In addition, CPPD conducted immediate and direct meetings with the Regional Resource Centre "Dr. Zlatan Sremac" Skopje as well as with representatives of the Regional Expert Body for Assessment of Functional Disability and Health - Skopje, from where they received additional information and documents related to the case. CPPD also carried out an immediate inspection of the school room where the student was stationed, and during the inspection the Commission received the weekly reports from the assistant, which she sent to the Resource Centre in conducting the educational process.

CPPD found segregation and exclusion on the grounds of disability carried out by the primary school, committed by unjustified and illegitimate physical separation of the discriminated student from the rest of her classmates without disabilities, which resulted in exclusion, i.e. in denying her right of access to an inclusive education process. The Commission also determined that direct continued discrimination by the school, carried out by not adapting the school infrastructure in terms of providing a sensory room equipped with appropriate assistive technology, resulted in the denial of access to education on an equal basis with others on the ground of disability and the special educational needs of the student. In addition, the CPPD also found calling, inciting and instructing to discriminate on the ground of disability and health status, enacted by eleven parents of the female and male classmates of the student and carried out by signing a petition to remove the student from regular classes and boycotting classes by not allowing their children to participate in classes until their demands were met, resulted in segregation on the ground of disability and special educational needs. Thus, the CPPD recommended that the primary school should provide conditions for the unimpeded implementation of the educational process of the student in the same class with her classmates, and to prevent any form of exclusion and segregation of the student from the educational process. CPPD recommended to the school, with the support of the Regional Resource Centre, to provide

an effective modified curriculum for the student with special educational needs. In addition, the school was tasked with creating an action plan, approved by the Resource Centre, which will specify in detail the measures, activities and deadlines in which a sensory room equipped with assistive technology adapted to the special needs of the student should be provided. In addition, the CPPD recommended that the school should request from the Resource Centre to hold a mandatory training for teachers and professional staff who are directly involved in the educational work of the student on inclusive principles and the way to use the provided assistive technology for her specific educational needs. Finally, CPPD recommended that the director of the school should organize a meeting with the parents-signatories of the petition, at which they will be presented with the principles and mandatory application of the Concept and the legal prohibition of calling, inciting and instructing to discriminate, with the mandatory presence of each parent. Within the stipulated time limits, CPPD was notified in writing that all recommendations were implemented. (*Complaint No. 08-82/1*, Decision from 02.03.2022, Opinion from 03.07.2022).

8. Victimization

Victimization is also considered to be one form of discrimination and refers to people who would report discrimination and file complaints against discrimination, as well to people who witnessed cases of discrimination. Victimization can be also described as an opposite measure that an organization, including employers and public institutions, or an individual, would take in revenge for the efforts to implement the right to equal treatment. One common example is when the employee complains about unequal treatment, and the employer's response is dismissal or refusal to promote the employee. For example, the judgment *RO-1007/12* of the Basic Court Skopje II - Skopje, determined that discrimination was committed on the basis of victimization of the plaintiff by the "13th November" Chess Club from Skopje, carried out by non-payment of salary and non-payment of social wellbeing contributions due to actions taken for protection against discrimination in the exercise of employment rights (RO No. 1007/12 from 10.04.2014 of the Basic Court Skopje II - Skopje, retrial RO No. 472/15 from 03.07.2015 of the Basic Court Skopje II - Skopje).

Anti-discrimination directives of the EU define victimization as one form of unlawful discrimination and member-states are obligated to ensure protection from victimization in their national legal systems.

For example, a stewardess in an airline complained to the management that she was discriminated against on the ground of her race. The airline reviewed the complaint but failed to inform the stewardess about the outcome of the disciplinary procedure. In fact, it was unclear which measures were taken by the airline against the alleged perpetrator. The refusal of the stewardess to take part in 'mediation' with the discriminator, was interpreted by the management as a refusal to cooperate, and that was itself considered as a reason not to renew her employment contract. This was a clear case of discrimination for the Dutch Anti-Discrimination Commission. In the court action for challenging her dismissal, the judge ruled against the airline and decided that complaints for discrimination should be resolved in a timely and transparent

manner, and that the complainant should always be given feedback, for instance, about the disciplinary procedure against the perpetrator. The Anti-Discrimination Commission and the judge draw the conclusion that the employer failed to establish transparent procedures for handling complaints about discrimination. The Anti-Discrimination Commission found a violation of the Law on Equal Treatment, while the civil court referred to a general provision from the Civil Code, meaning that the employer should have ensured that the working conditions are safe, including labour relations free of discrimination and the existence of transparent complaint procedures (ETC Opinion 2010-52, 29 March 2010, Haarlem District Court, Judgment of 27 April 2010).

The complainant, as an employee in the administration of a larger municipality, stated that after the local elections in 2021, she received a decision to immediately leave her workplace and perform her work tasks in municipal premises about one kilometre away from the municipal building, which she refused because there were no conditions for her to perform her work tasks in the new premises. After conducting several on-the-spot inspections in the municipality to determine the factual situation, during which the CPPD collected and documented a series of evidence, the Commission issued an Opinion establishing direct and prolonged discrimination on the ground of political affiliation made by the mayor in the field of work and labour relations. In addition, CPPD also found harassment in the workplace, as well as victimization of the complainant by the secretary of the municipality, when he fined her for disciplinary misconduct that happened several years ago and in accordance with the law, the act was time-barred. (*Complaint no. 08-506/1* from 30.12.2021, Opinion from 11.07.2022).

9. Multiple and intersectional discrimination

One individual may quite often embody several protected characteristics and one may easily assume that unequal treatment may happen at the same time on several grounds. For instance, an older worker with a back problem faces difficulties in finding a permanent job due to the combination of age and health status, or a person with a disability from certain ethnic community may be denied the cultural and linguistic needs when some assistance is provided in relation to the disability. Also, women are considered to be one of the most vulnerable groups, especially when their sex or gender are intertwined with age, religion, race, etc. Such cases are considered as instances of multiple discrimination, that is, discrimination on more than one ground, which does not only constitute a sum of two grounds of discrimination, but also a different outcome from a quantitative aspect, i.e. a synergic outcome. Given the synergic nature of multiple discrimination, the creation of certain policies and legal solutions for this phenomenon might prove to be difficult.

Speaking about multiple discrimination, one should note that there are two separate types. The first type is the so-called *cumulative or compounding discrimination* when the discriminatory grounds overlap. For example, one person is not allowed to enter the restaurant because he is Roma and also is in a wheelchair – in this case the discriminatory grounds are the ethnic origin and disability. The second type is the so-called *intersectional discrimination* and occurs when there is unique combination of discriminatory grounds, and implies an intersection of separate discrimination grounds which are protected under the

anti-discrimination legislation. For instance, women of the Islamic religion may not be discriminated against for being women or for being Muslim, but because of prejudices that affect Muslim women. Despite the known cases of multiple discrimination, the anti-discrimination legislation fails to solve this problem, for the reason that the legislation is predominantly designed to see discrimination only as a single problem. In fact, this is the paradox: the more the person differs from the "normal picture", the more likely he or she is to become a victim of multiple discrimination, and at the same time, is less likely to be given adequate protection from this type of discrimination.

In the case of *N.B. v. Slovakia*, a case concerning forced sterilisation of a Roma woman at a public hospital, the applicant expressly complained that she was discriminated against on more than one ground (race/ethnic origin and sex). The Court stated that the practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups (paragraph 96). The ECtHR found violations of Articles 3 and 8 of the ECHR but did not separately examine the complaint under Article 14.

From another side, in the case of *S.A.S. v. France*, a ban was imposed on the full covering of the face in public places. Here, the ECtHR acknowledged that the ban had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public, but considered this measure to have an objective and reasonable justification (paragraph 161). Consequently, it found no violation of Article 14 in conjunction with Article 9.

In the case of *Yocheva and Ganeva v. Bulgaria*, the ECtHR held that an applicant (single mother) had been discriminated against on the basis of both sex and family status when the authorities denied her a family allowance (normally granted when the father has died) when her children had not been recognised by their father.

Several problems come to the fore regarding multiple discrimination, that is: differences regarding the personal and substantive scope of the anti-discrimination legislation; differences regarding exceptions, and difficulties in finding a comparator in cases of indirect discrimination on several grounds. The difference with regard to the personal and substantive scope of anti-discrimination legislations seems to be a crucial problem, since various legislations provide protection on various grounds of discrimination, usually through exhaustive lists of grounds, and moreover, such protection is offered only in some areas (e.g. in employment and labour relations, but not in access to goods and services). Therefore, quite often, despite the numerous cases of multiple discrimination, only one part of such a case would be addressed by the legislation, no matter if it refers to one of the grounds or areas of protection, or both. This is further confused by the fact that different states would apply different protection mechanisms for each of the grounds, rather than having one particular entity, and therefore the competence of such entity to review cases of multiple discrimination is put under serious question, especially when one of the respective grounds is not protected. As a result, presently, many states have the intention to merge various entities or bodies, that is, to group their competencies into one single body that will have broad competences.

Differences regarding the exceptions for different grounds pose another serious problem. For example, in the case of an older worker with a back problem (as in the example given above) who complains

about multiple discrimination, one can raise a question in terms of whether the case will fall under the general exception (foreseen on the grounds of age) or under the narrowly defined exception (on the grounds of health status or disability)? In cases of multiple cumulative discrimination, this may be resolved by a separate review of both aspects, or specifically, as discrimination on the ground of disability or health status, as well as on the ground of age. However, difficulties would be encountered in case of multiple intersectional discrimination, that is, when discrimination is based on the combination of several grounds. Eventually, the problem would be the difficulty in finding a comparator in cases of indirect discrimination on several grounds, and also, presenting the *prima facie* case, due to a lack of available national statistics about compound and specific groups of comparators.

Legal theoreticians hold the opinion that multiple discrimination can be addressed only through the development of a harmonized model of anti-discrimination legislation, with the same scope of protection and similar exceptions for all grounds equally, as well as flexibility in the selection of a comparator. Such an approach is currently noticed in the broad formulation of the provision for protection from discrimination in the ECHR, i.e. Article 14, which entails an open-ended list of grounds and a general exception. Thus, according to Article 14, it is not required to show that different treatment is based on one of the foreseen grounds, because the ECtHR per se reviews the case without being bound by the restrictions given in the exception. From the case law of ECtHR, in the case *Thlimmenos v. Greece*, one can clearly see that that there is no need to reduce the complexity of a case by relating it only to one of the grounds which are expressly stated in the ECtHR.

The possibility for the national courts to recognize and accept that other grounds of discrimination are considered under the umbrella of the open-ended list of grounds of discrimination, is embodied in the legislation of Finland, Hungary, Latvia, Poland, Slovenia, as well as in our country. In Belgium, the Court of Arbitration considered that the exhaustive list of grounds of discrimination, that was included in the legislation, was unlawful. See: Court of Arbitration, Judgement no.157/2004, from 6 October 2004.

Acting upon a complaint, CPPD found direct discrimination against members of the Roma community on the grounds of ethnicity, belonging to a marginalized group, colour of skin, language and race in the area of access to goods and services committed by a restaurant from Skopje. Namely, the restaurant also had a recreational pool in its complex that worked every day, in which Roma were allowed to enter only on Tuesdays with a clearly placed inscription on their notice board that read "Tuesday only for Roma". Even though the inscription was removed before the Commission's opinion was issued, the CPPD found discrimination due to the damage that had already been done and recommended that the employees, the responsible persons, and the owner of the restaurant must not repeat this behaviour and not to act with prejudices against people from the Roma community and to provide them unimpeded access to the pool (*Complaint No. 08-369/1* from 07/01/2022, Opinion from 10/25/2022).

According to Poposka and Chalovska-Dimovska (2023), intersectionality as a concept and theoretical framework originates from the activism of racial and social justice advocates involved in the

civil rights movement of the 1950-60s and beyond, including Black feminist activists and academic researchers Angela Davis, Patricia Hill Collins and bell hooks. According to Sosa, the differences in attitudes and viewpoints between feminist perspectives regarding the non-inclusion of race and other diversities in the category of "women", expressed by African-American women and women belonging to minority ethnic groups, was critical to the development of intersectionality. In 1980, black feminist and legal scholar Kimberlé Crenshaw first used the term "intersectionality" to describe the dual relationship of simultaneous racial and gender prejudices faced by African-American women and to highlight, based on the specific experiences of black women, the ways in which race and gender intersect to produce qualitatively different forms of discrimination and oppression. From this perspective, a growing number of scholars have subsequently advanced the study of discrimination by viewing it through the lens of intersectionality and extending its application to a wide range of areas, including public services, employment, housing, education, health and social care, and access to justice. At the same time, these insights have broadened the understanding of exclusion in many additional areas on different grounds such as the intersection between age, disability, sexual orientation, gender identity and ethnicity, migrant, minority or indigenous status.

Accordingly, intersectionality is both a concept and a theoretical framework that facilitates the understanding of ways in which social identities overlap and create complex experiences of discrimination and simultaneous forms of oppression, or oppression based on two or more identity characteristics, i.e. discriminatory grounds. Intersectionality promotes the overarching idea that individuals and groups face multiple forms of discrimination and concurrent forms of oppression based on two or more grounds, rather than a single basis, although for the most part legislation operates on understanding women's and men's identities singularly (i.e., only as a man or a woman, but not as a Roma man or a Roma woman, or as a man with a disability or a woman with a disability, etc.) But according to Sosa, intersectionality is not a simple addition of social identities to one another, for example, ethnicity in addition to sex or gender, or disability in addition to sex or gender, but intersectionality is based on the fact that these two or more bases are interdependent and mutually constitutive. It notes that "it is something uniquely and synergistically different when discrimination involves multiple identity features."

According to Collins, an intersectional perspective further highlights the complexity of structural dominance and marginalization as it recognizes individual positionality as a result of multiple social structures. In other words, an intersectional approach emphasizes that those two or more identity characteristics (for example, ethnicity, race, gender, disability, sexual orientation, age, or socioeconomic status) not only intersect at a micro level in the individual experience of a particular woman or girl but also reflect "intertwined systems of privilege and oppression" (such as sexism, racism, xenophobia, origin-based exclusion, heterosexism, ableism, homophobia and transphobia) at the macro and structural levels.

Intersectionality is both contextual and relational as it highlights the socio-structural nature of discrimination and inequality. For those reasons, it simultaneously helps to understand the complex effects of various overlapping systems of power – such as patriarchy, racism, homophobia, ableism and the

like – as well as their specific impact on vulnerable and marginalized groups in society.

Cho, Crenshaw, and McCall also highlight the concept of "political intersectionality," which expresses a dual concern with resisting systemic forces that significantly shape the life chances of groups of people, especially women, where intersectionality overlaps but also deals with and by redefining modes of resistance beyond the supposed universal approaches of a single axis (where a discriminatory strand is at the centre). Political intersectionality provides an applied dimension to understanding the manifestation of structural intersectionality, offering a framework for challenging the established power system and thereby connecting the theory to existing and emerging social and political struggles. In that direction, the authors believe that intersectionality is included in three different types of interventions, namely: the first approach consists of applying the intersectionality framework or examining the cross dynamics of the foundations; the second consists of discursive debates about the scope and content of intersectionality as a theoretical and methodological paradigm; and the third consists of policy interventions that use an intersectional lens.

Chapter III

Areas where discrimination can occur

1. Discrimination in education

The European Court of Human Rights has stressed the need to take into account the status of the Roma in the protection of their rights, reiterating that as a result of their history they are a specific type of disadvantaged and vulnerable minority (*D.H. and Others v. the Czech Republic* [GC], 2007, § 182; *Oršuš and Others v. Croatia* [GC], 2010, § 147). In taking steps to achieve the social and educational integration of the Roma, States must ensure that these are attended by safeguards that would ensure sufficient regard to their special needs as members of a disadvantaged group (*D.H. and Others v. the Czech Republic* [GC], 2007, §§ 205-207; *Oršuš and Others v. Croatia* [GC], 2010, §§ 180- 182).

The Court has noted the importance of the fundamental principles of universality and non-discrimination in the exercise of the right to education, which are enshrined in many international texts. It further emphasised that those international instruments had recognised inclusive education as the most appropriate means of guaranteeing the aforementioned fundamental principles, as such education is geared to promoting equal opportunities for all, including persons with disabilities. Inclusive education indubitably forms part of the States' international responsibility in this sphere (*Enver Şahin v. Turkey*, 2018, § 55; *G.L. v. Italy*, 2020, § 53).

Education is one area where discrimination can occur in a profound, significant, and far-reaching negative context in the society. The right to education is a fundamental human right and is a constituent part of all fundamental international conventions and acts. It has direct reference to the right to work, for the reason that uneducated people are less competitive in the labour market, which, in return, implies the inexistence of real equality.

On the international level, the right to education is stipulated in Article 26 of the UN Universal Declaration of Human Rights, and in Article 13 and 14 of the International Covenant on Economic, Social and Cultural Rights. Education must be available to anyone and every human being should be given the possibility for free primary education, so as to ensure personal development and dignity as well as inclusion on the labour market. On a European level, the right to education is guaranteed by Protocol No.1 of the

Convention for Protection of Human Rights and Fundamental Freedoms, i.e. Article 2, as well as in Article 14 of the European Convention on Human Rights, which prohibits discrimination on all grounds. The European Court of Human Rights in Strasbourg plays a significant role in this protection from discrimination. Within the European Union, Community law and the Court of Justice create the legal framework for protection from discrimination, in general, and also in the subcontext of education. As part of the International Labour Organization (ILO), the right to education is specified with regard to professional development and promotion, which means that it has direct reference to labour relations. One cannot speak about education as part of the ILO without considering its reference to labour relations and employment. The respective system is based on activities that ensure access to professional trainings and education.

The concept about existence of educational system, despite having reference to the human development, spiritual education and intellectual growth, has its practical application in the market society which is mainly materialized through inclusion of people on the labour market. That would be the central characteristic of applied education.

In addition to the adoption of the Employment Equality Directive in 2000, the Race Equality Directive was adopted at the same time, and entails a system for social and health protection as well as a prohibition of discrimination in the access to goods and services. The Community system stipulates that protection from discrimination in education indirectly comes through the aspect of the free movement of people (migration) in terms of Article 12 of Regulation 1612/68, which specifically refers to the children of workers and the right to education.

However, the right to education and its protection from discrimination, being seen as an individual human right, is most often protected through the system of the European Court of Human Rights, that is, Article 14 of the European Convention on Human Rights and Article 2 of the Protocol No. 1. One case where discrimination was identified with regard to Article 2 of Protocol No.1, and in conjunction with Article 14 of ECtHR is the case Cejda *Evrim Cam v. Turkey* from 2008, where the Court, in February 2016, confirmed that Turkey violated the Convention and the Protocol No.1 because of discrimination in the area of education. The case refers to a blind person who was not admitted at the Music academy on account of his sensory disability, despite the fact that he successfully passed the entry exam. Another similar case where a violation of Article 2 from Protocol No.1 was identified is the case *Timisev v. Rusisa*, where the Court found that Russia violated the article and denied the right to education to a Chechan child for the reason that his father did not register his stay in the town. In the case Sampanis and *Others v. Greece*, discrimination occurred on the ground of race, in light of the right to education, because the children involved were of Roma origin. There is a similar case in Croatia, where the Court in the case Orsus and *Others v. Croatia*, found discrimination in education because Roma children were separated into special classes. Another case of segregation in the educational process, which is considered to be discrimination, was found in the case Lavida and *Others v. Greece*, where the country failed to take anti-segregation measures for the Roma children in the educational process.

The right to education and equality is mostly affected among those groups of citizens, who are considered to be on the margins of the society for many reasons, such as people with disabilities,

Roma or people from various ethnic groups. Protection from discrimination in education should be seen in the context of the principle of equal opportunities for all citizens in the society and as part of the broad system of the right to work and real equality.

2. Unmasking Discrimination: The Plight of Roma in Education

In modern society, diversity should be celebrated and embraced, yet certain marginalized communities continue to face discrimination, hindering their access to educational opportunities. The Roma, an ethnic minority scattered across Europe and other regions, have been subjected to historical prejudice and systematic discrimination. Of course, based on what was said before, we want to examine the disparities faced by the Roma in education, exploring the root causes, find examples of discrimination, and to propose potential solutions needed to bring about a more inclusive and equitable society.

The Roma represent one of Europe's oldest and most marginalized ethnic groups, with a rich cultural heritage spanning centuries. Despite their significant presence in various European countries, the Roma have long been targets of discrimination and social exclusion. The discrimination they face is multidimensional, impacting various aspects of their lives, especially education.

Education serves as a crucial foundation for personal development, social integration, and economic prosperity. However, Roma children encounter various obstacles when attempting to access quality education. One of the primary challenges is the prevalence of segregated schools, where Roma students are disproportionately placed in subpar or special education programmes based on their ethnicity. Such segregation perpetuates stigmatization, limits educational opportunities, and reinforces negative stereotypes.

Additionally, Roma children often experience bullying and exclusion within mainstream schools, further hindering their academic progress. Biases held by both educators and peers can foster an unwelcoming atmosphere, leading to lower self-esteem and decreased motivation to pursue education. Discrimination in education has had a direct influence on access to the labour market. The labour market is another arena where Roma face widespread discrimination. Discriminatory practices occur at multiple levels, starting with the hiring process itself. Roma individuals often face bias during job interviews, leading to reduced chances of securing employment, regardless of their qualifications and skills.

For those who do manage to secure jobs, workplace discrimination remains an issue. They are more likely to be offered lower wages, subjected to harsh working conditions, and have limited opportunities for career advancement. Discrimination in the labour market perpetuates a cycle of poverty and marginalization, making it difficult for Roma individuals to escape the vicious grip of economic disparity.

In Slovakia, a study conducted by the European Roma Rights Centre (ERRC) in 2020 found that 43% of Roma children were placed in segregated schools, compared to just 4% of non-Roma children. This stark difference reflects the deeply-rooted institutional discrimination within the education system. A study in Romania also revealed that Roma individuals were three times less likely to be employed than their non-Roma counterparts, even when

possessing similar qualifications and work experience. This finding underscores the existence of explicit bias and prejudice in the labour market.

Combating discrimination against the Roma requires multifaceted efforts at societal, institutional, and individual levels. The following are some essential steps to initiate positive change.

In the framework of its country-by-country approach, ECRI has been urging the Council of Europe member-states to include racial segregation among the forms of discrimination prohibited in national legislation, in the context of school segregation of Roma children, for example, Cyprus, Czech Republic, Denmark, Estonia, Latvia, Lithuania, North Macedonia, Poland, Portugal, Romania, Spain and Ukraine. An identical recommendation in the context of other minorities' school or housing segregation, but equally relevant, was made in respect to Andorra, Austria, Belgium, Georgia, Ireland, Malta, Netherlands, Norway, San Marino and Sweden.

Please see Council of Europe bodies and reports indicating the issues of school segregation of Roma children. As examples See ECRI 2023 reports/conclusions on SK, HU, CZ, North Macedonia, Advisory Committee on FCPNM Opinion on RO, Albania, Human Rights Commissionare visit report on Czech Republic.

2023 ECRI Report on North Macedonia in particular, and FCPNM Opinion on North Macedonia 2022.

3. Discrimination in access to goods and services

Protection from discrimination in the area of goods and services usually also includes protection from discrimination in housing, i.e. accommodation. In the European Union, it mainly derives from the Race Equality Directive and the Gender Equality Directive.

This form of discrimination, in general, relies on preventing the citizen's access to goods and services, as well as trading, and the right to housing, i.e. accommodation on equal ground with other people. It concerns all goods and services that are publicly accessible and are also available for legal and economic turnover, regardless of the affected person, both in the public and private sector, including the public authorities. It does not include protection in access to private and family goods and services, as well as to transactions in that context. Within the European Community system, protection from discrimination in access to goods and services excludes the aspect of media and advertising.

The right of access to goods and services is a fundamental right that enables an individual to exercise his/her rights to activity in the society, especially from the aspect of access to public services provided by public state bodies. This provides the possibility for free entry into the economic turnover and protection of the rights before the state/public authorities in the country. Essentially, services refer to several areas: 1. Activities of an industrial nature, 2. Activities of a trading nature, 3. Activities of craftsmanship and 4. Professional activities. Access to goods and services implies freedom as long as it concerns a financial award as compensation.

According to the case law of the Court of Justice of the European Union, the right

to access to goods and services shall also imply access to coffee bars (case of equal treatment by the Hungarian authorities, Case No. 72), restaurants, shops, (Supreme Court of Sweden, *Escape Bar and Restaurant v. Ombudsman against Ethnic Discrimination* T-2224-07) as well as to the systems for healthcare, in particular from the aspect of private medical institutions. In this context, the Court of Justice of the European Union considers that services should be part of the free market in order to compensate the costs for participation fee/payment for medical services, which is in fact elaborated in several cases, such as *Kohll, Peerbooms u Müller Fauré* (Kohll v. Union des Caisses de Maladie, Case C-158/96, [1998] ECR I-1931, Peerbooms v. Stichting CZ Groep Zorgverzekeringen, Case C-157/99 [2001] ECR I-5473, и Müller Fauré v. Onderlinge Waarborgmaatschappij, Case C-385/99 [2003] ECR I-4509).

In the context of housing, protection from discrimination entails the existence of the right to home, i.e. adequate accommodation and inclusion of infrastructural elements in housing which are to be provided by the state, as well as having one's home at disposal, or ownership.

One may conclude that the area of access to goods and services, as well as housing, is becoming a topical issue from the normative aspect and it reaches out to the new generation of rights which are protected from discrimination. These matters, for the time being, are quite well represented on the scene of the Court of Justice of the European Union, and somewhat more rarely at the European Court of Human Rights, from the aspect of Article 8 of ECHR. On a national level, the question of discrimination regarding access to goods and services, as well as to housing, is being recognized too slowly, and steps need to be taken for its normative and factual recognition and protection. As in the previous point, we can underline that the issue of discrimination against the Roma in terms of access to goods and services can be posed as a problem, while here the discrimination is conditioned through the framework of economic discrimination, and discrimination on the grounds of ethnicity. Roma frequently experience discrimination in housing. They are often forced to live in overcrowded and inadequate settlements, lacking access to basic amenities such as clean water, sanitation, and electricity. Discriminatory practices by authorities and landlords contribute to their exclusion from mainstream society, reinforcing the marginalization of the Roma.

4. Discrimination in social and health protection

A social system in a country which entails social and health protection, is considered a fundamental system of every society and state. Its purpose is to correct any imbalanced situations in the society deriving from unequal reallocation of material goods through the economic system of a country, and to protect the population's health as one of the fundamental human rights. Social protection implies a set of measures taken by the public authorities in a country, the purpose of which is to provide aid to a particular group of citizens in need. The need generally refers to material assets, and therefore the social system provides funds which are then disbursed as financial allowances to the citizens at social risk.

Health protection includes care for the citizens' health and for the people at risk of poor health (disease, disability, age,

work-related accidents and occupational diseases, as well as unemployment from the aspect of health protection), and refers to health measures which are taken to prevent and address health risks and conditions. The health system is utilized through public, private, or combined systems of medical institutions.

Discrimination in the area of social and health protection entails a high social risk which has a negative effect both on an individual level, and upon the whole society. This is for the reason that social and health protection are considered to be two key pillars that secure social peace on national level, as well as basic factors for global peace and development. This system, in addition to the labour law system, bears significant importance for the sustainable development and establishment of real equality, on both the national and the international level.

In this context, the practice shows the existence of significantly separated groups of people which are more susceptible to discrimination in the area of social and health protection. Some of the problems detected refer to discrimination against Roma women regarding the use of gynecological services. Furthermore, one should take into consideration the discrimination against separate groups of the insured, such as people with AIDS and HIV-positive people concerning their right to healthcare and the extent of using healthcare on an equal basis to others. In addition, in view of the right to accompany a child up to 3 years of age for a hospital treatment, there is gender discrimination against men, and although the law does not stipulate which parent may accompany the child, in many instances, fathers are not allowed to accompany the child while it is hospitalized. This further implies gender discrimination, because such a practice strengthens the gender stereotypes about mothers/women as individuals that predominantly take care of children and elderly family members, and fathers/men as the ones who earn to support the family.

This is an indication of the fact that discrimination in the area of health services and exercising the right to healthcare does exist in practice, even though legal provisions do not explicitly entail discrimination against any of the above-stated groups of citizens.

The health system and the social protection system require major investments to ensure their sustainability, given the existing format, that is, to provide a repairing and rehabilitating function. This new approach is in line with the determination to enhance the preventive function of the social system.

In the last decades, there is prevailing opinion that the existing social systems in Europe and worldwide should undergo changes. Addressing the consequences would not suffice, but rather it is believed that consequences should be primarily prevented. This is considered to be a new perspective that would shed light on the social insurance system from the aspect of social prevention. That would also mean different challenges concerning the protection from discrimination and application of the principle of equality.

In this regard, according to the opinion of the experts on safety at work and social security of the International Social Security Association - ISSA, which is functioning as part of ILO, matters concerning prevention will become a central challenge for all branches of social security. This is then further complemented by changes in the redistribution of power on the international scene, being a factor that would certainly bring about a change

in attitudes concerning social insurance and the emergence of new determinants in social policy. The issue about discrimination against Roma in Social and Health Protection can be defined as a deep-rooted issue of injustice.

Limited Access to Healthcare: Roma individuals often encounter obstacles when seeking healthcare services, leading to poorer health outcomes. Discrimination by healthcare providers, language barriers, and a lack of cultural sensitivity also contribute to this issue. Moreover, discriminatory attitudes towards Roma patients may lead to delayed or inadequate treatment, exacerbating health disparities.

Also, Roma women face significantly higher maternal mortality rates compared to the general population. Discrimination and bias against Roma women in healthcare settings contribute to inadequate prenatal care and to limited access to maternal health services, leading to tragic consequences for both mothers and infants.

4.1. International standards

There are numerous conventions and recommendations as part of ILO which regulate matters of social protection, health insurance, and social schemes. The fundamental framework act on minimal norms in social security is the Convention No. 102 from 1952. It also refers to health protection. Another relevant convention is the Convention No. 168 on the promotion of employment and protection against unemployment that also includes social benefits. These two conventions are considered to be fundamental acts that ILO uses to regulate matters of social security (primarily through financial benefits) and health protection.

Within the European Union, only the Directive on gender equality and social security includes provisions concerning equality in the use of social security systems on the ground of sex, but does not include a broad framework on protection against discrimination concerning social welfare and access to health care. However, many matters in this particular area seem to be inexplicit, especially concerning public health care from the point of service provision, as well as the treatment provided by the administrative and medical staff.

4.2. National solutions

Our legal system prohibits the discrimination that may occur in exercising the right to social and health protection. Article 4 of the Law on Prevention and Protection against Discrimination entails the protection also in these areas on all legally prescribed grounds from Article 3 in the law. The law ensures both the general and legal framework on the prohibition of discrimination. In addition, separate laws in the areas of social and health protection include provisions that prohibit discrimination. Articles 20-23 of the previous Law on Social Protection (LSP) set forth that both direct and indirect discrimination are prohibited on the following grounds: sex, race, skin colour, nationality, ethnicity, social situation, political views, religious beliefs, cultural and linguistic differences, property and social background, disability and origin. The new law adopted in 2019 in Article 16 stipulates that equal treatment and non-discrimination should be considered to be a basic principle. The article itself provides, similarly to the previous law, the prohibition of any type and form of discrimination on the grounds of race, skin colour, origin, national or ethnic affiliation,

sex, gender, sexual orientation, gender identity, belonging to a marginalized group, language, nationality, social origin, education, religion or religious belief, political belief, other belief, disability, age, family or marital status, property status, health status, personal characteristic and social status or any other basis in the aging of financial assistance from social protection and social services, determined by this law. However, this legal solution indicates that protection against discrimination will be provided in accordance with the Law on the Prevention and Protection against Discrimination, which is also relatively new and fundamentally improved the legal text from the previous law. With regard to health protection, the Law on Health Care (LHC) includes no provisions on discrimination, however, the Law on Protection of Patients' Rights (LPPR) includes provisions in Article 3 and 5 on the prohibition of discrimination against patients in their use of health services, and unlike the Law on Social Protection, it entails more grounds of discrimination, including sexual orientation.

These solutions specified by law aim to protect the citizens from discrimination in the system of social and health protection, and to ensure the equal approach of the employees in public and private institutions to service beneficiaries. This surely provides for the formal aspect of protection; however, the factual and real protection from discrimination would require a more detailed analysis.

PART TWO

Protection from discrimination on the international and national levels

Chapter IV

Protection from discrimination in international law

1. Protection from discrimination in the UN system

Discrimination was put on the United Nations's agenda after the Second World War. Prior to this period, the League of Nations considered and regulated only matters of minority rights through special minority agreements, and as part of peace agreements related to minorities. The adoption of the Declaration on International Human Rights by the International Law Institute in 1929 established the foundation for consideration and future protection of universal human rights.

After the adoption of the UN Charter in October 1945, matters of non-discrimination in exercising human rights were considered, for the first time, as part of the content of the system of equality. This was due to several reasons. After the Second World War, the conditions were fully developed to enable internationalization of human rights, which was inspired by the terrible experiences and consequences of the war. The idea of racial superiority and the initial disagreements among the winning countries served as sufficient impetus to start building a new system that enshrines universal human rights. This system essentially relies on the concept of mutual respect, understanding and tolerance, and in order to be realized as such, it implies non-discrimination in all of the segments. The question of human rights is not only seen as an internal matter, but rather as part of the international system for protection which is to ensure peace and security worldwide.

1.1. Universal human rights instruments

The UN Charter from 1945 is the first act which refers to non-discrimination, and is considered as a framework of guidelines for the development of the international system for human rights protection, which was one condition to eliminate international conflicts and keep the world peace. The Charter does not specifically determine that discrimination is prohibited, but calls for equality and respect for human rights, and from this aspect, it is considered to be important. This is specified in Article 1 paragraph 3 which reaffirms the international cooperation through respect for human rights irrespective of

race, sex, language or religion. This is the first provision that sets forth the need for equality and serves as ground for further development of the international system for non-discrimination.

The wording of the Charter includes other provisions which are relevant from the aspect of the prohibition of discrimination. Article 13 stipulates the General Assembly's promotion of international cooperation without discrimination, and especially Article 55, regarding the international economic and social cooperation based on the principle of equal rights and non-discrimination. The Charter further stipulates the establishment of bodies that work on the promotion of human rights, such as the Economic and Social Council (Article 62 and 68), with their primary goal to work on the development of human rights.

Even though the Charter does not specifically define protection from discrimination as well as human rights and the respective list thereof, or the obligation of the states to respect these provisions, the Charter is still considered to have established the international system for equality and non-discrimination under the concept of *erga omnes*, which previously used to be the exclusive competence of the states. Therefore, the application of the provisions in practice was not open to challenge, which is further proved in the numerous cases of the International Court of Justice.

The UN Universal Declaration of Human Rights, adopted on 10 December 1948, is the fundamental general and framework international agreement that regulates matters of human rights and the prohibition of discrimination. It includes two basic articles pertaining to non-discrimination, that is, Article 2 and 7.

Article 2 sets the norm of universal equality in exercising and enjoying human rights worldwide, regardless of race, colour, sex, language, religion, political or other affiliation, national or social origin, ownership, birth or other status. This provision stipulates the prohibition of any forbidden differentiation on the stated grounds. It is an open provision and gives reference to other articles of the Declaration which guarantee specific rights.

Article 7 is of particular importance since it provides the equality of all people before the law and the right to equal protection. That is foreseen without the existence of any discrimination. Protection from discrimination is a right that equally belongs to all people worldwide on all grounds. It is also important as it makes reference to protection from discrimination not only in accordance with the provisions of the Declaration, but also as part of the national legislation of the respective states.

The International Covenant on Civil and Political Rights (ICCPR) is another UN instrument that promotes civil and political rights on the international level. It was adopted in 1966 and once it came into force in 1976, it set the framework for fundamental civil and political human rights. From the aspect of the protection from, and prohibition of, discrimination, Article 2 of the Covenant promotes the principle of equality in terms of respecting all rights from the Covenant for all the citizens from the state parties without any differentiation on the same grounds as in the Declaration. This article is applied only in conjunction with the other articles of the Covenant. Article 3 sets forth the establishment of a system for gender equality among men and women in the enjoyment of all civil and political rights from the Covenant, which implies the accessory nature of this article.

Article 26 of this Act is also very important, and despite the similarities with the provision of Article 7 in the Declaration, it has a much broader contextual scope. It implies that all people are equal before the law and all people are protected without any discrimination before the law; however, the respective law must guarantee the prohibition of discrimination, that is, equal and successful protection regardless of race, colour, sex, language, religion, political or other affiliation, national or social origin, ownership, birth or other status. Specifically, this article refers to the national legislation of the states, and stipulates that every state that ratifies the Covenant must also stipulate the prohibition of discrimination, at least, on the foreseen discriminatory grounds. This was also confirmed by the UN Human Rights Committee.

In the course of the same year, the International Covenant on Economic, Social and Cultural Rights (ICESCR) was also adopted, mainly due to the specifics in the content and application of these rights. From the aspect of the content, the Covenant prohibits discrimination on the grounds of race, colour, sex, language, religion, political or other affiliation, national and social origin, ownership, birth or other status. As in the previous legal instruments, the prohibition of discrimination has accessory nature and makes reference to the other provisions of the Covenant (Article 2 item 2). The article does make mention of discrimination, which is not the case with the International Covenant on Civil and Political Rights or the Universal Declaration. Paragraph 2 of this Article makes reference to discrimination since it calls upon the equal rights for non-nationals and nationals in terms of the equal enjoyment of economic rights. There are no other direct provisions on the prohibition of discrimination; however, the wording of the whole Covenant emanates the spirit of equality and the recognition of the rights of all people, especially those rights pertaining to the labour law. One specific refers to the fact that the provisions of the Covenant, in accordance with the Committee on Economic, Social and Cultural Rights, are applicable to all employers, both in the public and private sector.

The Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted in 1965, and came into force in 1969. It is an international act that deals with one specific ground of discrimination and embodies all aspects related to racial discrimination, i.e. all its forms. This is the first international act that specifically and directly prohibits some of the grounds of discrimination, which are also elaborated in detail. This Convention was inspired in the aftermath of the Second World War, when formal racism in the South African Republic and colonialism in Africa still existed. Nowadays, the provisions still carry the same importance as previously: even though the primary objective of their adoption is only partially achieved, protection in this area is still a topical and difficult issue on the international level.

The Convention defines racial discrimination as *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*. The definition from Article 1 provides for comprehensive protection and refers to all areas of life and all areas of society. Discrimination is condemned by all state parties, and they are obligated to work in the field of the prevention of racial discrimination.

Racial discrimination refers not only to skin colour and race, but also to the ancestors and to ethnic and national origin, which is why it is considered to have expanded the notion of race. It concerns the ethnic and national groups with specific features and characteristics, yet, it does not include religious groups.

This Convention pertains to the overall economic, social, legal, political, cultural, educational and other fields of social life where unequal treatment may occur and, moreover, it imposes the prevention of any propaganda, as well as an obligation for measures to be taken in the educational sector to educate and develop a culture free of prejudices and which fosters understanding, tolerance and friendship. This approach is in line with the UN Charter and aims to create societies free of discrimination. Therefore, it is seen as a Convention of major importance, which aims to help peacebuilding in the world and promotes an enhanced and available welfare among the people and the nations.

The Committee on the Elimination of Racial Discrimination was established according to this Convention, and is entrusted to deal with the implementation and the oversight of the implementation of the Convention, as well as the communication and information within the procedures and mechanisms for the notification of racial discrimination by the state parties.

In addition to ICERD, the International Convention for the Elimination of Discrimination against Women (ICEDW) was adopted in 1979 and came into force in 1981. It is also considered to be an important international document that elaborates the fundamentals and principles embedded in the Universal Declaration of Human Rights, and in the subsequent aforementioned Covenants, in reference to specific areas of gender discrimination, and sets forth the measures that states are obligated to pursue in order to eliminate such discrimination (Kadriu, 2007).

Article 1 of the Convention defines discrimination against women in a manner identical to that in the CERD, whereby only the phrase "preference" is removed. In certain situations, "preference may be given to men" over women, especially in the area of labour relations, where there is exception from discrimination concerning some special conditions, qualifications or special protection of women in labour relations in the context of using this exclusion as determining occupational requirement, as explained above. The Convention specifies the affirmative actions that need to bring about real equality in all fields of the society, such as employment and labour relations, the legal system, education, political rights, and economic and social rights. The Committee on the Elimination of Discrimination against Women was established to monitor the situation, to review reports and information received from state parties, and to decide upon individual complaints in accordance with the Optional Protocol to CEDAW.

The Convention aims to secure equality among men and women in all fields of society and to promote a culture of equality and parity. It also aspires to changes in the traditional understanding about women in the society and their cultural, educational and economic emancipation. Many state parties have expressed reservations to this Convention, as some of the articles go beyond the public sphere, and interfere in the private life of an individual. In some respects, it fosters a complete change of customs, practices as well as prejudices, and therefore, it is not accidental that certain societies would not accept it, and in which it also has negative repercussions. Some people are also of the opinion that the Convention is contrary to other international acts

and rights that guarantee the individual's freedom to opinion, expression, privacy, and freedom of religion. The Committee urges that stereotypes and prejudices in the traditional attitudes about women's inferiority to men produce negative practices, such as physical and domestic violence against women, forced marriages, female genital mutilation, etc. This is especially emphasized as a problem within certain religious systems and groups.

In addition to these acts, which have a central place in the international law regarding human rights, another fundamental document is the Convention on the Rights of the Child (CRC), where Article 2 stipulates the accessory nature of the provision on protection from discrimination on the following grounds: race, skin colour, sex, language, religion, political or other affiliation, national, ethnic or social background, property status, disability, birth or other status of the child or his parent or legal custodian, in conjunction with the rights guaranteed in the Convention. This Convention was adopted relatively late, in 1989, and came into force in 1990. The Convention embodies children's rights to education, family, care and protection, identity, freedom of expression, rights of migrant and refugee children, children with disability, etc. The scope of this act is quite extensive in terms of children's rights, and refers both to public authorities and private relations.

The UN adopted the International Convention on the Rights of People with Disability (CRPD) in December 2006 and it came into force in May 2008. This Convention, as an international act, deals with matters related to people with disabilities worldwide, in a comprehensive and integral manner, and provides specific directions to state parties on the regulation of these matters.

It refers to all people with disability, and focuses on the rights that would ensure enhanced and overall integration of these people regarding education, freedom of movement, independent life in the community, employment, accessibility, receiving adequate health care, participation in politics, cultural and sporting events, independent decision-making, etc. The Convention distinguishes women and children with disability as separate groups of people with disability. Discrimination is prohibited on all grounds, i.e. it prohibits unequal treatment in all areas specified in the Convention. However, why was it necessary to adopt this convention? In general, people with disabilities are still denied their basic rights and fundamental freedoms. Generally, people with disability are still seen as "objects" that require care or medical treatment, and not as holders of rights. For that reason, the Convention underlines the fact that people with disability enjoy the same human rights as any other people and that people with disability are capable of leading their lives as fully entitled citizens who can contribute significantly to the society, if they are given the same opportunities as other people. These values are further conveyed in the section on employment, specified in Article 27 of the Convention.

This particular article presupposes the options for employment of people with disability, which means work on an equal basis with others (paragraph 1). Work should be made available to people with disability, while employment should be promoted, above all, by the public sector in the state parties (Article 27 paragraph 1). The latter clearly indicates that states should have the primary role in employment of people with disability. It can be achieved through direct employment in the public sector, and through legislation that stimulates employment in the private sector.

All these aspects were taken into consideration when the Convention was adopted, so it comes as no surprise that the provisions of Article 27 stipulate measures that states should take for employment and labour integration. Any form of discrimination in all types of employment and labour relations is prohibited, as well as regarding the safe and healthy working conditions for people with disability (Article 27 paragraph 1, item 1).[16] Furthermore, any unequal remuneration for work of equal value is forbidden. Collective rights are also guaranteed and state parties are required to ensure the promotion and career advancement of people with disability. Discrimination is prohibited, and incentives are foreseen in the areas of education, professional guidance, and vocational trainings, as well as occupational rehabilitation. Among other obligations, member states are required to create appropriate policies and measures that stimulate employment of these people (item 8). The Convention also stipulates the provision of reasonable accommodation for people with disability (item 9). All these measures should lead to the realization of one single goal, that is, the enhanced employment of people with disability and their protection from discrimination in labour relations. The aspect of employment of people with disability is further elaborated in many research projects which have proved that employers of people with disability gain many benefits, among others, the most representative being the improvement of the working environment and enhanced attraction of consumers.

With regard to the promotion of the employment of people with disability, a significant place in the overall system of the Convention is given to the introduction of possibilities for self-employment, entrepreneurship, and starting one's own business, which are considered as significant elements to ensure the independence of people with disability (item 6).[17]

The UN adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMWF) in December 1990 and it came into force in 2003. It aims to protect the rights of migrant workers and their families by introducing an international framework of rules which are supposed to guarantee such protection.

Matters related to migrant workers are not a novelty, given that these matters were the subject of regulation by the International Labour Organization. Nowadays, under conditions of globalization of labour--and increased workers' mobility of over 200 million annually--unquestionably, this matter is gaining momentum. On the regional level, in the context of the ongoing migration processes that affected the region of Asia Minor, North Africa and Europe in the past years, this matter acquires not only an economic dimension, but also assumes political and social dimensions.

The Convention includes a series of rights for the migrant workers and their families, as well as restrictions for the countries that ratify the Convention regarding discriminatory treatment and policies that put migrants in unequal positions. This Convention applies to migrant workers with regulated stays. The definitions used refer to several categories, such as migrant worker, family of migrant worker, etc. The starting point for our analysis will be section two, which includes the anti-discrimination provisions.

[16] See: Lucas, E. 2004. Adjusting to disability rules. Professional Manager Magazine, Vol. 13, Is. 5.

[17] See: Stojkova, Z. 2005. From Idea to Reality: Comprehensive and integral international convention for protection and promotion of the rights and dignity of people with disability. Justicija, Skopje, page. 64.

Article 7 stipulates that state parties, based on international human rights instruments, including the Convention, shall ensure all rights to the migrant workers and their families without any distinction on the ground of sex, race, skin colour, language, religion, political or other affiliation, nationality, ethnic or social background, age, economic status, property and material status, birth or other status. In addition, this provision goes beyond the Convention and refers to all international human rights instruments, which is a rare occasion.

The Convention includes a wide range of human rights for migrant workers and their families, not only from the aspect of labour and social law, but also as matters of common importance which have the role of fundamental human rights. Examples of this are the right to free movement and leaving the country of stay, except when necessary to protect the national security, public order and health (Article 8). Articles 9 to 11 stipulate very important rights. Article 9 refers to the right to life of migrant workers and their families. Article 10 stipulates the prohibition of torture, or cruel, inhuman or degrading treatment, or the punishment of these categories of people, while Article 11 prohibits slavery or compulsory labour.

On the other hand, the Convention also includes provisions on labour rights, such as in Article 25, which prescribes enjoyment of equal rights to employment both by nationals and migrant workers in the country of employment. Article 26 stipulates the right of migrant workers to take part in trade unions and their right to association. In addition, the Convention provides for the property rights of migrant workers and their families, their social rights, and above all, the right to health care: but it also deals with their treatment before the state authorities, their private relations with other citizens of the country, their departure and return to the country of stay, etc.

This Convention sets forth the rights of migrant workers and their families from the perspective of human rights, and even makes a step forward to secure their rights and assures their protection from exploitation.

Despite the existence of these conventions, different marginalized groups and communities continue to face numerous challenges and barriers to achieving equality. Discrimination against individuals, and some groups like the Roma, is still prevalent in various aspects of life, including education, employment, healthcare, labour and housing. Negative stereotypes, prejudices, and social exclusion persist, hindering their integration into mainstream society.

One major obstacle to the effective implementation of the anti-discrimination laws is the lack of comprehensive data and reporting on discrimination, which is done on various discriminatory grounds. Often, incidents go unreported or unaddressed due to fear of reprisals or a lack of trust in the law enforcement and judicial systems. Governments and stakeholders on both the international and national levels must collaborate to improve the data collection and reporting mechanisms to better understand the extent of discrimination in different fields and on different grounds.

Additionally, raising awareness and sensitivity among the general public is crucial in countering discrimination. Educational programmes, media campaigns, and community outreach initiatives can play a vital role in dispelling stereotypes, and in combating prejudices that stimulate and encourage discrimination, and additionally to be an instrument for the prevention of, and

protection from, discrimination. The objective of creating equal conditions for all citizens of the international plan is the main goal and motive of the normative framework of the UN. The responsibility for the realization of this idea is upon the national government and upon every local society.

2. Protection from discrimination in the system of the Council of Europe

2.1. European Convention on Human Rights

On the regional level, the European Convention on Human Rights and Fundamental Freedoms, signed on 4 November 1950 by the then twelve member-states of the Council of Europe, is considered as the most significant benefit for the regional system for human rights protection. The ECHR is a legally-binding document for all European states which ratified the Convention and agreed to ensure conditions for the realization of basic human rights within their national system. State parties are obligated to implement the Convention by proclaiming the rights, which are guaranteed by the Convention and its Protocols, in their national legislation, and to provide legal protection for every individual on a national level. The effects of the European Court of Human Rights' judgments are considered both *inter partes* and *erga omnes*. The system, which is considered the most efficient legal system on the regional level, not only provides the right to file an individual application to the Court due to violation of the ECHR provisions, but also guarantees that the judgments are implemented by the state.

Prohibition of discrimination is expressly set forth in Article 14 of the ECHR, which reads as follows: "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". This anti-discrimination clause does not distinguish between direct and indirect discrimination, and discrimination is seen as one phenomenon. For a long period of time, the European Court of Human Rights took action only about cases of direct discrimination; however, the shift in the case *Thlimmenos*, the case *D.H*, and the case *Zarb Adami* brought about a change of approach and the Court started to act on cases of indirect discrimination as well.

One case where the Court found discrimination on the ground of gender is the case *Zarb Adami v. Malta*, where the applicant claimed that the way in which lists of lay-judges were compiled in Malta, and the conditions under which a person can be released from that obligation, were discriminatory, by putting men in a less favourable position to women. Allegations for discrimination on the ground of gender were also considered in the cases *Rasmussen v. Denmark* as well as *Mizzi v. Malta*, which referred to the introduction of time restrictions in the national legislation for the assumed father to deny his fatherhood for a child born in marriage, whereas women could have started such a procedure at any time. The European Court of Human Rights held that the difference in treatment among men and women was justified.

As far as the clause from Article 14 is concerned, one can single out several specifics, that is: its accessory nature, the application is not necessarily conditioned

by violation of some of the fundamental rights and freedoms protected by the ECtHR, and it includes an open-ended list of grounds of discrimination.

The first characteristic of this provision is the accessory or dependent nature, which means that Article 14 is not applied independently, but only in reference to the violation of the rights and freedoms from the ECtHR. Moreover, those are not only the rights that are expressly listed in the Convention, but also additional rights deriving from the Court's interpretation of guaranteed freedoms and rights embedded in the ECtHR, and which are treated as its constituent parts. Furthermore, Article 14 is applied in accordance with both the substantive and the procedural aspects, which means that a violation exists when it is proved that certain treatment is discriminatory, as well as when the state does not undertake an effective investigation to establish the allegations of discriminatory treatment of the applicants.

Protection from discrimination is mostly oriented against the state, for the reason that some unequal treatment was established through competent authority's practice, or through legislation, and such treatment cannot have legitimate justification. The state, at the same time, is obligated to prevent and punish discrimination deriving from the attitudes of legal entities, especially with regard to racial or religious discrimination, and may be also a reflection of xenophobia, intolerance or racial hatred and intolerance in the society (*Šečič v. Croatia*, No. 40116/02, from 31 May 2007, and *Milanovič v. Serbia*, No.44614/07, from 14 December 2010).

The second characteristic of this clause is that its application is not necessarily conditioned on the violation of some of the fundamental freedoms and rights which are protected by the ECtHR. The Court may also consider the aspect of possible discrimination, although some fundamental right was not violated, which was proved in the case *Sommerfeld* and the *Belgium linguistic case*. The third characteristic is that Article 14 includes an open-ended list of grounds of discrimination. It does not expressly include some of the grounds that prevail in contemporary anti-discrimination law, such as disability, age, sexual orientation, etc. However, the ECtHR does include these grounds in its interpretation under "other status" in accordance with Article 14, which is verified in the case law, and derives from the Commentary to the Protocol No.12. The Commentary to the Protocol provides explanations about the reasons for this legal technique, which are worded as follows: "This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of the drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of on-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included". (paragraph 20).

The ground of disability, according to the ECtHR, is enshrined in Article 14, which is confirmed by the ECtHR in the case *Glor*, where the Court found violation of Article 14 in conjunction with Article 8, i.e., the Court determined that the applicant is a victim of discriminatory treatment on the ground of his disability. In this case, the Court established that the applicant who was a diabetic may be considered as a person with disability, although diabetes was classified as a milder form of disability in the national legislation. The applicant had to pay certain compensation tax in order to be exempted from military service, and which was paid by all citizens who were eligible--but did not do--the military service. In order to be released from payment of the tax, the person was either supposed to have at least a 40% degree of disability or a "conscientious objection". Those who had the "conscientious objection" were obliged to do civil service. The applicant's disability was present to the extent that he was declared unfit to do the military service; however, the degree of disability was not sufficient to be exempted from payment of the tax. In addition, the authorities rejected his request for doing civil service. Accordingly, the Court found violation of Article 14 in conjunction with Article 8, and the applicant was considered to be a victim of discriminatory treatment on the ground of his disability, since the state had no reasonable justification about different treatment of people who are unfit to do the military or civil service, and who do not pay the tax, and those who are unfit to do the service and pay the tax, so that the latter are put in a less favourable position. As shown in this case, the cumulative approach to the rights is applied, that is, in addition to Article 14 (due to its accessory nature), the applicant also invoked Article 8 of ECtHR.

As far as reasonable accommodation is concerned, it is not expressly stated in Article 14; however, it has been demonstrated in several cases before the ECtHR, especially within the meaning of Articles 3, 6 and 8 of ECtHR and Article 2 of the Protocol No. 1. For example, concerning Article 3, in the case *Price v. United Kingdom*, there is a obligation foreseen for the states to apply different treatment to prisoners with disability, unlike the treatment received by other prisoners without disability, especially the ones within the prison system, in order to avoid inflicting bigger harm. Despite this, the reasoning of the ECtHR, especially in cases within the meaning of Articles 6 and 8 of ECtHR, and cases that allude to the question of possible reasonable accommodation for people with disability, is utterly unsatisfactory. Namely, in accordance with Article 8, in the cases *Botta v. Italy*, *Marzari v. Italy*, *Sentges v. The Netherlands*, and the case *Zehnalová and Zehnal v. The Czech Republic*, the Court sought a direct link between the measure to be pursued by the state and the private life of the applicant, which largely restricts the scope of this article regarding mediation in the inclusion of people with disability in mainstream social life. The same is confirmed in the cases of *Malone v. United Kingdom*, *Stanford v. United Kingdom* and *Young v. United Kingdom*, in line with Article 6. The ECtHR considered reasonable accommodation in the case *Çam v. Turkey*, explained above in *Chapter II: Forms in which discrimination occurs, part 6. Reasonable accommodation*.

In the case *Malone*, Mrs. Malone who was using a wheelchair, and complained of a violation of Article 6 of the ECtHR, because the court before she took civil legal action was inaccessible. The ECtHR declared the application to be inadmissible since the applicant did not take action before the national court and did not request that

the case be shifted to an accessible court, until the proceedings were scheduled at the London court (Malone v. United Kingdom case, Application No.25290/94, Admissibility Decision, from 28 February 1996).

Finally, according to the ECtHR, Article 14 allows for the application of affirmative measures. In the case *D.H. and Others*, which is a case regarding the segregation of Roma children in school for children with disability: "under certain conditions, failure to take measures for the remedy of unequal treatment, may amount to violation of the article in the Convention".

In the case *Guberina v. Croatia*, the ECtHR held that the Croatian authorities failed to take into account the needs of the child with disabilities when they determined that the father should not be exempt from payment of sales tax on real estate, he purchased that was accessible to his child with a disability. Namely, in accordance with the Croatian legislation, this exemption was, in fact, available to buyers who moved in order to solve their "housing needs", that is, when their previous property did not possess the "basic infrastructure". The applicant argued that accessibility was an element of basic infrastructure and that his previous apartment did not meet his family's housing needs. The Croatian authorities, on the other hand, disagreed and rejected the request without taking into account the special circumstances of his son. The ECtHR confirmed the need to give a broad interpretation to the concept of non-discrimination on the grounds of disability, including discrimination by association, and in this particular case found that there was discrimination against the father on the grounds of his child's disability.

In addition to Article 14, protection from discrimination is also stipulated in the Protocol No. 12 to the ECtHR which is of an independent nature. Namely, Protocol No. 12 to the ECtHR is a separate international agreement that includes a general prohibition of discrimination. The aim is not to replace Article 14, but rather to complement it by accepting the already established case law on the prohibition of discrimination. The clause in Protocol No.12 is of an independent nature, i.e. is not connected to the rights and freedoms which are protected by the Convention, and has a much wider scope. It is applicable to all the rights which are guaranteed to the citizens in the national legal system, as stated: "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" as well as "No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1". The Commentary to Protocol No. 12 stipulates protection in the enjoyment of any right specifically granted to an individual under the national law; in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner; by a public authority in the exercise of discretionary power (for example, granting certain subsidies); by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot). (paragraph 22). Furthermore, the Commentary to Protocol No. 12 includes that, although the Protocol secures the protection of individuals against discriminatory treatment by the state, yet

it also protects the private relations to a certain extent, especially those relations among private persons that are normally expected to be regulated by the state, such as: an arbitrary ban on access to work, and entry in restaurants or services that private individuals make available to the public, such as health care services, water supply services, electricity supply, etc.

However, the real range of this clause cannot be currently estimated for two technical reasons. First, the Protocol was ratified only by 20 member states of the Council of Europe, and second, it came into force on 1 April 2005, i.e. three months after the tenth instrument for ratification was deposited (in accordance with Article 5 of the Protocol). The entry into force and the small number of countries that ratified the Protocol are decisive for the existence of poor case law by the ECtHR in the application of this Protocol. The first case in which the Court found violation of Protocol No. 12 was published in December 2009, and refers to discrimination on the ground of ethnic/racial origin on the part of Bosnia and Herzegovina. In the case *Sejdič and Finci v. Bosnia and Hercegovina*, the ECtHR found violation of Article 14 in conjunction with Article 3 of Protocol No. 1, as well as violation of Protocol No. 12, since the Constitution of Bosnia and Herzegovina prescribes that members of the House of Peoples (lower home) of the Parliament belong to the biggest ethnic communities (as constituent nations, that is: Bosnijaks, Croats and Serbs), which automatically excludes the members of smaller communities to run for members of the House of Peoples and the presidency of the country, as was the case with the applicants (Sejdič and Finci v. Bosnia and Hercegovina case, No.27996/06 and No.34836/06, from 22 December 2009).

It is worth noting the fact that Protocol No. 12 sets forth the obligation for the state parties to prohibit discrimination in all fields of society. Areas where discrimination most often occurs, such as employment, education, access to goods and services etc., are protected by the Protocol.

In the case *Pinkas and Others v. Bosnia and Herzegovina*, 51 applicants who were, or still are, judicial clerks from the courts of Bosnia and Herzegovina claimed that there is discrimination against them on the ground of "other status" because there was a difference in treatment regarding allowances for meals, travel, and separate life between judges and judicial clerks, which was decided in two legal proceedings before national courts. Namely, the court officials received these allowances from January 2013 onwards, while judges were also paid for the period before that. This situation arose as a result of a decision of the Constitutional Court from 2013, by which the non-existence of compensation for both categories until that moment was declared unconstitutional, and based on that, the national courts made different decisions in proceedings for judges and the judicial clerks. The ECtHR considered that judicial clerks (a category of public officials to which the petitioners belonged) and judges were in a comparable situation, since the same legal regime applied to both categories of public officials in terms of allowances for meals, travel and separate life. The Court considered that "a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group" (paragraph 62). The ECtHR stated that the special feature of the present case was that the judges and the judicial clerks at the State Court brought a joint civil action relying on the same legal provisions, that the civil courts then severed their case into

two cases on the grounds of their status (see paragraph 8 above) and reached opposite conclusions regarding one of the key legal issues raised in those cases. Accordingly, the Court determined that this difference in treatment was based on "other status" which neither the domestic courts nor the State could objectively justify, finding a violation of Article 1 of Protocol No. 12 of the ECtHR (paragraphs 63 to 66).

Another issue which is elaborated in this chapter and relates to the open-ended list of grounds of discrimination from Article 14 and Protocol No. 12, is that the Court uses the "assumption" for the respective discriminatory ground in order to determine the level at which the case will be reviewed. The Court applies the test of very weighty reason, if established that the given ground is "assumed "by the member states, and in such case, any justification for discriminatory treatment would be rarely accepted. For example: ethnic background as a discriminatory ground in the case *Timishev v. Russia*, where the Court applied a very strict test and in its judgement, held that "any differentiation based solely or largely on the person's ethnic background cannot be objectively justified" (paragraph 56), as well as in the case *E.B v. France*, where ECtHR considered that sexual orientation is an "assumed" ground on which the test of very weighty reason applies. On the other hand, if the ground is not "assumed" such as, for example, ownership as a discriminatory ground, the Court applies the margin of free appreciation of the state in order to decide about the necessity of given differentiation, that is, the Court would partially consider the justification provided by the state, by using a less strict test.

The Court has identified grounds of discrimination where the margin of appreciation is not that wide. It has found repeatedly that no different treatment, which is based exclusively or to a decisive extent on a person's ethnic origin, was capable of being objectively justified in a modern democratic society built on the principles of pluralism and respect for different cultures (*D.H. and Others v. the Czech Republic*, paragraph 176; Sejdić and *Finci v. Bosnia and Herzegovina*, paragraphs 43-44).

2.2. The European Social Charter

The European Social Charter (ESC) was adopted by the Council of Europe to complement the ECtHR in the field of economic and social rights. ESC entered into force on 26 February 1965, while the revised version of the Charter was open for signing on 3 May 1996, and came into force on 1 July 1999. It is considered a very important instrument for the reason that the enjoyment of these rights gives rise to many possibilities for the occurrence of unjustified distinctions on discriminatory grounds. The most significant protected rights are the following: right to education, right to work, and rights arising from labour relations (right to equal working conditions, fair remuneration, workers' right to association in trade unions, right to vocational training), right to social security, right to medical assistance, etc. States have a general obligation to provide adequate protection concerning these rights. Namely, the Charter from 1961 does mention the non-discrimination principle only in the preamble, while the revised Charter contains a separate article. Article E in Part V of the ESC sets forth the obligation of the state parties to ensure the enjoyment of the rights from the Charter without discrimination, worded as follows: "The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race,

colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status". The anti-discrimination clause in Article E is characteristic for its open-ended list of protected grounds. Complaints can be lodged to the European Committee of Social Rights to be decided. The protection set forth by the revised European Social Charter, in particular in the part on non-discrimination, is significant as it provides possibilities for filing collective complaints, since the philosophy of this mechanism is not to prevent the individual legal remedy but to ensure wider social reform. This was also pointed out by the Committee itself, such as in the decision in the case *Autism-Europe v. France*, which clearly demonstrates the capacity of this protective mechanism to address institutionalized forms of discrimination, by stating the substantive concept of equality, and invoking the guiding principles embodied in the Charter, such as human dignity and social inclusion.

In the case *Mental Disability Advocacy Centre v. Bulgaria*, the Committee found violation of the revised Charter, i.e. violation of Article 17 paragraph 2 (right to education) seen in reference to Article E (non-discrimination). In its decision, the Committee openly criticized Bulgaria for its active practice of excluding children with intellectual disability from the educational system, thus stating that 3,000 children with moderate and severe intellectual disability, who live in 27 residential facilities for children with intellectual disability, were deprived of the right to efficient education. By criticizing the inadequacy of the standards for inclusive education in Bulgaria, the Committee stated the following: " the regular educational system is neither accessible or adjusted to the children with disability who live in residential facilities for children with mental disability; training received by teachers is inadequate, and the curriculum and teaching aids are not tailored to the special needs of children with intellectual disability; the Government of Bulgaria failed to implement the law from 2002 according to which children living in residential facilities for children with mental disability should be included in the mainstream educational process; as a result of such non-implementation, only 6.2% of the children living in residential facilities for children with mental disability attend school, while the percentage of all children attending primary school in Bulgaria accounts for 94%; the gap between children with and without disability who attend school is so large that it amounts to discrimination against children with intellectual disability living in residential facilities for children with mental disability" (paragraphs 52 - 55)..

2.3. Framework Convention for the Protection of National Minorities

Considering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but should also create appropriate conditions enabling them to express, preserve and develop this identity, the Committee of Ministers of the Council of Europe adopted the Framework Convention for Protection of the National Minorities on 10 November 1994. Until July 2014, the Convention was signed by 43, and ratified by 39 countries.

It is the first legally binding multilateral instrument devoted to the protection of national minorities worldwide. It lays down the legal principles which are binding for

the member states to secure protection of national minorities. The Council of Europe put in place the aspirations stated in the Vienna Declaration to translate, as much as possible, the political obligations acknowledged by the Conference on the Security and Cooperation in Europe (CSCE) into a legal instrument.

According to Section II Article 4 of the Convention, the parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this regard, discrimination on the ground of belonging to a national minority is prohibited. In addition, parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities. These measures shall not be considered to be an act of discrimination.

According to Article 6 of the Convention, the Parties shall be obligated to encourage a spirit of tolerance and intercultural dialogue, and to take effective measures to promote mutual respect and understanding and co-operation among all persons living in their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture, and the media. The Parties also undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

Articles 12-14 of the Convention entail the right to education of national minorities through promotion of their language, culture, need for textbook in the languages of minorities, equal access to quality education, etc. Namely, the parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority. In this context, the Parties shall *inter alia* provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities. The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities. Within the framework of their education systems, the Parties shall recognize that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments. Accordingly, it includes the principle of non-discrimination and equal opportunities for all people irrespective of their ethnic background, which is covered under the definition of national minorities in the Convention.

The Advisory Committee on the Framework Convention for National Minorities, in its third opinion on the country report, adopted on 30 March 2011, in paragraph 18 concludes that a well-developed system of minority language education exists in the country, that is, there are several bilingual and trilingual schools that provide tuition in Macedonian, Albanian, Turkish and Serbian, complemented by optional subjects on learning the language and culture of Bosnijaks, Vlah and Roma (paragraph 156). Nevertheless, cases of discrimination against Roma *inter alia* occur in the field of education, and

special attention should be devoted to the needs of Roma women, as well as the women from other ethnic communities (paragraphs 22, 25, 60 and 69).

International law and practice, and academic literature, discuss the protection of minorities, which is based on two pillars. It is important that practitioners bear the differences between these two pillars in mind, so that they can correctly understand international law and practice, which is why they are discussed here briefly.

One pillar is the non-discrimination pillar, which covers enjoyment of human rights and equality before the law without discrimination, as well as the application of affirmative measures and positive action measures for reaching substantive equality. The other pillar is the identity pillar, which covers minority identity rights, and which have the purpose of providing minorities with necessary conditions to preserve, foster and develop their culture and other essential elements of their identity.[18]

2.4. ECRI and the General Policy Recommendation (GPR) No. 13 on combating antigypsyism and discrimination against Roma

The European Commission against Racism and Intolerance is a unique human rights expert body that monitors actions against racism, discrimination (on grounds of "race", ethnic or national background, skin colour, citizenship, religion, language, sexual orientation, gender identity and sex characteristics), and intolerance in Europe. The ECRI monitors the fights against racism, discrimination, and intolerance that are or may be of a structural or general nature, and the states' legislative and policy responses to these. It is not, however, entitled to receive individual complaints.

The ECRI was set up by the first Summit of Heads of State and Government of the member States of the Council of Europe in 1993 and became operational in 1994. Current trends show that problems of racism and intolerance persist and evolve in European societies and require renewed efforts to overcome. The ECRI is composed of 46 members appointed on the basis of their independence, impartiality, moral authority and recognised expertise in dealing with issues of racism and intolerance. Each Council of Europe member state appoints one person to serve as a member of the ECRI.

The ECRI's statutory activities are country monitoring, thematic work, and relations with civil society. Fulfilling its mandate, the ECRI co-operates with the authorities of Council of Europe member states; independent authorities responsible for action against racism and intolerance at the national level (equality bodies); relevant international organisations, such as the EU, the UN, the OSCE; and civil society.

As part of its thematic work, the ECRI issues General Policy Recommendations (GPRs) addressed to the governments of all member States. GPRs cover important areas of concern in government action against racism and intolerance across Europe, and are intended to serve as guidance for policy makers. General Policy Recommendation No.13 on combating antigypsyism and discrimination against Roma was adopted on 24 June 2011 and was amended on 1 December 2020. This GPR No.13 reinforces the ECRI's GPR No.3, in response to a worsening of the situation of Europe's Roma population. In this recommendation, the ECRI calls on member States to adopt a set of measures

[18] See: Kotevska, B. 2013. Guide on discrimination grounds. OSCE Mission to Skopje and Commission for protection from discrimination, p.23.

as a combination of legal responses, capacity building, as well as educational and awareness-raising activities aiming at combating antigypsyism, discrimination and social exclusion of Roma.

> The term "Roma" includes not only Roma but also Sinti, Kali, Ashkali, "Egyptians", Manouche and kindred population groups in Europe, together with Travellers.

The GPR No.13 stresses that the Governments must develop, implement, and fund national strategies and policies which promote the empowerment and participation of Roma, and engage them as equal partners in working to eliminate racism, intolerance, and discrimination.

These strategies must ensure: i) the adoption of policies underpinned by clear political will and long-term investment designed to improve the situation of Roma; ii) targeted activities to combat racist violence and antigypsyism, and implement effective legal protection against all forms of discrimination in employment, housing, education, health, access to goods and services, and in the exercise of all public authorities' duties; and iii) collection and analyses of statistical data to monitor progress. Women and children are seen as particularly vulnerable groups, and that member-States should improve the situation of Roma women, ensure their rights, and combat multiple forms of discrimination against them, and register all Roma children at birth and ensure all Roma are issued with identity documents.

> "Although most Council of Europe member-states have adopted [measures at different levels], mostly in the form of national strategies and action plans [for the integration of Roma], these are often not successfully implemented. Bridging the gap between strategy and proper implementation is a challenging task for many countries. A number of member-states have not allocated a specific budget for this purpose and a considerable part of the funding spent on Roma integration across Europe is provided through EU funds. This reflects the low level of political priority accorded to Roma at the national level." (ECRI Annual Report 2016, paragraph 22).

The ECRI's Annual Report for 2022 states that Antigypsyism and hate speech targeting Roma remains rife around Europe, as does discrimination against Roma and Travellers, including in the form of persistent or increasingly segregated Roma school classes, and the absence of improved housing conditions. Failure to address antigypsyism in policing is also of particular concern (paragraph 19). Roma with an itinerant lifestyle and Travellers were faced with unfavourable encampment regulations for their "mobile homes" / camping cars, which are not considered as qualifying for housing rights in some countries, while yet being treated less favourably than others in regard to parking and other rules which are applied to camping cars used by tourists. Furthermore, fixed structures inhabited by Roma at times do not meet the authorities' criteria for registered residences, leaving Roma without associated rights or inclusion in urban planning. Regrettably, evictions of Roma from irregularly erected dwellings remained "popular" among voters in many European countries, prompting local authorities to be disposed towards such evictions, without proper safeguards being implemented, notably arrangements for suitable alternative housing for the evicted Roma (paragraph 22). At the same time, the ECRI observed progress in some countries with regard to compensation to Roma for past wrongs committed against them in the form of illegal and often forced

sterilization (paragraph 23) and for past police abuse (paragraph 25).

For more information please see: Chapter VIII: Antigypsyism.

3. Protection from discrimination within the system of the European Union

Article 13 in the Amsterdam Treaty from 1997 (came into force on 1 May 1999 after ratification by all member-states), stipulated the direct competence for EU institutions to adopt measures for anti-discrimination in all areas listed in the European Union law on the ground of sex, racial or ethnic origin, religion or belief, age, disability, and sexual orientation. Prior to this, the concept of human rights was not expressly entailed in treaties establishing the European communities, but indirectly through given provisions that secured the smooth functioning of the internal market. The CJEU had a major role concerning the introduction of this concept in EU law by treating human rights as constituent parts of the general principles of law that the Court must take into account in the interpretation and application of EU treaties. For the first time, the CJEU ruled that human rights are part of the general principles of EU law in the case *Internationale Handelsgeselschaft v. Einfuhr und Vorratselle fur Getreide und Futtermitte* (Case 11/70, (1970), ECR 1125). However, the approach proved to be impractical in the long run since the general principles of law are relevant only for the interpretation and application of treaties, but have no legal effect for expressly construed provisions in treaties. This is for the reason that provisions in treaties have a constitutive character and are above the general principles of law in the hierarchy of norms. Therefore, it was decided that the concept of human rights, and especially the principles of non-discrimination, become part of the European Union acts of primary law, i.e. treaties.

Article 13 in the Amsterdam Treaty is the legal base for the two anti-discrimination directives. The two directives have an identical structure; however, they differ both regarding the *ratione materiae*, and *ratione personae*. Separate directives were adopted in reference to the ground of gender. Different treatment on these grounds in the EU law can be seen mainly in the material scope of the directives. While directives pertaining to the protection of gender and racial difference, i.e. ethnic origin, entail a broader material scope, the Council Directive 2000/78/EC on equal treatment in employment and occupation with regard to the other four grounds, entails only labour relations. Or, in other words, only this Directive stipulates protection from discrimination on the ground of age within the EU, which means also in the field of labour relations. EU institutions failed to adopt a directive that ensures protection against discrimination on the ground of religion or belief, disability, sexual orientation and age beyond the field of labour relations, even though a proposal was made for the so-called horizontal directive on equal treatment. In respect of multiple discrimination in general, and especially in the field of employment and labour relations, one can surely mention the Charter of Fundamental Rights, Directive 2000/78/EC and the two Gender directives (2004/113/EC and 2006/54/EC). The explanation of these directives is provided further in the text.

Before we consider the EU Directives on anti-discrimination, it is worth analyzing the Charter of Fundamental Rights of the European Union (EUCFR), as it is now

considered part of the primary sources of EU law, which was previously part of the Lisbon Treaty. The Charter entails the anti-discrimination clause (in Article 21). That is, Article 21 is horizontally applied and includes all forms of potential discrimination. Article 21(1) reads as follows: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited". In addition, the anti-discrimination clause includes the most extensive list of protected grounds in international law, since it is an open-ended list and includes the category *other status*.

Furthermore, it does not specifically refer only to the rights from the Charter, but stipulates a general prohibition of discrimination in the enjoyment of all rights. Yet the application of the anti-discrimination clause is addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member-States only when they are implementing the EU law (Article 51(1)), and only within the existing powers of the EU (Article 51(2)). From a legal point of view, the existing powers do provide the possibility for the prevention of discrimination through the above-stated directives, and one may state that the Charter does not give added value to this protection. One can note that this clause of the Charter, which is similar to the anti-discrimination clauses in the general human rights instruments, such as Article 14 of ECHR, explained above, entails a broad possibility to justify the limitations to exercising the rights recognized by the Charter, which are subject to the principle of proportionality and only if they are necessary and genuinely meet objectives of general interest (Article 52(1)). And finally, it is noted that this anti-discrimination clause does not distinguish between direct and indirect discrimination, by deriving the two forms of discrimination from the same general definition. It means the same standards of proof are applied for two forms of discrimination, which may pose a problem.

On the other hand, the contribution of the Charter relies on the acceptance of the concept of factual and real equality. This is reflected in Article 26 since it refers only to people with disability.

3.1. EU Directive on equal treatment in employment and occupations

Directive 2000/78/EC from 27 November 2000, establishing a general framework for equal treatment in employment and occupations, as previously stated, expressly lists four grounds of discrimination, i.e. religion or belief, disability, sexual orientation, and age. The purpose of the Directive is to lay down a general framework for combating discrimination on four grounds in the field of employment, occupation and training (Article 1). In view of the terminology used in Article 1 of the Directive, it is clear that it focuses more on the individual rather than the group to which the individual belongs, i.e. it does not stipulate protection for the group, but prohibits discrimination on the four specific grounds. Protection in view of groups exists only with regard to indirect discrimination (Article 2, paragraph 2, line b), affirmative measures/positive action (Article 7), and reasonable accommodation to certain extents (Article 5), i.e. when it is relevant for the affected person to show the relation with a larger group. It poses a problem that Directive 2000/78/EC does not define the discriminatory grounds separately. This matter, however, was

subject of review in the CJEU case law, that is, in cases where disability occurs as a discriminatory ground, and especially in the case *Chacón Navas*, case *Coleman* and case *Jette Ring*.

In the case *Sonia Chacón Navas v. Eurest Colectividades SA*, CJEU held that although the concept of "disability" is not defined in Directive 2000/78, yet, it must be understood as referring to a limitation which results in particular from physical, mental, or psychological impairments and which hinders the participation of the person concerned in professional life (paragraph 43). Furthermore, the concepts of disability and sickness are not identical and cannot be treated as such (paragraph 44), therefore, an individual dismissed from work on the ground of his sickness does not fall under protection from discrimination on the ground of disability, according to Directive 2000/78/EC. And finally, in order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time (paragraph 45) (Sonia Chacón Navas v. Eurest Colectividades SA, Case C-13/05, [2006] ECR I-6467, from 11 July 2006).

On the other hand, *ratione materiae* of Directive 2000/78/EC is very narrow, i.e. it specifies prohibition of discrimination only in the field of labour relations, both in the public and private sector. Nevertheless, the Directive entails all the aspects, starting with the job advertisement, application process, recruitment criteria, interviews, employment, rights arising of employment, remuneration, promotion, annual leave, other benefits, vocational guidance, training and retraining, practical work, membership in workers' organizations, use of membership benefits, and finally the termination of employment (Article 3(1)). The Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes, and Member-States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces. (Articles 3(3) and 3(4)).

It prohibits both direct and indirect discrimination (Article 2(2)), Harassment (Article 2(3)) and instruction to discriminate (Article 2(4)) as well as victimization (Article 11), on the part of natural persons and legal entities both in the public and private sector (Article 3), and stipulates the possibility for the provision of reasonable accommodation for people with disability (Article 5) as well as taking positive action (Article 7).

In view of discrimination on the ground of disability, Article 5 is an important part of the Directive as it obligates the employer to provide reasonable accommodation for these people. That is, Article 5, is worded as follows: "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned". Also, the preamble of the Directive, or the recital 20 and 21, provide guidance that explains the concepts of "reasonable accommodation" and "disproportionate burden". That is, "appropriate measures should be provided, i.e. effective and practical measures to

adapt the workplace to the disability, for example by adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources" (recital 20). Furthermore, "to determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organization or undertaking, and the possibility of obtaining public funding or any other assistance" (recital 21). One identified weakness of this provision is that it fails to expressly state that unjustified non-provision of reasonable accommodation shall amount to discrimination.

The scope of application of this Directive is further restricted by provisions that enable the non-application of the Directive. As mentioned before, given provisions exclude the application of this directive in social security or social protection schemes and well as in view of the armed forces. Also, Article 2.5 allows for measures to be taken which are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health, and for the protection of the rights and freedoms of others. These measures, if somehow distinguished on the ground of age or disability, would not be considered as discriminatory, but those are certainly subjected to the test of necessity and proportionality.

Protection from discrimination on the ground of age, in general, is especially negatively influenced by the provision of Article 6 (1) of this Directive, which ensures an open possibility to justify a distinction on the ground of age. This provision is specific since it applies only to distinctions on the ground of age, hence, age as a ground of discrimination is put in a less favourable position to the other grounds prescribed in Article 13 in the Treaty of Amsterdam. Nevertheless, any such distinction on the ground of age must be subjected to the test of proportionality (legitimate goal, necessity and appropriateness).

CJEU acknowledges that compulsory retirement must not be a priori accepted as justified. In the case *Palacios de la Villa v. Cortefiel Servicios SA*, the Court held that any compulsory retirement must meet the requirement for necessity and proportionality as recognized in Article 6 of the Directive 2000/78/EC. This approach makes it feasible to conduct a court review of the compulsory retirement and to avoid negative influence on workers who are fit and willing to work (Palacios de la Villa v. Cortefiel Servicios SA, Case C-411/05, [2006], from 16 October 2006).

Directive 2000/78/EC is horizontal, that is, it is applied and binding both for the public and private sector. However, it does not produce a direct horizontal effect, i.e. natural persons may file a request to another natural person or legal entity only on the ground specified in the national legislation where this directive was transposed. Also, the directive applies the minimalistic approach, i.e. only the objectives which are to be achieved are defined and only minimum obligations are binding for the states. It leaves freedom to the states to opt for ways of realization of the objectives through their national systems, as well as freedom to adopt and apply more favourable provisions for certain groups of people.

3.2. EU Directive on racial and ethnic equality

Having considered that Article 13 of the Treaty of Amsterdam laid down the freedom of the Council for the selection of measures, in 2000, the Council adopted

Directive 2000/43/EC on equal treatment of people irrespective of their racial or ethnic origin, which means that due consideration was given to the matters of prohibition of discriminatory treatment and protection from discrimination. Other grounds are not embedded in this directive as it refers only to discrimination on the ground of racial or ethnic origin. Other grounds are elaborated in other directives, such as Directive 2000/78/EC explained above, and gender directives that will be further explained. This is one of a few instruments where ethnic origin is considered a separate discrimination ground.

It prohibits both direct and indirect discrimination (Article 2.2. a) and b)). In order to prove direct discrimination, one should identify a comparator, i.e.an individual in a similar situation, so that compared to him/her, the applicant is put in a less favourable position. Direct discrimination on the ground of racial or ethnic origin cannot be justified under any conditions, unless such a characteristic constitutes a genuine and determining occupational requirement (Article 4) or it is based on undertaken affirmative measures (Article 5). The Directive also prohibits indirect discrimination. In order to prove indirect discrimination, one should conclude that the implementation of certain apparently neutral provisions, criteria or practice produces a disproportional and negative effect on the members of a certain racial or ethnic group, in comparison with members of other groups. In view of the existence of indirect discrimination, one should prove that the members of the discriminated group were disproportionately affected through the use of neutral provisions, criteria or practices. Indirect discrimination may be justified, in cases when such distinction (criterion, provision, practice) has a legitimate goal, and the measures are necessary and appropriate to the goal.

Definitions about direct and indirect discrimination, harassment, instruction to discriminate and victimization from EU Directives, including the present directive, should be the base for the definition of these concepts in our national legislation. Any existing legal inconsistencies need to be resolved by invoking the EU Directives and their definitions on various forms of discrimination.

Article 3 determines the material scope of the Directive. Namely, this Directive applies to labour relations, that is, conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions, promotion, access to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, employment and working conditions, including dismissals and pay, membership of and involvement in an organization of workers or employers. This Directive also applies in areas beyond labour relations, such as employment, social protection, social security, health care, access to goods and services and housing; andtherefore it differs from Directive 2000/78/EC on equal treatment in employment and occupation, as explained above.

Article 4 stipulates a limited exception from prohibition of discrimination, and allows for a difference of treatment which is based on a characteristic related to racial or ethnic origin, when such a characteristic constitutes a genuine and determining occupational requirement.

Article 5 sets forth the affirmative measures as exceptions of direct discrimination, and in fact, complies with the generally accepted position on affirmative measures within the EU, in the sense that it shall not prevent any Member-State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to

racial or ethnic origin. Given the interim nature of affirmative measures, they shall apply with a view to ensuring full equality in practice. Affirmative measures recognized in Article 5 of the Directive are also relevant for our country in terms of the justification of measures related to the implementation of the principle of adequate and fair representation.

The Directive also sets forth the safeguard mechanism, as a goal that member-states should implement in their national legal systems. Above all, member-states should ensure access to judicial and administrative proceedings whenever individuals consider themselves as being discriminated against. If the alleged victim establishes facts from which it may be presumed that there has been less favourable treatment or disproportional negative effects from a given provision, criterion or practice, the burden of proof is shifted to the respondent to prove that discrimination did not occur (Article 8(1)).

Based on this Directive, member-states shall designate a body or bodies for the promotion of equal treatment without discrimination on the grounds of racial or ethnic origin. These bodies shall provide independent assistance to victims of discrimination in pursuing their court action, will conduct research, and will publish independent reports on any issue relating to such discrimination (Article 13).

CJEU in the case *Firma Feryn*, found direct discrimination concerning situations when an employer publicly states that it will not recruit employees of a certain ethnic or racial origin since such statements have a strong likelihood of dissuading certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market. (Paragraph 28).

3.3. Gender directives

Directive 2006/54/EC of the European Parliament and of the Council 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

The purpose of this Directive is to simplify, modernize and improve the EU legislation in the field of the equal treatment of men and women in matters of employment by bringing together in a single text the main provisions existing in this field as well as certain developments arising out of the case-law of the CJEU. Given the case law of CJEU, due consideration should be given to the case Bilka as the CJEU examined the different treatment on the basis of the employer's managerial views that justify the exclusion of part-time workers from the Pension Insurance Fund, in view of the fact that the measure was taken to stimulate full-time work and ensure sufficient number of staff. In this case, CJEU did not expressly state whether the measure is considered proportional to the different enjoyment of rights (Bilka-Kaufhaus GmbH v. Weber Von Hartz, Case 170/84 [1986], ECR 1607, from 13 May 1986). Given the case law of CJEU, one may draw the conclusion that the Court would not accept justification for discriminatory treatment on the ground of sex, which is simply based on financial or managerial considerations of employers.

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation and to that end, it focuses on the three areas, as follows: access to employment, including promotion, and to vocational training; working conditions, including pay; and occupational social security schemes.

The Directive prohibits both direct and indirect discrimination, harassment, sexual harassment, and sets forth principle of equal pay for equal work and work to which equal value is attributed and occupational social security schemes paid by the employer.

It includes provisions concerning the three following principles: equal pay; equal treatment in the social security schemes by the employers; equal treatment in access to employment, vocational guidance and promotion in the field of labor relations.

The Directive invokes and prompts the principle established under Article 141 paragraph 4 of the Treaty Establishing the European Community, in view of ensuring full equality in practice between men and women in working life, and that the principle of equal treatment shall not prevent any Member-State from maintaining or adopting measures providing for specific advantages, in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

In the case *Kalanke v Freie Hansestadt Bremen*, the affirmative measures for women were challenged and CJEU held that quotas for employment of women that were automatically and absolutely set, were contrary to the anti-discrimination legislation of the European Union. See: Kalanke v. Freie Hansestadt Bremen, Case C-450/93, [1995] ECR I-3051, from 17 October 1995.

This part also includes provisions from the Directive 2002/73/EC on enhanced protection for mothers, fathers and adoptive parents during the parental leave. Also, it makes reference to Directive 92/85/EEC (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding).

The Directives requires the member-states to introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation for the loss and damage sustained by a person injured as a result of discrimination on the grounds of sex, and does not specify the maximum amount of awarded compensation.

Also, the Directive includes provisions concerning the following: obligation of each member-state to designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex, as well as provision of assistance to victims of discrimination.

Furthermore, the Directive underlines the need for a strengthened role of social partners and civil organizations for the promotion of the principle of equal treatment.

The Directive also calls upon the member-states to repeal or change part of the national legislation that is contrary to the principle of equal pay and the principle of equal treatment of men and women. Member States shall establish a system of penalties, which may comprise of effective, proportionate and dissuasive penalties for anyone who violates the rights guaranteed by the Directive. In addition, it calls upon protection of employees, including those who are employees' representatives against adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment` (protection from victimization). The Directive recommends that the member-states

should encourage employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment. Member States are required to actively take into account the objective of equality between men and women when formulating and implementing laws and regulations and all relevant information is brought to the attention of all the persons concerned.

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

This the first EU legal instrument that aims to extend the application of the principle for equal treatment of men and women beyond the area of employment and labour law. Having regard to the legal ground in Article 13 of the Treaty of Amsterdam, which sets forth the possibility for the Council, on proposal of the Commission and after consultations with the European parliament, unanimously to adopt measures for combating discrimination on the ground of sex; and it prohibits the discriminatory approach to goods and services offered on the market. The Directive shall not apply to media and marketing as well as to public or private education.

The prohibition recognized by the Directive equally applies to indirect and direct discrimination, including the less favourable treatment due to pregnancy or maternity, deemed as one form of direct discrimination. Harassment and sexual harassment are also stipulated and prohibited as one form of discrimination. The principle of equal treatment shall not prevent any member state from adopting specific affirmative measures.

Pursuant to the Directive, member- states shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits. As an exception, pursuant to the Directive, member-states can permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk. However, such treatment must be based on relevant and accurate actuarial and statistical data which are publicly available and regularly updated. The Directive prohibits those costs related to pregnancy and maternity result in differences in individuals' premiums and benefits on the ground of sex.

In the case *Test-Achats*, the Belgian law allowed the insurance companies to make different calculation of premiums and benefits for men and women pursuant to Article 5(2) of Directive 2004/113/EC. The court found that implementing this derogation is contrary to the principle of equality between men and women. The Belgium Constitutional Court referred the question to the CJEU to establish whether Article 5(2) of the Council Directive 2004/113/EC is in compliance with the principle of equality and non-discrimination as guaranteed by the provision. CJEU held that difference in premiums and benefits where sex is the decisive factor in the calculations (based on statistics to assess the risk in possible situations for men and women) must be annulled, having in mind that five years passed since the transposing of Directive 2004/113/EC in the national legislation. That is, the Court declares Article 5(2) to be invalid upon the expiry of the appropriate transitional period, i.e. from 21 December

2012. Consequently, the Court ruled that when calculating benefits and premiums, both men and women should receive equal amount of benefits irrespective of the sex. See: Association Belge des Consommateurs Test-Achats and Others v. Conseil des ministres, C-236/09.

As exception, the Directive allows the differential treatment of men and women, only if that is justified with a legitimate goal, such as, protection of victims of gender-based violence, protection of privacy and morale, organization of sporting events with participants from only one sex etc.

Each member-state shall adequately make changes of the relevant legislation which is contrary to the principle of equal treatment. In addition, the directive specifies that each member-state shall designate a body or bodies for the promotion of equal treatment of men and women on the national level in all areas stated in the Directive.

The Directive also provides the possibility for protection of victims of discrimination within judicial and/or administrative procedures and ensuring real and effective compensation or reparation to victims of discrimination. Sanctions in case of discrimination must be efficient, appropriate and proportional. Considering the burden of proof in cases where the plaintiff presented facts on which one can assume the existence of discrimination, it shall be for the respondent to prove that there has been no discrimination in the respective case. The directive provides for protection from victimization, that is, from any adverse treatment or adverse consequence as a reaction to a complaint or to legal proceedings aimed at enforcing compliance with the principle of equal treatment, as well as the witnesses of cases of discrimination on the ground of sex.

The Directive also encourages a constructive dialogue with the civil sector as a contribution in combating discrimination, as well as broad dissemination of information with regard to this Directive and the rights and obligations thereof

3.4. Future challenges of the anti-discrimination law of the European Union

The Proposal for a Council Directive on implementing the principle of equal treatment between persons, irrespective of religion or belief, disability, age or sexual orientation, the so-called 'Horizontal Directive' has been under the process of review by the Council of EU for almost 15 years now. The proposed directive is an attempt to complete the anti-discrimination legislation of the EU, i.e. the existing directives, and ensure prohibition of discrimination also in other areas beyond the area of employment, on all above stated grounds. The lack of harmonization in the areas of protection on each of the discriminatory grounds, that is, different material scope of each of the existing EU anti-discrimination directives was often criticized for having created a hierarchy of protected grounds. In order to address this deficiency and due to persistent pressure from the European Parliament and the civil society, the Commission presented the Proposal for Directive in July 2008. By way of retrospective look, despite the extensive examination and amendments to the proposal, i.e. which were changed by the Council, unfortunately, one can draw the conclusion that practically there is no indication that EU member-states are close to reaching agreement on the wording of the proposal for directive and the respective voting. Bearing in mind that

this would require the unanimity of the Council, it is essential and utterly necessary that member-states reach an agreement.

The analysis of the proposal for direction, including all the changes, draws one's attention to three separate trends, which will be additionally examined. *First*, the willingness to go a step backwards in view of the material scope of the directive, unlike the existing anti-discrimination directives; *second*, to avoid taking a more ambitious approach than the one already applied (such as, e.g., regulate the matters of multiple discrimination or impose a positive obligation onto EU member-states for the promotion of equality); and *third*, in view of disability (not the other grounds of discrimination) one can notice that member-states seem to be ambitious in order to use the directive in the implementation of the Convention on the Rights of People with Disability which has been signed by EU member-states.

One may conclude that many member-states are still reexamining their willingness to adopt the proposal for directive on equal treatment. Moreover, this proposal for directive shall not introduce any new innovative solutions, and also the proposal fails to reform the existing anti-discrimination legislation of the EU, and finally, this results in missing the opportunities for modernization. However, accepting the Horizontal Directive by the EU will demonstrate the willingness of the member-states to adhere to the fundamental values of the Union and move towards a Union of Equality.

Chapter V

Protection from discrimination in the national legal system

1. Legal framework on anti-discrimination

As far as the national legislation is concerned, the anti-discrimination legal framework was created in the country in the past several years and may be considered as a relatively solid base for future development of the case law.

1.1. Constitutional protection

Article 9 of the Constitution stipulates the general provision on equality, which is worded as follows: "Citizens of the Republic of North Macedonia are equal in their freedoms and rights, regardless of gender, race, colour of skin, national and social origin, political and religious conviction, property and social status. Citizens are equal before the Constitution and the law. "(Constitution, 1991, Article 9). Nevertheless, this provision has been criticized mainly for the use of the word *citizens*, since one gets the impression that foreigners (people without citizenship and foreign nationals) are not protected against discrimination based on this provision. Furthermore, Article 9 does not include some of the discriminatory grounds which are currently typical, such as age and mental and physical disability, and also includes a closed list of discriminatory grounds. Ultimately, bearing in mind that Article 9 refers to the human rights and freedoms of individuals and citizens, i.e. natural persons, it does not stipulate protection against discrimination for legal entities. Furthermore, despite the criticism, the Constitutional Court for many years has been providing a very restrictive interpretation of this clause, with reference to Article 110 paragraph 3, that is, it acts *upon requests for protection of human rights and freedoms*, which is also clearly manifested by the fact that the Court declares itself as having no competence for cases of alleged discrimination and for deciding on the merits of the case.

For purposes of illustration, we shall consider the procedure for reviewing the constitutionality and legality of the provision from the Call for scholarships for the second-cycle of studies in the country for the academic year 2009/2010, from 15 February 2010, posted on the website of the Ministry of Education and Science. The petitioner is mainly concentrated on the scholarship criteria which are considered

as discriminatory and contrary to several constitutional and legal provisions, including Article 9 of the Constitution, as well as the Law on Prevention of and Protection against Discrimination. The Constitutional Court did not take the initiative, and that was supported by the arguments that the Minister of Education and Science has the legal power to establish criteria on granting scholarship through the operationalization of the legal norms. Given the fact that the minister acted in the framework of his powers, there is no violation of the principle of constitutionality and legality. The second argument of the Court is that the state awards scholarships, and in view of its economic power, the state would make the arrangements about who can apply for such scholarship (Constitutional Court, *Decision U No. 138/2010*).

Both arguments of the Constitutional Court were not thoroughly elaborated. The first argument, that the minister has legal powers to prescribe conditions and criteria for awarding scholarship, is considered inappropriate since discrimination on any ground, including that of age, is not permitted in designing the scholarship criteria. The minister is given discretionary right, however, this right may not be overstepped arbitrarily. The second argument is stronger in view of the fact that the state awards the scholarships and therefore has the right to establish the respective conditions. Given the unemployment rate, the state opted for awarding scholarships to young unemployed people. In other words, this suggests the existence of an objective goal concerning the scholarship criteria, and that would mean alleviating the conditions for employment of young people. However, the Court did not take account of the necessity and appropriateness of this criterion to attain the established goal (that is, whether the criterion surpasses the established goal, which, in return, results in unnecessary discrimination). This is especially pertinent in view of the question, "Why cannot older unemployed people be awarded scholarships? "One can also raise the question, "What about the process of lifelong learning that is promoted by the state? "The Constitutional Court failed to analyze these questions, and held that the state is entitled to establish the criteria. However, the Constitutional Court should also have taken account of the state's obligation to guarantee equality and non-discrimination.

For that reason, the national legislators started to expressly prohibit discrimination through the adoption of several laws, the most relevant being the laws in the field of labour relations. This process further culminated with the adoption of the Law on Prevention of and Protection against Discrimination in 2010 and consequently the second one in 2020.

1.2. Law on Prevention and Protection against Discrimination

The Law on Prevention and Protection against Discrimination is expected to fill the legal gaps in our legal system in the field of non-discrimination, and to ensure better legal protection for all people who are alleged victims of discrimination. Article 5 of the Law, in addition to the listed grounds, such as: race, skin colour, origin, national or ethnic belonging, sex, gender, sexual orientation, gender identity, belonging to a marginalized group, language, nationality, social origin, education, religion or religious belief, political belief, other belief, disability, age, family or marital status, property status, health status, personal and social

status, also specifies an open-ended list of grounds, within the meaning of the phrase "and any other ground".

The Law prohibits all forms of discrimination, including direct and indirect discrimination (Article 8), calling, inciting and instructing to discriminate (Article 9), harassment (Article 10), victimization (Article 11), segregation (Article 12) done by natural persons or legal entities--both in the public and private sector--in the field of employment and labour relations, education, access to goods and services, housing, health, social protection, administration, judiciary, science, sport, membership and activity in trade unions, political parties and civil organizations as well as other fields, respectively (Article 3). However, discriminatory advertisements or statements are not expressly prohibited by the law. Also, Article 13 of the Law stipulates that multiple discrimination is a more severe form of discrimination, that is, when one person is discriminated against on several discriminatory grounds at the same time. This is of great importance for the reason that all people carry different personal characteristics, which may, in many cases, amount to cumulative or intersectional discrimination. As severe forms of discrimination the Law prescribes also this intersectional discrimination, repeated discrimination and continued discrimination. In Article 4, which comprises the Glossary, item 11 defines that repeated discrimination shall mean any discrimination against a person or group committed multiple times on the same discriminatory grounds. Item 12 states that "Continued discrimination shall mean any discrimination committed against a person or group uninterrupted, for a longer period of time, on any discriminatory grounds".

Direct discrimination on discriminatory grounds is prohibited pursuant to Article 8 paragraph 1 of the Law, and occurs when a person or a group is treated, was treated or would be treated less favourably (such as differentiation, exclusion or restriction, which has or can have the effect of denial, violation or limitation of the rights of the person) compared with another person or a group in a factual or potentially comparable or similar situation, merely on the ground of a protected characteristic. This definition is fully compliant with the Directive 2000/78/EC, as explained above.

In respect of the existence of general justification of direct discrimination, one should note that the Law does not prescribe such justification. On the other hand, the anti-discrimination legislation includes three general exceptions in Article 7. For instance, differential treatment of persons who are not citizens of the Republic of North Macedonia regarding the rights and freedoms provided in the Constitution of the Republic of North Macedonia, in the laws and international agreements ratified in accordance with the Constitution of the Republic of North Macedonia, and which derive directly from citizenship of the Republic of North Macedonia (Article 7 paragraph 3 item 1); genuine and determining occupational requirement, i.e. differential treatment of persons on any discriminatory grounds due to the nature of their occupation or activity, or due to the conditions in which such occupation is performed, which constitutes a genuine and determining occupational requirement, the aim is legitimate and the requirement is not exceeding the level required for its realization (Article 7 paragraph 3 item 2); and affirmative measures in specific cases - any measures and actions undertaken with the specific aim of eliminating unequal enjoyment of human rights and freedoms, until the factual equality of a person or a group is achieved, if such differentiation is justified and objective, and the means used to achieve such an aim are proportionate,

i.e. appropriate and necessary, shall not be deemed to constitute discrimination (Article 7 paragraph 1). It should be pointed that the last exception is limited. Namely, Article 2 paragraph 2 provides that "the measures and actions from paragraph (1) of this Article are time limited and are applicable until factual equality or persons or a group in enjoyment of rights is achieved". Indirect discrimination on a discriminatory ground is prohibited pursuant to Article 8 paragraph 2 of the Law. It is manifested as apparently neutral regulations, provisions, criteria, programmes or practices that put a person with a protected characteristic or a larger group of those people, at a disadvantage in comparison with other persons or groups of persons based on a discriminatory ground, unless it arises from a legitimate aim, and the means of achieving such an aim are proportionate, i.e. are appropriate and necessary. This definition is not fully compliant with Directive 2000/78/EC, which was explained above, for the reason that its formulation only means that it puts people in a disadvantageous position, without reference to the fact that people could have been put or can be put in a disadvantaged position. The law provides for the possibility for a general justification of indirect discrimination based on the existence of a legitimate aim and the proportionality test. Interestingly, one can note that the courts should have the key role in resolving the dilemma about the extent to which the members of the group are affected in cases of indirect discrimination. The use of statistics is explicitly stated as an evidentiary tool in order to prove such cases, and the authors hold the opinion that statistics can be accepted as evidence in court proceedings, based on the discretionary admission of evidence by the court.

In addition, calling, inciting and instructing to discriminate is prohibited pursuant to Article 9 of the Law as one form of discrimination. It includes both direct and indirect invoking, encouraging, giving instruction and stimulating/prompting another person to discriminate.

Harassment on discriminatory grounds is prohibited pursuant to Article 10 of the Law, where it is defined as a separate emergent form of discrimination. Harassment and degrading treatment violates the dignity of a person or group of people on a discriminatory ground, and aims to, or results in, a violation of the dignity of the respective person, or in the creation of a threatening, hostile, degrading or intimidating environment, approach or practice. This is a broad definition of harassment, for the reason that besides the violation of dignity of one person, it also refers to groups of people who share the protected characteristic. It also mentions undesired/unwanted treatment, i.e. that there can be no victim of harassment if the individual wanted or approved of such behaviour. Finally, when speaking about harassment, I would point out that our legislation does not provide a clear answer to the question about the liability of the responsible entity (employer or service provider) for any harassment done by third parties. Yet, it is considered that the liability of the employer for treatment by third parties, including harassment, shall largely depend on the nature of their mutual relations, as well as the future development of case law in this regard. Sexual harassment is specifically prohibited in the Law, stating that "Sexual harassment shall mean any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of violating the dignity or creating a threatening, hostile, degrading or frightening environment, approach or practice".

With regard to people with disabilities, Article 4 paragraph 1 item 4 is of great importance, as well as Article 6 that sets forth the provision of reasonable accommodation. According to the Law, "Reasonable accommodation shall mean the necessary and appropriate modification and adjustment required in a particular case, which does not resolve in a disproportionate or undue burden, aimed at ensuring the exercise or enjoyment of all human rights and freedoms of persons with disabilities on an equal basis with others. Denial of reasonable accommodation shall constitute discrimination". The Law does not define the term "necessary and appropriate measures" in regard to persons with disabilities, except for the explanation that those are individualized measures, i.e. required in a specific case. Additionally, the Law does not distinguish between the important and basic functions of the workplace, and the marginal and unessential functions, which is considered to be a significant deficiency of this provision. Finally, in respect of the disproportional burden, according to our law: a disproportional burden shall not be analyzed by the national legislation and it shall not be subjected to the size and status of the legal entity (state or private), financial costs, scope of employer's financial resources, as well as the possibility of receiving funding from public sources or any other assistance, which is the case in other countries. Any subsequent changes of the law must include such an explanation. One progressive feature of this article, as well as of Article 6, is its full compliance with the Convention on the Rights of People with Disabilities, that is, that denial of reasonable accommodation shall constitute discrimination.

Victimisation is provided for in Article 11 as a specific form of discrimination that occurs when someone is bearing harmful consequences only because this person has taken action to be protected against discrimination, i.e. who has reported discrimination, initiated proceedings for protection from discrimination, testified during such proceedings or has otherwise participated in the procedure for protection against discrimination. This provision is fully in line with the secondary legislation on anti-discrimination and gender equality of the EU.

Article 12 provides for segregation as a specific form of discrimination, which is a novelty in comparison with the Law on Prevention and Protection from Discrimination from 2010. Namely, the Law defines segregation as any physical separation of a person or group of persons on any discriminatory grounds, without a legitimate or objectively justified aim. Article 4 paragraph 1 item 7 defines what a legitimate and objectively justified aim means – "any aim for whose fulfillment the means shall match the actual needs in a particular case, shall be specifically defined in advance, necessary for the achievement of such aim and shall be proportionate to the effects to be achieved".

In consideration of the procedural provisions, the shifting of the burden of proof is expressly stated in the Law on two occasions: first in the procedure in front of the Commission for Prevention and Protection from Discrimination (Article 26), and second in court procedure (Article 37). Moreover, Articles 14 to 31 of the Law stipulate the establishment of an equality body - Commission for Prevention and Protection from Discrimination (CPPD), and regulate the procedures before this body. Three procedures can be undertaken in case of alleged discrimination within the national system, that is: administrative procedure (before the CPPD pursuant to Article 23 to 31 of the Law and before the Ombudsperson Institution pursuant to Article 13 to 27 of the Law

on Ombudsperson), civil procedure (pursuant to Article 32 to 40 of the Law) and misdemeanor procedure (pursuant to Article 41 to 44 of the Law).

The CPPD is an equality body that works on combating discrimination and for the realization of the right to equality. It is stipulated to be an independent, autonomous body, which is competent both for the public and private sector according to the Law. In accordance with Article 21 of the Law, the CPPD is given broad competencies with regard to the promotion of equality and the prevention of, and protection from, discrimination on discriminatory grounds, which can be divided into four groups, as follows.

- Provision of legal aid and support to victims of alleged discrimination on all grounds (by deciding upon individual cases and issuing opinion and recommendations for specific cases of discrimination, as well as by issuing general recommendations, initiate *ex officio* proceedings for protection from discrimination, taking active part in court procedure in cases of discrimination by initiating, acting as co-party and submitting *amicus curiae* (friend of the court) briefs to the court);
- Implementation of promotional, educational and advisory functions (awareness raising about discrimination on the discriminatory grounds and available safeguard mechanisms, issuance of opinions in relation to proposed laws that are relevant for anti-discrimination on these grounds, issuance of recommendations and making initiatives for changes of regulations for the purpose of implementing and improving the protection from discrimination);
- Research, analytical and reporting functions (collecting statistics and establishment of databases, conducting studies and research, submission of reports, quarterly informing the public about the current state of discrimination); and
- Capacity building and cooperation with other bodies (cooperation with local self-government units and central authorities, cooperation with the Ombudsperson Institution and civil society, provision of trainings on discrimination, cooperation with national equality bodies from other countries, as well as international organizations in the field of protection from discrimination).

The Law provides that any person who considers himself/herself to be a victim of discrimination can file a complaint to the CPPD. Once the factual situation is established, the Commission shall issue an opinion regarding the alleged discrimination within 60 days from the day when the complaint was filed, and shall notify the complainant and the respondent accordingly. If existence of discrimination is determined, CPPD shall recommend ways in which it should be eliminated. The person to whom the recommendation is addressed, is liable within 30 days or within a longer period if there are particularly justifiable reasons but no longer than 6 months from the receipt of the recommendation to act accordingly and eliminate the violation of a certain right. The Commission must be notified if the violation was eliminated. If the discriminator does not act upon the recommendation within the specified period, the CPPD shall submit a request to initiate misdemeanor proceedings before the competent court on misdemeanor.

The Law also stipulates that court proceedings may be initiated for the protection of rights in cases of discrimination, which is explained in more details below.

1.3. Law on Labour Relations

The Law on Labour Relations as *lex generalis* is crucial for the area of labour relations. It regulates the labour relations among employees and employers, based on concluded employment contract (Article 1). It should be noted that the Law does not distinguish between employees in the private and public sector (Article 3 paragraph 1), as well as between full-time and part-time employees (Article 8 paragraph 3). However, the Law does not provide for protection of volunteers, which is fully compliant with the Directive 2000/78/EC, explained above.

From the perspective of protection from discrimination, Article 6 of the Law on Labour Relations expressly prohibits discrimination by natural persons and legal entities, both in the public and private sector. Also, the Law prohibits all forms of discrimination, including direct discrimination (Article 7 paragraph 2), indirect discrimination (Article 7 paragraph 3) and harassment of job applicants and employees. Pursuant to Article 9 and Article 9-a, the Law distinguishes between harassment, within a general definition, sexual harassment and mobbing (psychological harassment at the workplace) as some of the emerging forms. Discrimination is also prohibited with regard to conditions to access certain employment, self-employment or occupation, including selection criteria for applicants; promotion; access to all types and levels of professional guidance, trainings, advanced professional trainings and retraining, including practical work experience; conditions for employment and work, including pay and other benefits, dismissal from work; membership and participation in activities of trade unions, employers' organizations and other organizations, whose members deal with particular occupation and the advantages from such membership (Article 7 paragraph 4).

The law is criticized for the fact that instruction to discriminate is not stipulated as separate legal institute. In addition, it is criticized for failing to expressly prohibit the discriminatory advertisements or statements on discriminatory grounds, with the exception of the ground- sex. Article 24 paragraph 1 of the Law expressly prohibits discriminatory advertisements or statements only on the ground of sex, which is worded as follows: "an employer may not advertise a particular job only for men or only for women, unless given sex is necessary condition for the respective work".

Despite the fact that the Law on Prevention of and Protection against Discrimination in article 10 give as the definition of what harassment is, but is not quite comprehensible in terms of who can do harassment, the Law on Labour Relations provides only a partial answer, whereby the perpetrator of psychological harassment (mobbing) may be one or several persons in the capacity of employer, that is, a natural person, superior or worker (Article 9-a paragraph 4).

Besides substantive provisions, the Law also lays down the procedural provisions, such as the shifting of the burden of proof (Article 11 paragraph 1 and 2) and the court procedure for protection of rights from employment. Furthermore, according to the Law, in cases of discrimination, a job applicant or employee are entitled to claim compensation for damage (Article 10). On the positive side, the law does not specify restrictions on the amount awarded by the court, i.e. the employee is entitled to an amount of compensation based on the Court's discretion, which is in line with the judgement of CJEU in the case *Marshall No. 2*. Any restrictions on the amounts that a Court awards as compensation for

damage to an employee, are contrary to Article 15 of the Directive 2000/78/EC.

What is new and current in relation to the Law on Labour Relations is the fact that a new legal solution is being prepared that should overcome the problems and causes related to the question of discrimination. Also, in the new legal resolutions, appropriate provisions are planned that will apply to special groups of employees (such as women, minors, persons with disabilities and elderly employees). This review is expected to provide a better balance between the issues of labour protection and equality as a systemic determination of the new Labour Relations Act.

1.4. Law on Equal Opportunities of Women and Men

The new Law on Equal Opportunities for Women and Men was adopted in January 2012. The adoption of this law enabled all arrangements concerning the establishment of equal opportunities and equal treatment of women and men, adoption of general and specific measures for establishment of equal opportunities, and also specified the rights and obligations of responsible entities for provision of equal opportunities, as well as the procedure for establishment of unequal treatment of women and men by the Agent for equal opportunities for women and men.

The purpose of the Law on Equal Opportunities for Women and Men is the establishment of equal opportunities for men and women in the political, economic, social, educational, cultural, health, civil and any other area in the society. The Law includes definitions *inter alia* for discrimination on the ground of sex, direct and indirect discrimination on the ground of sex, and harassment and sexual harassment on the ground of sex.

Even though the law was adopted in 2012, one can notice several deficiencies with regard to the definition of direct discrimination (Article 4 item 3) and failure to state the types of less favourable treatment, which poses a risk to exclude some type of treatment which is not stated in the law. The definition should be extended in order to clearly reflect the constitutive elements of direct discrimination, and specifically to make mention of cases of gender discrimination. In respect of indirect discrimination, the law formulates a situation "when individuals of one sex are put in a less favourable position", (Article 4 item 5). The definition is not fully compliant with Directive 2000/78/EC since it only stipulates that people are put in a less favourable position, and fails to stipulate that people were put or can be put in a less favourable position. The Law provides the possibility for general justification of indirect discrimination based on the existence of a justified goal and a proportionality test.

Article 8 paragraph 1 specifies which entities adopt special measures, while paragraph 4 specifies which entities adopted special measures and need to submit an annual report for the previous year to the Ministry of Labour and Social Policy (MLSP) until 31 March in the current year. It is a declarative provision since it only sets forth the proposition that certain legal entities should adopt special measures and they need to submit an annual plan and report, respectively. If one considers this provision in conjunction with Article 39 of the Law, which sets forth the fine that is imposed upon an entity that fails to submit the annual plan and report to the Ministry, it becomes known that the fine is prescribed only for the

entities that adopted special measures but failed to submit an annual plan and report, while the fine is not imposed upon entities that did not adopt special measures and did not submit annual plan and report. The authors are of the opinion that this provision should undergo changes that will refer to all entities, or, having in mind the declarative nature of the provision, the fine should not be prescribed.

With regard to overseeing the areas where positive measures were introduced (Article 12 paragraph 1 line 15 and Article 37), none of the provisions define the overseeing process by the Ministry, i.e. whether it is done by special professional service, commission, etc.

1.5. Other regulations

The Law on Protection from Harassment at the Workplace sets forth the rights, obligations and responsibilities of employers in respect of the prevention of psychological and sexual harassment at the workplace, as well as the measures and procedures for protection from harassment at the workplace (Article 1). As far as the subject matter of the law is concerned, in point of fact, it is an anti-discrimination law with limited material scope and applies only to psychological and sexual harassment, only at the workplace (Article 3 paragraph 4 and Article 5). Shifting the burden of proof in accordance with Article 33 of the Law is guaranteed in a court procedure concerning protection from harassment at the workplace.

In addition to all previously stated laws, the national legislation expressly provides for general prohibition of discrimination in several other laws, such as the Criminal Code, Article 137 (violation of citizen's equality), Article 282 (violation of equality in economic activities), Article 319 (provoking national, racial and religious hatred, discord and intolerance), and Article 417 (racial and other discrimination). In addition, it does make mention in the Law on Courts (Article 3 paragraph 1 item 3 and Article 6 paragraph 1, and Article 43 paragraph 1), Law on Social Protection (Article 20), and the Law on Child Protection (Article 12 to 15). Then, laws in the field of education, such as Law on Primary Education (Article 2), Law on Secondary Education (Article 3 paragraph 3) and Law on High Education, also including anti-discrimination clauses. This also holds true for the Law on Equal Opportunities of Women and Men, explained in details above, the Law on Protection of Patients' Rights (Article 5), and the Law on Volunteers (Article 9).

Despite the fact that all these laws include anti-discrimination clauses, they are mostly criticized for the failure to harmonize the terminology and legal instruments, the different solutions they provide and the inconsistent system of protection in various areas and on various grounds.

2. Institutional framework for protection from discrimination

From the aspect of the Law on Prevention and Protection against Discrimination, the mechanisms for protection from discrimination may be divided in two groups, that is: action that prevents an occurrence of discrimination (preventive action) or, conversely, as I have an objection action as response to already existing cases of discrimination (restitutive and repressive). The first group consists of educational and preventive action and extrajudicial legal protection, while the second group consists of civil and misdemeanor liability resolved in appropriate court proceedings. Chapter five of the Law on Prevention and

Protection against Discrimination (court protection) is devoted to the civil-legal protection, being the most important and direct aspect of the protection of the rights of victims of discrimination, which is specified in separate provisions in the law.

2.1. Quasi-judicial protection

2.1.1. Commission for Prevention and Protection against Discrimination

The Commission for Protection against Discrimination (CPD) was established as an independent and autonomous body with strictly defined competencies by law, on the basis of the Law on Prevention and Protection against Discrimination, which started to apply on 1 January 2011. In compliance with the anti-discrimination directives and recommendations of the European Union, and based on the candidate status of the country for membership in the EU, which was fine. The country was obligated to transpose the directives in the national legislation, whereby CPD takes the role of central national authority for prevention and protection from discrimination, as well as for affirmation and promotion of the principle of equality. In 2020, the new Law on Prevention and Protection against Discrimination was adopted, replacing the same Law from 2010. With the 2020 Law a new Commission for Prevention and Protection against Discrimination (CPPD) was created, starting its operation in January 2021.

In general, the competencies of CPPD pursuant to Article 21 of the Law may be divided in two pillars or two areas of action: first, preventive action which implies promotion of values for equal treatment and concept of non-discrimination, and, second, preventive action where CPPD should establish and provide guidelines, opinion, and recommendation, including general recommendations, in dealing with certain cases of discrimination.

In addition to these two key roles, CPPD is also given competencies, as well as the obligation towards potential victims - complainants to provide information about their rights and possibilities to initiate judicial or other proceedings before competent state bodies, due to breach of the Law on Prevention and Protection against Discrimination, to inform the public about cases of discrimination through educational and promotional activities related to equality and human rights, to give recommendations to state bodies concerning the realization of equality, and to establish cooperation with competent bodies for equality and human rights protection in the local self-government, as well as the Ombudsperson Institution and civil society. Finally, the CPPD has mandate to actively participate in court proceeding in discrimination cases by initiating the cases on their own, acting as co-party (intervener) in the proceedings and acting as *amicus curiae* (friend of the court).

Article 21
Competences of the Commission

(1) The Commission shall:

1) Undertake activities for promotion, protection and prevention of equality, human rights and non-discrimination;
2) Monitor the implementation of this Law and provides opinions and recommendations;
3) Promote the principle of equality, the right to non-discrimination and dealing with all forms of discrimination through raising public awareness, informing and education;
4) Contribute to drafting and implementing of programmes and materials in the area of formal and informal education;

5) Draft and publishers special and thematic reports for specific issues in the area of equality and non-discrimination;
6) Provide general recommendations for specific issues in the area of equality and non-discrimination and monitor their implementation;
7) Advocate for ratification of bilateral and multilateral international treaties in the area of human rights or to accession towards such agreements and monitors its implementation;
8) Contribute to drafting reports that the country is obliged to submit to international and regional human rights bodies and contributes in implementation of their recommendations;
9) Promote and propose harmonization of national legislation, provisions and practices with international and regional human rights instruments;
10) Initiate proceeding for amendment of legal provisions in order to enforce and improve the protection from discrimination;
11) Give opinions on draft laws of significance for prevention and protection from discrimination;
12) Establish cooperation with both natural and legal persons, as well as associations, foundations and social partners to achieve the principle of equality and enhancement of prevention and protection from discrimination;
13) Establish cooperation with relevant national bodies from foreign countries, international and regional organizations in the area of protection from discrimination;
14) Act upon complaints, and render opinions, recommendations and conclusions on specific cases of discrimination;
15) Initiate ex officio proceedings for protection from discrimination;
16) Provide information to any person interested in his/her rights and opportunities of initiating judicial or other proceedings for protection from discrimination;
17) Monitor the implementation of opinions and recommendations given regarding particular cases of discrimination up until the fulfillment of such recommendations made by the Commission;
18) Initiate and appear as an intervener in court proceedings for protection from discrimination;
19) Upon previous request of the party or its own initiative, may submit a request to the court to enable the Commission to appear as a friend of the court (amicus curiae);
20) Inform the public about any cases of discrimination quarterly, in a manner prescribed with a Commission's act;
21) Publish opinions, findings and recommendations and address the public through any media;
22) Adopt Rules of Procedure, an Annual Plan and Work Program and other acts for internal organization of its work;
23) Can establish advisory bodies composed of experts regarding specific issues related to promotion, prevention and protection from discrimination;
24) Collect and publish statistical and other data, and set up databases in relation to discrimination;
25) Submit for consideration Annual Report on its work to the Assembly of the Republic of North Macedonia at the latest till 31 March in the current year for the previous year;
26) Publish on its webpage all reports, including the financial report.

(2) The Commission shall provide accessibility in the enforcement of its competences as referred in paragraph 1 of this Article.

The Commission, comprised of seven members, derives its legitimacy directly from the Parliament that elects the members for a five-year term, with right to re-election. According to Article 16 paragraph 3, when choosing the first composition of the CPPD, four members shall be elected for a five-year mandate, while three members for a three-year mandate, with the right to be re-elected. CPPD members have the status of appointed persons who perform their function professionally and such function shall be incompatible with performing another public function, profession, or holding a function in a political party. The work of CPPD is funded from the Budget, but CPPD is also given the possibility to provide funding from other sources, as donations, grants and other.

Equality bodies, which is a common term for the commissions for prevention and protection from discrimination, belong to the so-called extra-judicial mechanisms for protection from discrimination. The Law prescribes the specific procedure before the CPPD in Chapter Four, which is accessible to any person claiming to be a victim of discrimination, free from payment of any fees or charges. The procedure starts by submitting a complaint, which is done in writing or orally and is entered into a record. A person considered to be discriminated against may be represented before the CPPD by an association, foundation or Trade union upon being given prior consent. Also, according to Article 23 paragraph 3, associations, foundations, Trade unions and other civil society organizations and institutions that have a justified interest in protecting the interests of a particular group, or that deal with protection against discrimination as part of their activities, may file a complaint, particularly in instances in which it is probable that the actions of a certain natural or legal person have discriminated against a larger number of persons. The CPPD has a possibility to initiate procedures *ex officio* if any circumstances and facts, as well as the information received otherwise, provide a reasonable suspicion that by competent bodies in the public and private sector, discrimination has been committed based on discriminatory grounds. Along with the complaint, the person submits all facts and evidence that support the facts, on the basis of which one may assume that discrimination occurred.

Pursuant to Article 24 paragraph 5 of the Law, complaint can be submitted to CPPD no longer than 6 months after becoming aware of the act of discrimination, or no later than 1 year from the date when the violation occurred. However, the legislator provides the possibility to CPPD to initiate the procedure after the expiry of this deadline, if assess that it is a case which effects larger group of persons or when the consequence of it continues or affects public interest. The practice, so far, shows that CPPD utilized this possibility and took action about cases after the expiry of this deadline.

The Commission shall render a conclusion not to act or to terminate the procedure upon the complaint in case a procedure on the same matter has already been initiated or is being initiated before the court in parallel with its procedure, or if its procedure has been effectively completed, and it shall inform the complainant for that (Article 27 paragraph 5). In addition, the CPPD will not initiate proceedings upon a complaint for which I was acting previously, if no new facts and circumstances are presented (Article 27 paragraph 6). Furthermore, the CPPD shall render a conclusion not to initiate or terminate the procedure if the complainant decides to withdraw the complaint during the proceedings (Article 27 paragraph 7) and a conclusion for non-initiation, or terminate the procedure if

during the procedure the complainant died unless his/her successors demand the continuation of the commenced procedure (Article 27 paragraph 8).

When the Commission decides to act upon a submitted complaint within 5 days from receipt, it forwards the complaint to the respondent, who is also given deadline of 15 days to respond on the allegations (Article 24 paragraph 7). If the respondent does not respond within the legally prescribed deadline, CPPD shall decide based on available evidence. The Commission shall establish the factual situation based on the review of all submitted written evidence, by taking statements from the complainant and the respondent (Article 24). While performing its duties if the CPPD ascertains that available evidence is not sufficient to correctly and fully establish the factual situation, the Commission may directly inspect the documentation and premises and may request and gather copies from documents pertaining to any particular case concerned, from all legal persons, state bodies, local self-government bodies, other bodies and organisations performing a public function, and public institutions and services that have at their disposal data and information for cases and general practices of discrimination, by respecting the right to privacy (Article 29 paragraph 1).

While the factual situation is established, CPPD adopts an opinion concerning the alleged discrimination within 60 days from the day when the complaint was filed, and notifies the complainant and the respondent, accordingly (Article 27). Such opinion must entail a written reasoning of all activities undertaken and all evidence presented by the Commission, that is, which evidence was declared admissible, and which evidence was rejected within the decision-making process, as well as the facts and evidence on which the opinion is based regardless if established that discrimination occurred or not.

If CPPD determines the existence of discrimination, it issues a written opinion along with recommendation about the ways in which the violations of the right should be eliminated (Article 27 paragraph 2). The entity to whom the recommendation was addressed must act accordingly and remove the violation of the right within 30 days of the recommendation's receipt, or within a longer period if there are particularly justifiable reasons but no longer than 6 months, and inform the CPPD (Article 27 paragraph 3). When such obligation is not respected by the person to whom the opinion and recommendation were addressed, the Commission based on its powers, will submit a request to initiate misdemeanor proceedings before the competent court on misdemeanor (Article 27 paragraph 4).

Finally, given the position of CPPD specified by Law, its opinions and recommendations are not legally binding for the respondent; however, they have a force of a convincing authority (мк. убедлив авторитет). Such opinions and recommendations are of advisory and preventive nature, and also have the role of educating the persons who discriminated against without any legitimate aim on some of the grounds protected from the law.

2.1.2. Ombudsperson Institution

The Constitution (Article 77 paragraph 2) and the Law on Ombudsperson, stipulate the following: "Ombudsperson is a body … that protects the constitutional and legally prescribed rights of citizens and all other people, that were violated by acts, actions and failures to act on the part of state administration bodies and organizations with public authorizations, and takes activities and measures for

the protection of the principles of non-discrimination and fair and equitable representation of the communities within the state bodies, local-self-government units and public institutions and services" (Article 2). Therefore, despite the fact that the Ombudsperson protects the right to work, it can also protect people with certain protected characteristics, which is the subject of this analysis (such as: ethnic background, sex, age, or mental and physical disability) and from discrimination on specific grounds in the field of employment and labour relations in the public sector.

In this context, the Ombudsperson, as an independent and autonomous body, provides legal protection of potential victims of discrimination on the above-stated grounds or protection of the right to work, by way of receiving and processing individual complaints from these groups of citizens. The Ombudsperson may also proactively initiate procedures (Article 13). The Ombudsperson decides upon each complaint and adopts an opinion which is not legally binding, along with instructions about some ways in which concrete violations can be eliminated. Furthermore, the Ombudsperson can take the initiative and visit and inspect the concerned bodies (Article 29) and issue recommendations, opinions and criticism to the addressed bodies (Article 28 paragraph 2), and make initiatives for changes and amendments of laws and bylaws to the authorized proposers, as well as concerning their harmonization with international agreements (Article 30 paragraph 1).

Pursuant to Article 45 of the Law, and for the purpose of a more efficient and successful protection of constitutional and legal rights of citizens, including citizens' rights from employment, the Ombudsperson may establish and organize departments. To that end, in addition to the work undertaken on cases in the field of labour relations, a special department for protection from discrimination and fair and equitable representation, was established within the Ombudsperson institution.

For illustrative purposes, here we present the statistical data from the Ombudsperson's Annual Reports from 2021 and 2022 with regard to protection of discrimination. In the 2021 Annual Report, 43 complaints were submitted and the Ombudsperson Institution initiated on its own initiative (*ex officio*) 7 additional cases related to protection against discrimination. From the complaints received and those initiated on their own, the Institution divided them into the following areas: work and labour relations (22 complaints), access to goods and services (6 complaints), justice and administration (4 complaints), housing (4 complaints), education, science and sports (3 complaints), social security, including social protection (1 complaint), public information and media (1 complaint) and other (2 complaints) (OI, 2021 Annual Report, p.84). In the 2022 Annual Report, although the number of cases has increased, that is, 76 or 2.37% of the total number of filed cases, referred to protection against discrimination, however, the areas remained the same. Of the complaints received and those initiated *ex officio*, they were divided into the following areas: work and labour relations (34 complaints in total); access to goods and services (4 complaints); justice and administration (4 complaints); housing (1 complaint); education, science and sports (8 complaints); social security, including social protection (2 complaints); public information and media (5 complaints); and 'other' (18 complaints) (OI, 2022 Annual Report, p.61 and p.82).

One limiting factor for the Ombudsperson concerning the protection against discrimination is the prescribed

competence of the Ombudsperson is only in the public sector, but not in the private sector. Still, the Ombudsperson Institution can initiate *ex officio* cases, including in cases of discrimination, but also developing and submitting *amicus curie* (friend of the court) briefs.

Complaint No.1000/2017 was filed with the Ombudsperson Institution for the Civic education textbook for eighth-grade pupils, which, according to the CSO that submitted the complaint, contained texts with discriminatory content on the grounds of sex and gender. After the OI's recommendation to the Ministry of Education and Science to review the contents of the controversial textbook, the Ministry formed an appropriate commission that analyzed the textbook and made a proposal to withdraw it from the teaching process (OI, 2017 Annual Report, p. 111).

In another example, the OI initiated an *ex officio* procedure for protection against discrimination on the grounds of sex and gender (*OI No. 2148/16*), considering that the Law on Administrative Officers in connection with the termination of the employment, provided for a different age limit for women in comparison with men (OI, 2016 Annual Report, p.135).

In a third case (*OI No. 500/11*), OI found unequal treatment and discrimination against female detainees in the Skopje prison, due to the fact that the search procedure itself by the persons in the Security Service was carried out with omissions and with a different approach to female detainees (OI, 2011 Annual Report, p. 117).

2.1.3. Legal representative for procedures establishing unequal treatment of women and men

In view of the implementation of the Law on Equal Opportunities of Women and Men, the Legal representative for procedures establishing unequal treatment of women and men was appointed at the Department for promotion of gender equality within the Sector for equal opportunities at the Ministry of Labour and Social Policy. Pursuant to the law, the following grounds of discrimination are specified: *inter alia* sex, gender, nationality, age and disability (Article 3 paragraph 6), as well as possible multiple discrimination. The legal representative pursues a procedure based on a filed complaint and drafts a written opinion with recommendations to address the situation (Article 21 to 32).

The Legal representative for procedures establishing unequal treatment of women and men, since the appointment until nowadays, has received only 7 cases, and in 4 of the cases no violation of the right on the ground of sex was established (Analysis of the extent of implementation of the Law on Equal Opportunities of Women and Men, 2011). Only 1 case refers to potential discrimination on the ground of sex in conjunction with the ethnic background of the complainant. Discrimination was not found in any of these cases by the legal representative. Unfortunately, this mechanism, even though it based on law, is not functional in practice.

2.2. Judicial protection

In addition to the procedure before the CPPD, the Law on Prevention and Protection against Discrimination, in its Chapter Five, stipulates the judicial protection of individuals who consider

themselves to have had their rights violated by discrimination, by way of taking action before a competent court. Judicial protection in cases involving protection from discrimination has one very important characteristic, that is, the provisions of the Law on Litigation Procedure are specifically applied for this type of proceeding. This is pursuant to Article 32 of the Law, where paragraph 3 sets forth the urgency of the procedure, which is the third important characteristic of the judicial protection in such cases. Even though a specific deadline is not foreseen, which holds true for labour disputes according to the LLP (6 months deadline), the principle of urgency must be duly applied, which means that although the deadline is not specifically written, the 6 month period may be taken as most appropriate to complete the procedure before first instance courts.

In respect of the subject-matter jurisdiction, civil courts shall have the jurisdiction. However, there is a possibility that when legal actions are taken to establish or prohibit discrimination, and those involve compensation claims for damage, the basic courts with extended jurisdiction may also have the jurisdiction if the claim is over 50,000,00 Euro. In view of the territorial jurisdiction, and pursuant to Article 33 of the Law, in addition to the court with territorial jurisdiction, the court on which territory is the seat, i.e. domicile of the plaintiff shall also have jurisdiction in proceedings related to protection from discrimination. The so-called collective legal action for protection from discrimination, as explained below, is also allowed for such court proceedings. Only the basic court with extended jurisdiction can have the subject-matter jurisdiction in such cases because the parties will always be legal entities, while the territorial jurisdiction may be also discerned either based on the defendant's seat (general territorial jurisdiction) or according to the court on which territory acts of discrimination occurred.

Another important characteristic of the court proceedings, also considered as highly important, refers to the shifting of the burden of proof, which is presented in more details below.

2.2.1. Types of legal action for protection from discrimination

Article 34 paragraph 1 of the Law on Prevention and Protection against Discrimination sets forth the special means of protecting the rights to equality. Such legal action may include several independent anti-discrimination lawsuits with so-called anti-discrimination claims, based on Article 32 paragraph 1 of the Law, which may be used for the following requests:

1. Establish whether the defendant violated the right of the plaintiff to equal treatment, i.e. the action that the plaintiff took or failed to take led to discrimination (request for establishing discrimination – *declaratory anti-discrimination claim*);
2. Prohibit the undertaking of actions by which the plaintiff's right shall be or may be violated, i.e. undertake activities that eliminate discrimination and effects thereof:
   - Prohibition of discrimination – *prohibitional discriminatory claim*, and
   - Eliminate discrimination and the effects thereof – *restitutive anti-discriminatory claim*;
3. Compensation for pecuniary and non-pecuniary damage as may result from violation of the rights protected by this Law (*reparative anti-discrimination claim*); and

4. Publish the disposition of the court judgement establishing discrimination in an accessible format, in the media, at the expense of the defendant (*publicational anti-discriminatory claim*).[19]

In the case *P4 no. 265/20* before the Basic Civil Court Skopje, initiated by the European Roma Rights Centre, it is determined that there has been a violation of the right to health care of children who use narcotic drugs and psychotropic substances by the Ministry of Health by not providing treatment for treating addictional disease. In addition, the court determined that the Ministry of Health violated the right to equality of the same group of children by discriminating and omitting to act, i.e. not providing treatment for addiction as a disease, on the grounds of their age, ethnicity and belonging to a marginalized group, and it found direct discrimination against all children who use narcotic drugs and psychotropic substances on the grounds of age and as members of a marginalized group, and indirect discrimination against Roma children who use narcotic drugs and psychotropic substances on the grounds of ethnicity. The court ordered the Ministry of Health to adopt a specific programme for the treatment and care of children who use narcotic drugs and psychotropic substances, to start its application and to open a Centre for the treatment of children who use psychotropic active substances, as a specialized health facility for the treatment and care of minor drug addicts, within 3 months of the finality of the verdict (binding and open to enforcement). The positive thing in the judgement is that the court presented a collation of evidence, including the Special Report of the Ombudsperson Institution on the situation with children who use narcotic drugs and psychotropic substances, as well as the standards set by the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the ECtHR and the revised European Social Charter. (P4 no. 265/20 of 22.03.2021 of the Basic Civil Court Skopje).

Declaratory anti-discrimination claim shall mean a legal action to establish the violations of the plaintiff's rights to equal treatment. The legal protection provided with this claim is preventive in character: a court ruling/judgement determines the discriminatory nature of the defendant's actions. A decision on the claim eliminates doubt and is binding for all future relations between the parties. In all future proceedings between the plaintiff and the defendant, a valid ruling determining discrimination will have the effect of *res judicata*. The adoption of the declaratory anti-discriminatory claim is the precondition for the adoption of the publicational claim.

For example:
HEREBY IT IS ESTABLISHED that the defendant violated the plaintiff's right to equal treatment, by way of publishing the Job advertisement No. ... in the daily newspaper "Vecer" from ... year, concerning the requirements for recruitment of one waiter for a limited period of time, and specifying the criterion that only female applicants, not older than 25 can apply to the job advertisement, which is considered as a violation of the rights to equality on the ground of age and sex.

Prohibitive anti-discrimination claim is legal action seeking the prohibition of activities violating or potentially violating

[19] See: Poposka, Z., Dimova, L., Velkovska, B., Georgievski, A., Kocevska, L. 2014. Practicum for the Law on Prevention of and Protection against Discrimination. OSCE Mission to Skopje and Academy for judges and prosecutors.

the plaintiff's right to equal treatment. The claim is convicting (condemnatory) in character, and, if adopted, seeks passivity from the defendant – to refrain from further action.

For example:
HEREBY A BAN IS IMPOSED upon the defendant who runs the restaurant "Narodna kujna", to treat Roma unequally as members of special ethnic group
HEREBY AN OBLIGATION IS IMPOSED upon the defendant, within three days from service of the judgement, to remove the written warning on the front door with the following text "ROMA NOT PERMITTED" and to provide all Roma with equal treatment as guests of the restaurant, under the same conditions as for all other guests.
HEREBY A PROHIBITION IS IMPOSED that the defendant takes such or similar action in future that violates the right to equal treatment.

Restitutive anti-discrimination claim is a legal action seeking that the defendant carries out actions that will eliminate the discrimination and the effects thereof. The goal of such a claim is to restore the situation to the condition in which it was before the right to equal treatment was violated. The claim is convicting (condemnatory) and seeks action on the part of the defendant.

For example:
HEREBY AN OBLIGATION IS IMPOSED upon the defendant Public Medical Institution, within 60 days from the service of judgement, to enable adjusted infrastructure for access and space in the building located at ..... (place, street and number), for the purpose of ensuring the utilization of publicly available healthcare resources, by the plaintiff and all other people with physical disability (in wheelchairs), by means of taking all necessary construction works that will enable the plaintiff, being a person with a physical disability and all other people with physical disability (persons in wheelchairs), to receive equal treatment in future like all other people, including the right to equal opportunities in healthcare.

Reparative anti-discrimination claim shall mean claim for damage compensation in view of the unlawful violation of the rights to equality. It is aimed at seeking damages that cannot be compensated by complying with the obligation to restore the situation to the primary condition. Claims may refer to pecuniary and non-pecuniary damage compensation. This claim is condemnatory in nature as well.

For example:
HEREBY AN OBLIGATION IS IMPOSED upon the defendant to pay for the non-material damage concerning the violation of personal rights due to sexual harassment and degrading treatment of the plaintiff, as well as violation of the plaintiff's dignity, in the amount of 300,000.00 MKD, calculated with default interest at the referential rate of the National Bank of the Republic of Macedonia, valid on the last day of each six-month period, i.e. period preceding the current six-month period and increased by 8% points, calculated from the day when the judgement was pronounced until the day of payment, and the costs for the procedure, that is, to be paid within 8 days of the service of the judgement.
HEREBY AN OBLIGATION IS IMPOSED upon the defendant to pay the plaintiff for non-material damage concerning the bodily injuries, as follows: for sustained physical pain at the amount of 100,000.00 MKD, for sustained fear at the amount of 150,000.00 MKD and for sustained mental pain and reduced life activity at the amount of 200,000.00 MKD, calculated with default interest at the referential rate of the National Bank of the Republic of

Macedonia, valid on the last day of each six-month period, i.e. period preceding the current six-month period and increased by 8% points, calculated from the day when the judgement was pronounced until the day of payment as well as the costs for the procedure, that is, to be paid within 8 days from the service of the judgement.

Publicational anti-discriminatory claim shall mean a legal action seeking that the disposition of the court judgement establishing discrimination be published in the media in an accessible format at the expense of the defendant.

If such a claim is approved, the Court, in general, would order that the disposition of the court judgement is published. Only in exceptional cases, if there is no prejudice to the legal protection provided, and where appropriate for the protection of the right to privacy, the court can decide that specific personal data be removed from the text of the ruling. The court should order that the disposition of the judgement be published in the media and in the way that would be most appropriate. In case it has come to the instance of discrimination through the media, the court should order that the ruling be published in the same media, in a way identical or comparable to the original publication. The specificity of a court decision on the publication of the anti-discrimination claim is that it takes effect not just among the parties to the procedure (*inter partes*), but is binding for third parties (*ultra partes*) as well. A publisher of the medium in which the judgement needs to be published is obliged to publish it in accordance with the "court disposition" regardless of whether he was a party to the judicial proceedings concerned. In return, the medium publishing the ruling is entitled to all relevant costs and compensation, which are for the defendant to bear.

For example:
HEREBY IT IS ESTABLISHED that the defendant violated the plaintiff's right to equal treatment, by way of publishing in the Job advertisement No. ..... in the daily newspaper"....." from ... year, that the requirements for employment of one waiter for a limited period of time specify that only interested female applicants may apply who are not older than 25, which amounts to violation of the rights to equal treatment on the ground of age and sex. HEREBY IT IS IMPOSED that the wording of the judgement and the section with the rationale of the reasons establishing the violation of the plaintiff's right to equal treatment, on page 5, paragraph 3 to page 6 paragraph 4, are published with anonymized protected personal data of the plaintiff, in the daily newspaper "....." at the expense of the defendant, within 15 days from the day the judgement becomes valid.

All antidiscrimination claims are decided on in legal proceedings, with the subsidiary application of the provisions of the Law on Litigating Procedure. In one lawsuit, several anti-discrimination claims can be jointly brought before the court (cumulated). The plaintiff can, for instance, only request that discrimination be determined, but she/he can also file a lawsuit simultaneously seeking the determination of discrimination, the prohibition of future discrimination, the elimination of the results of discrimination, compensation of damages, as well as the publication of the ruling. The question of which claims will be brought before the court in a specific lawsuit depends entirely on the disposition of the plaintiff, with minimal limitations. The plaintiff can, for instance, only bring an indemnity claim, or a claim for the prohibition of discrimination. Out of the various combinations, the only one excluded is bringing an independent claim for the publication of the judgement,

which can only be brought along with declaratory anti-discrimination action.

Along with the possibility of cumulating various anti-discrimination claims, in order to avoid any doubt, the law explicitly provides for the cumulation of anti-discrimination claims with other actions. At the same time, it prescribes privileged conditions for objective cumulation. An anti-discrimination claim can be brought before the court, together with any other claim to be decided upon in legal proceedings, if all the requests are interrelated and if the same court has the subject-matter and territorial jurisdiction over them (Article 34 paragraph 2).

Collective anti-discrimination action. The specificity of the collective lawsuit means a possibility for natural persons and legal entities to take legal action in the capacity of plaintiff, who do not claim to be victims of the violation of rights, but who take legal action in the name of the protection of the rights of groups or classes of nominally unidentified persons, pursuant to Article 35 of the Law on the Prevention of and Protection against Discrimination. Given that legal action is not taken in their own--but in other's--interest (which can be partially identified with common public interest), a joint lawsuit may be considered as a subtype of lawsuit in the public interest (so-called *actio popularis*). The law expressly stipulates that associations, foundations, Trade unions or other civil society organizations and informal groups are entitled to file a collective lawsuit, based on their justified interest in protecting the collective interests of a particular group or based on their professional engagement in the area of protecting against discrimination, and to take action before the court against the defendant who discriminated against a larger number of people.

Claims which are brought in collective anti-discrimination action are mostly the same as the ones in individual action, except for one significant difference. One can bring a declaratory anti-discrimination claim (a claim seeking that it be determined that the defendant's actions discriminated against members of a specific group), a prohibitional anti-discrimination claim (a claim for the prohibition of the discriminatory action), a restitutive anti-discrimination claim (a claim for activities to be undertaken, which will eliminate the discrimination and its consequences) as well as a publicational claim (a claim for the publication of a disposition of the court judgement establishing discrimination in an accessible format). When submitting a collective action, however, one cannot bring a claim for damages. If the defendant brings such a claim, the court should reject it as inadmissible.

When a final and binding ruling is made on a collective action, the question is what its meaning and effects are. Since collective action is considered a form of collective protection of rights, in case discrimination is determined, does not only have effects for the parties in the proceeding – the association, foundation, Trade Union, other civil society organizations and informal groups as the plaintiff, and the natural person or legal entity that violated the right to equality as the defendant – but for all members of the group discriminated against. In this sense, a ruling determining discrimination (but not a ruling rejecting the claim) would have a prejudicial effect for all future disputes between the victims of discrimination and the discriminator. This is particularly important since with associational action one cannot seek damages, which means that damages would need to be sought individually by everyone whose rights have been violated. Due to the prejudicial effect of the ruling, the court would be bound in

the individually initiated disputes over damages, if it determines that the plaintiff is a member of the group in question, by the determination of discrimination, and would not need to deliberate the defendant's liability, but only the existence and amount of damages paid to the plaintiff. In the same sense, the extended effects of the ruling would enable all (even all future) members of the group to rely on it, and a ruling on a prohibitional claim would bind the discriminator to refrain from similar actions in all future cases. It means that the ruling on the collective anti-discrimination action is considered as a legal basis that entitles every member belonging to the group of the joint action to seek individual protection with an individual claim for damage compensation against the discriminator. Execution on the basis of the ruling could be sought not only by the plaintiff (associations, foundations, Trade union or other civil society organizations and informal groups), but by any member of the group in question.

Though the subjective *res iudicata* limits are extended in associational actions, in the sense that the ruling has an *ultra partes* effect, the fact that such an action was brought does not prevent individual plaintiffs from bringing parallel individual anti-discrimination actions. In case a ruling is rendered for the individual claim that is different from the subsequent ruling on the *actio popularis* lawsuit when it comes to determining discrimination, this could be the basis for the request to reopen the proceeding in question.

2.2.2. Shifting the burden of proof

Burden of proof in discrimination cases differs from the "regular" burden of proof specified in the Law on Litigation. This principle was developed by the Court of Justice of the European Union in cases of sexual discrimination, such as the case *Danfoss*. Nowadays, it is deeply embedded in the European anti-discrimination legislation.

> In the *Danfoss* case, the union brought a case on behalf of the female workers in a company because they earned on average 7% less than their male colleagues in the same or similar job positions. In this case, the CJEU expressly stated that in cases in which the enterprise implements a system of calculation of wages that is completely non-transparent and the statistics show inequalities in paid wages between female workers and male workers, the burden of proof shifts to the employer to prove that the difference in paid wages refers to factors unrelated to the sex of the workers.

Article 10 of Directive 2000/78/EC, explained above, clearly demonstrates the principle of shifting the burden of proof, which is worded as follows: "Member-States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them, establish before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".

In cases of discrimination, one has to prove the existence of different and less favourable treatment (for direct discrimination) or disproportionally negative effect (for indirect discrimination) on a protected ground, which cannot be justified.

In order to prove the case, there is no need to establish several supporting facts in

cases of discrimination. *First*, there is no need to prove whether the perpetrator was motivated by prejudices, or to prove that the respondent has prejudices for a given person or group of people, in order to prove the case of discrimination. People's attitudes cannot be regulated by law since these matters concern the internalized state of how things are experienced. However, the law can specify the treatment which demonstrates such attitudes. *Second*, there is no need to prove that a certain provision, criterion, or practice aims specifically to have a less favourable effect on particular group of people. On the contrary, even though a given provision, criterion or practice was well-intentioned, but it is proved that it has a less favourable effect on the respective group of people, it shall be considered as discriminatory. *Third*, only with regard to the EU anti-discrimination legislation, there is no need to prove the existence of a concrete victim of discrimination, as demonstrated in the case *Feryn*.

In the *Belov* case, in which discrimination on grounds of ethnicity is alleged, the CJEU General Advocate Kokott stated in her opinion that in order for the burden of proof to shift nothing more than a "presumption" of discrimination was required, and any stricter interpretation would jeopardise the need for practical efficiency and would mean that the rule itself would be unnecessary. In other words, it requires a presumption and not a conclusion or unequivocal evidence of discrimination.

The shifting of the burden of proof from the victim (plaintiff) to the assumed discriminator (defendant), implies that the plaintiff present facts that make it probable that discrimination took place, or the so-called *prima facie* case of discrimination, where it is clear that the protected characteristic was the reason to apply less favourable treatment in comparison with other people.

The fact that a person has one protected characteristic unlike another person, does not suffice to shift the burden of proof. This is for the reason that such distinctions will always exist, and if accepted as sufficient, will always amount to a *prima facie* case of discrimination, and from legal point of view, that is considered as nebulosity. Therefore, it is required that other facts or evidence are produced that show the use of a protected characteristic as the criterion in the respective case. For example, in cases when a person of a certain ethnic origin is not selected despite having better qualifications than another person who was selected, or when other people, but not Roma, are allowed to enter a restaurant, there is a *prima facie* case and the burden of proof is shifted to the defendant to prove the opposite. Or there may occur cases when, despite the disability, there are additional circumstances that show the existence of stereotypes about people with disability, based on which the discriminator made the decision. Such circumstances can be, for example: making comments about the intention to discriminate, former discriminatory cases/policies against people with disability or certain type of disability (usually people with disabilities) from the same person or legal entity, questions asked during an interview (e.g. about the type of disabilities of the person), untransparent or unjustified procedural violations, requests for additional data, such as data from the medical records of the person with disability, etc. In other words, in order to make a *prima facie* case of discrimination, the applicant must show a clear causal link between the less favourable treatment and the resulting injury, but also between the less favourable treatment and the discriminatory ground, where only the causal link between the

discriminatory ground and the resulting injury should be made probable.

A *prima facie* case of direct discrimination on a discriminatory ground can be often proved if the plaintiff presents that a discriminatory policy of a legal entity or rule was applied and amounted to different treatment of the individuals in comparison to other people. For example, cases may arise when it is proved that Roma are not allowed to enter the swimming pool, or older people are not allowed to enter a particular coffee bar, or a rule that prohibits people with guide dogs to enter a restaurant. This is also relevant in cases of indirect discrimination, i.e. to prove that a certain apparently neutral provision, criterion or practice has a disproportionally negative effect on a certain group of people. The plaintiff is required to prove that such a disproportionally negative effect results from the application of the given provision, criterion or practice, which is being challenged. Or, in other words, the plaintiff must show the causality between the challenged measure and the disbalance created among various groups concerning their enjoyment of certain benefits.

In the case *Brunnhofer*, where the plaintiff claimed discrimination on the ground of sex, for being paid less than her male colleagues on the same professional level, the Court of Justice of the European Union held that the plaintiff should prove the following: first, that she received a lower salary, unlike her male colleagues who were on the same professional level; and second, that the work done was of the same value as the work done by her male colleagues. This was considered sufficient to make it probable that the different treatment may be justified only on the account of her sex, and the burden of proof is automatically shifted to the employer to prove the opposite (paragraphs 51 to 62).

In discrimination cases, the ECtHR has established that, once the applicant has shown a difference in treatment, it is for the Government to show that it was justified. In the case of *Timishev v. Russia*, the applicant alleged that he was prevented from passing a checkpoint into a particular region because of his Chechen ethnic origin. The Court found this to be corroborated by official documents, which noted the existence of a policy to restrict the movement of ethnic Chechens. The State's explanation was found unconvincing because of inconsistencies in its assertion that the victim left voluntarily after being refused priority in the queue. Accordingly, the ECtHR accepted that the applicant had been discriminated against on the basis of his ethnicity. As stated in the Guide on Article 14 of the European Convention on Human Rights, and on Article 1 of Protocol No. 12 to the Convention, the Court has also recognised that Convention proceedings do not lend themselves in all cases to a rigorous application of the principle *affirmanti incumbit probatio*. For instance, where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (*Salman v. Turkey*, paragraph 100; *Anguelova v. Bulgaria*, paragraph 111; *Makuchyan and Minasyan v. Azerbaijan and Hungary*). The Court has also shifted the burden of proof in other cases where it would be extremely difficult in practice for the applicant to prove discrimination (*Cînța v. Romania*).

When the burden of proof is shifted from the plaintiff to the defendant, the assumed discriminator can rebut the assumption of discrimination if it is proved that the plaintiff, in fact, is not found to be in a similar situation to the comparator, or if it is proved that the different treatment is not based on a protected characteristic, but

rather on objective differentiation. If the defendant fails to rebut the assumption for discrimination, as previously stated, the different treatment/disproportionately negative effect will have to be justified, that is, it has to be proved that it is objectively justified and proportional. In discrimination cases the ECtHR has not excluded that in certain situations the respondent Government may be required to disprove an arguable allegation of discrimination and – if they fail to do so – the Court may find a violation of Article 14 of the ECtHR on that basis.

In the above stated case *Brunnhofer*, the Court of Justice of the European Union provided guidance on how to disprove the assumption for discrimination: First, if it is proved that employed women and men are not found to be in similar situations since the work they do is of unequal value; and second, by establishing other objective factors that contributed to the difference without being related to the particular sex of the plaintiff, which in this case refers to female gender (paragraphs 51 to 62).

Therefore, in a *prima facie* case of discrimination, the defendant should prove that any differentiation made on the ground of a protected characteristic aims to achieve an objective and justified goal, and such differentiation is appropriate and necessary to achieve the respective goal.

In the case *Asociația ACCEPT*, concerning discrimination on the ground of sexual orientation during the recruitment of football players by the professional football club, the CJEU held that a *prima facie* case of discrimination on the grounds of sexual orientation may be refuted with a body of consistent evidence. Such body of consistent evidence may include, for example, a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy, aimed at ensuring compliance with the principle of equal treatment. The Court proceeded by stating that the shifting of the burden of proof would not require evidence impossible to adduce without interfering with the right to privacy (paragraphs 58 and 59).

In the *Maruko* case, a homosexual couple entered into a "life partnership". The applicant's partner died and the applicant wanted to claim a survivor's pension from the company holding the deceased partner's pension fund. The company refused to pay him such a pension on the grounds that the family pension was paid only to spouses, and he was not married to the deceased. The CJEU accepted that non-payment of a pension is a less favourable treatment and that such treatment puts the applicant in this position compared to that of the comparator "married couple". The Court found that the same-sex partnership in Germany largely creates the same rights and obligations for life partners as for spouses, especially in terms of state pension funds. Hence, in this case, the CJEU decided that life partners are in a situation similar to that of spouses, finding discrimination on the ground of sexual orientation. Hence, the fact that they were unable to marry is an inseparable part of their sexual orientation.

In addition to the practice of the CJEU, the shifting of the burden of proof is also noticed in the case law of the ECtHR, which evaluates presented evidence in its entirety, for the fact that states usually dispose of information (facts and evidence) which can confirm the allegations. If the facts presented by the plaintiff seem credible

and consistent to the other presented evidence, the ECtHR shall consider them as admissible, unless the respondent is in a position to present another credible reasoning. The court shall consider as facts the allegations which are "supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions ... proof may follow from the coexistence of sufficiently strong, clear and concordant inferences, or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake". (*Nachova*, cited above, paragraph 147; *Timishev*, cited above, paragraph 39; *D.H.*, cited above, paragraph 178).

Finally, the burden of proof requires that due account is taken of three aspects: *first*, the national legislation that lays down the type of required facts/evidence before the national bodies and the presentation of those facts/evidence which may be much rigorously defined compared to the ECtHR or CJEU; *second*, rules on shifting the burden of proof do not apply in criminal procedure for the prosecution of perpetrators of hate crimes; and *third*, states can decide not to apply rules on shifting the burden of proof in cases when the court initiated an investigation, having in mind the presumption of innocence principle.

In the case before the County Court in Ljubljana, the plaintiff claimed discrimination on the grounds of religion or belief because, as a candidate for medical specialization in gynaecology and obstetrics, she was denied the job by the selection commission. She argued that the commission's position had changed following her announcement that she was invoking conscientious objection in cases of abortion and certain forms of contraception. She filed a lawsuit claiming she was discriminated against. The Court of first instance considered that the plaintiff made a *prima facie* case of discrimination and the burden of proof was shifted to the respondent, i.e., the Medical Society of Slovenia, which failed to prove, through the statements of the witnesses who were members of the selection commission who interviewed the candidate, that the reasons for the evaluation of the candidate were justified (Ljubljana County Court, *Case No. III P 7/2021*).

In the case of *Binderen v. Kaya*, the Supreme Court of the Netherlands considered that the applicant had shown that, in the past years, the social housing company Binder had allocated 157 social apartments, of which only one went to a family of immigrant origin, although the percentage of immigrant families in that city was 4.6% and in the total number of registered families for social housing, immigrant families accounted for 10.2%. Additionally, among other social housing companies, the percentage of social housing allocations to immigrant families was 7.2%. The Supreme Court considered that the attached facts were sufficient to justify a *prima facie* case of discrimination and shifted the burden of proof to the social housing company Binder to justify its policy as non-discriminatory towards immigrants. The evidence was not produced and therefore the Supreme Court considered that the company had committed discrimination (Supreme Court of the Netherlands, NJ 1983, 687 (Binderen v. Kaya).

Given the foregoing, the shifting of the burden of proof in the national legislation

is expressly stipulated in the Law on the Prevention of and Protection against Discrimination (Article 37) and the Law on Labour Relations (Article 11 paragraph 1 and 2), as well as the Law on Protection from Harassment at the Workplace (Article 33). Article 37 provides that: "The plaintiff claiming that discrimination has been committed under the provisions of this Law, shall state the facts that make the claim probable, and then the burden of proof shall shift to the respondent to prove that there was no discrimination committed (paragraph 1). In addition, the law specifies that this provision shall not apply in misdemeanor and criminal proceedings (paragraph 2)". This provision is fully compliant with the anti-discrimination standards, especially with the EU law.

Considering the provisions quoted, particularly the provision from Article 38, paragraph 1 of the Law on the Prevention and Protection against Discrimination, which prescribes that the burden of proof that discrimination did not occur falls to the respondent, it is the Court's opinion that the plaintiffs delivered evidence to make it probable that they suffered discrimination when they were refused the opportunity to exit the country, while the respondent failed to prove that discrimination did not occur, i.e. the actions taken by the police officers were no different than actions taken with all other citizens. The plaintiffs were not allowed to leave the country by the officers employed by the respondent at the border crossing without any reason, which led them to an unequal position compared to other citizens. The respondent failed to prove a justified, regulated reason not to allow the plaintiffs to leave the country and that discrimination did not occur in this case (Basic Court Bitola, *P4 No. 123/17*).

In the first instance judgment of the Basic Civil Court Skopje, concerning discrimination on the grounds of disability due to failure to provide access to the polling station on an equal basis with others, the court clearly pointed out that after creating a *prima facie* case of discrimination by the plaintiff, the respondent who bears the burden of proof in accordance with the Law on Prevention and Protection from Discrimination, within the proceedings did not propose and produce relevant evidence to establish that reasonable accommodation has been provided in the polling stations for the effective implementation in practice of their right to vote in the period after 2019, and after the reports of the associations have been prepared and the above recommendations have been made, that in all polling stations in the country access of persons with disabilities has been completely prevented (Basic Civil Court Skopje, *P4 No. 75/21*).

The laws make no mention concerning the shifting of the burden of proof in cases of reasonable accommodation. However, pursuant to Article 6 of the Law on the Prevention of and Protection against Discrimination, where any denial of reasonable accommodation shall be considered as a form of discrimination, and the burden of proof pursuant to Article 37 of the same law is shifted in cases of discrimination, it means that this provision will be also applicable in such cases, and the burden of proof will be shifted after a *prima facie* case of discrimination is established. If any differentiation is based on some legal provision which is challenged before the court, the plaintiff may simply invoke the provision and establish a *prima facie* case of discrimination. In such case, the defendant bears the obligation to prove that the respective provision is not discriminatory for a particular person or group of people.

Regarding the indication by the Court of Appeals that it is not clear as to how the conclusion that the respondent was going to continue the employment of the plaintiff if she had not been pregnant was reached, and considering that her employment contract was for a fixed time, pursuant to Article 38, paragraph 1 of the Law on Prevention and Protection against Discrimination, proving that discrimination did not occur falls to the burden of the respondent. In the specific case, the respondent failed to prove to the Court that the plaintiff would not have been extended even if she had not been pregnant, moreover, when the plaintiff received a document for termination of employment six other workers were employed, and the respondent failed to deliver proof that the reason to terminate the plaintiff's employment was not her pregnancy (Basic Court Skopje 2, *RO-980/17*).

The Commission on Prevention and Protection against Discrimination in Case *No. 0801-13664*, reviewed the applicant's allegations of discrimination against the Public transport company Skopje because the bus driver on city line No. 22 forcibly expelled from the bus a woman and her two underage children, one of whom was in a wheelchair all belonging to the Roma ethnic community. The CPPD considered that the applicant made the allegations of discrimination plausible and therefore shifted the burden of proof to the respondent to prove non-discrimination. In analysing all the facts and evidence in the case, the CPPD found direct intersectional discrimination on the grounds of race, skin colour, social origin, ethnicity, and belonging to a marginalised group in the area of access to public goods and services by the Public transport company Skopje (Case No. 0801-136).

2.2.3. Evidence in discrimination cases: the statistical evidence and situation testing

The applicant may enclose direct or indirect evidence. Direct evidence enables fact-finding without requiring the court to draw conclusions about the evidence, while indirect evidence is only part of the puzzle that the court should solve in accordance with the rules of logic. Given the nature of the subject matter of the application, the following can be evidentiary means used in the proceedings:

- documents, if they have content related to the discrimination or relate to the specific case of the plaintiff,
- reports and analyses from relevant sources,
- witnesses to the discriminatory treatment,
- expert testimony for the pecuniary and non-pecuniary damage due to the resulting discrimination,
- audio and video materials and records, recorded in accordance with the law,
- other writings, clippings of articles, postings on social networks, and the like,
- hearing of the parties,
- statistics,
- situation testing, and
- other evidence that would be relevant in the specific case, and the court believes that should be taken into consideration.

For example, in the case of a selection process following a published advertisement or competition, only written evidence available to the respondent may be admissible. However, if the discrimination is against an employee of the employer, witness statements regarding possible discrimination may also be considered during proceedings

before the court, depending on the nature of the decision. The plaintiff can propose witnesses, either with the lawsuit or during the proceedings.

In the case before the Basic Court in Brussels, in which a Belgian couple of immigrant origin claimed discrimination on the grounds of ethnicity because of the inability to rent an apartment, following the facts and witness statements, the court considered that a *prima facie* case of discrimination had been committed (Basic Court in Brussels, *Case No. 05/1289/A*).

The LPPD in its Article 38 provides that data obtained through situation testing and statistical data, in addition to the evidence prescribed in the Law on Litigation Procedure, are admissible as evidence. Statistics, as a branch of mathematics, refers to the collection and interpretation of data. Since one of the goals of statistics as a science is to produce the "best" information from the available data, some consider it a branch of the theory of decision. Statistical data as evidence are of particular importance, or almost mandatory, when determining the existence of indirect discrimination, but also in the case of direct discrimination, especially intersectional discrimination, which in the case law of the ECtHR, were the basis for establishing the facts on which the Court's decision was grounded. The practice shows the use of statistical data, databases, reports on constant trends from international institutions and national relevant sources, as well as other sources. However, the provision of statistical evidence is not an obligation, but an opportunity that may or may not be used in the specific case to make a presumption of indirect discrimination. And it is not always necessary to present statistical evidence in order to create a probable (*prima facie*) case of discrimination. The most important thing is that the statistical data used in court proceedings as evidence should be relevant and representative.

In the case of *Seymour-Smith and Perez*, which refers to unfair dismissal, which gives special protection to those who have worked continuously for more than two years at the specific employer. The CJEU considered that the conditions for obtaining certain rights from employment or privileges would represent a probable (*prima faciae*) case of indirect discrimination, if the available statistical data show that a significantly lower percentage of women than men were able to fulfil the conditions.

Point 14 of Article 4 of the LPPD defines situation testing as "a method of proving discrimination by involving organized testers who are placed in a comparative situation to investigate the occurrence of discrimination in different subjects, processes and areas on any discriminatory ground". Situation testing is a special method for proving cases of discrimination. As seen from the definition, it consists of deliberately organized testers who are placed in comparative situations to prove less favourable treatment; thus it is best suited to unmask direct discrimination cases. For example, in cases of discrimination in access to goods and services, members of two groups are organized, including members of the discriminated group, who have to prove that the provider of the goods and/or services behaves less favourably, i.e. in a discriminatory manner, towards the members of one group, while it serves the members of the other group quite normally.

In several European countries, such as the Netherlands, France, Denmark, Finland, Sweden, the United Kingdom, and the

Czech Republic, situation testing is allowed in legal proceedings. It should be noted that the situation testing must be considered by both the CPPD and the court as confidential and final, i.e., one is to be able to reach a concrete conclusion through it. However, comparative experience from the courts shows that courts generally believe that the test results must be backed by other sources of evidence to lead to a finding of discrimination.

The Anti-Discrimination Agency (ADA) in the town of Enschede carried out situation tests at a number of discotheques. The people of ethnic minority backgrounds included in the tests were denied entry, while the native Dutch were allowed in. In the complaint submitted to the Equal Treatment Commission, the ADA stated that the groups participating in the test could be assumed to be average discotheque visitors. They had no relationship with the ADA; they had no criminal past; they could not be distinguished from the average discotheque visitors as far as hairstyle, clothing, shoes, etc. were concerned, and the persons participating had sufficient command of the Dutch language to communicate with the doorman.

The Equal Treatment Commission stated that it "is of the opinion that by means of situation testing, depending on the circumstances, proof of unequal treatment can be established". Subsequent opinions of the Equal Treatment Commission follow the same line of thinking (Anti-Discrimination Agency, *Opinion no. 1997-65*, from 10 June 1997).

It can be stated that the national court allows situation testing to be used as evidence in court proceedings in cases of discrimination. For example, the Basic Court Skopje 2 in Skopje, in the *judgment 16P-894/16* of 07.06.2017 underlines (page 3 of the judgment) that it allows the report on the situational testing to be produced as evidence and to be inspected, although the defendant objects that situational testing is not provided for as a means of evidence in the Law on Prevention and Protection from Discrimination that was in force during that time (2010 Law). The situational testing was carried out by an association of citizens, and the case of discrimination referred to possible discrimination against members of the Roma community by a private gynecological practice.

In the case *P4 no. 641/17* before the Basic Court Skopje II - Skopje, a violation of the right to equality of the male and female plaintiff, spouses from the Roma ethnic community, by not allowing them to cross the state border on three occasions, on 04.06.2013, 08.06.2013 and 07.12.2013, done by the Ministry of Internal Affairs. The court ordered the defendant to pay the plaintiffs an amount in the name of non-pecuniary and pecuniary damage. The positive thing in the judgement is that the court presents numerous evidences, including a group of evidences through which the situation was tested, as well as the statements of the witnesses - testers who were of non-Roma ethnic origin. (P4 no. 641/17 of 01.11.2017 of the Basic Court Skopje II - Skopje).

The European standards on evidence in discrimination cases are transposed in the national legislation, predominantly through the LPPD, allowing for *inter alia* statistics and situation testing to be used. In practice, both evidentiary tools are used in front of the Commission for Prevention and Protection from Discrimination, as well as courts, with success. Still, knowledge by judiciary as well as lawyers on using these novel types of evidence should be strengthened, thus making access to justice for victims of discrimination effective.

PART THREE

Discrimination in labour relations

Chapter VI

Characteristics of discrimination in labour relations

1. Discrimination and its justification

Discrimination in the area of labour relations has a profound effect and intensity. It results from several reasons. First, discrimination in labour relations often remains unrecognized, and as such it can be quite lengthy, so that its detrimental effects can multiply. Furthermore, discrimination in labour relations or employment is usually characterized as having not only a direct effect, but also an indirect effect, on citizens' economic security. When discrimination occurs in employment or a person cannot exercise the right to employment, it directly affects the economic and biological survival of the person. On the other hand, if discrimination occurs in labour relations, it also affects the economic security of the employee, both directly and indirectly.

In addition, discrimination in labour relations and employment strongly influences the emotional state of people and may be the cause for many illnesses, which are already recognized by the World Health Organization. Stress in labour relations and stress at work are considered to be the basic risk-factors for cardiovascular disease, which often has fatal consequences. Also, discrimination may be seen as a risk in the workplace, that is, within the group of so-called *new risks in the workplace*. Therefore, discrimination in labour relations is also considered from the aspect of the protection of health and safety at work. This is especially noticeable in cases of harassment at the workplace, in the context of anti-discrimination.

Discrimination in labour relations should not be viewed only from the aspect of its economic and psychological-health effects. Discrimination in labour relations, also, has a direct impact on the competitiveness of enterprises. Furthermore, the more frequent and intensive the discrimination, the bigger the social effects, as well as the effects on political levels and in the society. This can be also reflected in political discontent that is created, whenever discrimination occurs in employment on the ground of political affiliation. There are many examples from practice that prove the existence of this type of discrimination both in employment and labour relations (in case of career promotion), which had a negative political reflection. This goes in line with the conclusion that discrimination in labour relations has multilayered and far-reaching negative consequences, affecting

individuals, companies and the society as a whole.

Is it possible to justify discrimination in labour relations, bearing in mind that labour relations are understood as the entirety of legal and economic relations in the society?

As a matter of principle, one cannot speak about discrimination that would be justified; however, certain cases and situations, both in theory and practice, seem to fall in this line. There are cases where certain differentiation does exist; however, it does not amount to discrimination. In fact, this is a matter of legal fiction. Cases of this type should be socially justified, i.e. they aim to achieve some socially beneficial goal. Those are usually encountered under the terms *positive discrimination, affirmative discrimination, affirmative measures,* etc. As a matter of fact, these are not typical examples or cases of discrimination, but rather exceptions from discrimination. These exceptions are also recognized in the Law on Labour Relations. Such cases refer to the genuine and determining occupational requirement; however, the goal must be justified and the requirement must be proportional (Article 8 paragraph 1). Exceptions are also considered to be the measures laid down by the Law on Labour Relations, as well as other laws, and collective agreements and employment contracts in view of special protection of health and safety at work for special categories of workers (people with disability, older workers, pregnant women and employees exercising rights on the ground of maternity and parenthood). There is no exception to the prohibition of discrimination against workers employed for a limited period of time. In view of those workers, the Law does provide an exception on the ground of objective reasons, without listing the specific reasons (Article 8 paragraph 3). According to this provision, those reasons should be stated and specified in the collective agreements or employment contracts. Nevertheless, this is a very general provision that gives rise to possibilities for abuse, and moreover, it is not based on a legitimate goal.

From the foregoing, one can conclude that in view of the justification of the goal, the Law on Labour Relations provides an opportunity to the employer to make an exception from protection from discrimination, whereby such discrimination would be considered as justified. As far as special protection at work is concerned, the goal is legitimate because it provides for extended protection for some workers based on their personal characteristics.

Articles 13, 14 and 15 of the Law on Prevention of and Protection against Discrimination lay down the situations considered as exceptions from discrimination, or when discrimination can be justified. First, those are the affirmative measures with an integrative objective, aimed to ensure the factual equality of individuals, groups, communities or marginalized groups. The goal is to establish a system that would reduce the factual inequality, and will ensure the natural development and realization of the right to equal opportunities (item 1 and 2, paragraph 1, Article 13 of LPPD). With respect to labour relations and employment, the Law entails several provisions on situations which are not considered as discrimination. First, it stipulates the age of 15 as being when employment can start, which is in accordance with international acts, the Convention 77 of ILO and Directive 94/33 of EU, and can be considered as a protective provision for juveniles.

In addition to this protection, the legislator stipulated that discrimination shall not be considered any labour involvement within trade unions based on the specifics

of their objectives and ideas, in religious institutions and organizations, as well as religious educational institutions that require special qualifications consistent with their objectives (Article 14). In this context, the legislator also stipulated the benefits awarded on the basis of employment, and which derive from years of service and professional experience, but only when that is objectively justified with a legitimate goal. Any privileges provided on the stated grounds must be objective and targeting all employees who meet the foreseen requirements. The goal should relate to the professional development of employees and ensuring productivity and enhanced competitiveness of the company.

The Law on Prevention and Protection against Discrimination includes a large number of grounds that may not be considered as discrimination and refer to special categories of people, i.e. workers. The special protection on the ground of pregnancy, maternity and parenthood, as well as protection on the ground of disability, belong to this group of exceptions, which overlap with the LLR.

The national legal framework constitutes a solid base for the prevention of discrimination and development of a labour law system, based on the values of tolerance and equal opportunities. On the other hand, the practical application of this framework of values, when translated into legal norms, gives rise to many problems and challenges. One may say that the relatively well-designed legal framework is not fully applied in practice. It means that discrimination exists both in employment as well as in exercising the rights from labour relations. This is evidenced by the increasing number of court settlements about this negative phenomenon, such as several ongoing and finished court proceedings before the Basic Civil Court in Skopje concerning discrimination on the ground of sex, i.e. cases of dismissal of workers on the ground of pregnancy.

Discrimination in employment is a significant problem in the society, for the reason that certain people are prevented to enter the labour market, and those are usually people from marginalized groups. This, in return, implies negative effects in the society, having a social and legal nature.

2. Psychological harassment at work (mobbing)

Changes which affected labour-related matters in postindustrial societies gave rise to new forms of risk at work and in the workplace, most notably in the form of illnesses connected to working with display screens, and in particular psychological risks[20], which can be essentially seen as ground for discrimination at work. Nowadays, questions related to *stress management* have become part of the human resources management concept as well as protection of health and safety at work. At the same time, the protection of workers' health has been extended to the protection of mental health and a prohibition against discrimination. When the work implies stress which can be essentially avoided, it shall be considered as ground for moral, that is psychological, harassment of employees. Psychological harassment at work basically means discriminatory treatment that strongly affects the worker's health. Therefore, on one side, it should be seen from the aspect of discrimination, but on the other

[20] See: Supiot, A. *Le Droit de Travail*, (translation in Macedonian: Ален Супиот *Трудово право*), Ars Lamina, Skopje, 2010, page 118-119.

side, it also entails an aspect of protection of health and safety at work. In view of discrimination, it is seen as prohibited conduct, while in view of protection at work, it is seen as a risk that may involve some occupational disease, i.e. illness.

Given the aforesaid about discrimination at work, *mobbing* can be singled out as one specific and contemporary type of discrimination. This type of discrimination belongs to the group of so-called *new risks*. *Mobbing*[21] is considered in conjunction with stress at work. It is a specific type of stress which rests on psychological harassment at the workplace.

Mobbing can be construed as particular conduct at the workplace, when one or more individuals, i.e. other employees, usually in superior positions, subject another person to systematic psychological harassment or intimidation, for a longer period of time, with the intention to challenge the professional reputation and moral integrity of the concerned employee, or his/her professional and human dignity, in order to create unbearable working conditions, that puts the victim of mobbing in a hopeless position and results in his/her resignation, which, in return, enables the employer to avoid payment of compensatory awards for dismissal as well as for any labour disputes.

In order to be able to understand the phenomenon of *mobbing*, in particular its substance and emergent forms, it needs to be considered in a multidisciplinary manner,[22] or in different contexts, but also from the interdisciplinary aspect. *Mobbing* is a problem examined from various standpoints, and not only from the aspect of labour law. Effects from mobbing can be experienced on various levels, such as psychological, medical, psychosomatic, moral, economic, social, and legal effects.[23]

2.1. Types of mobbing

There are several different types of mobbing. The most frequently observed types of mobbing are: *horizontal*, *vertical*, and *reversed mobbing*, that is, mobbing considered from the aspect of the harasser or the victim; and *strategic and emotional mobbing*, which is based on the motivation to harass. One particular type of mobbing is so-called *transitional mobbing* which is characteristic for former communist countries. Subtypes of horizontal mobbing may imply harassment of particular categories of employees, such as women, etc. However, one cannot speak about a particular kind of rule or formula which determine who is the possible victim of *mobbing* at work.

Horizontal *mobbing* shall mean harassment which takes place among the employees. This type of mobbing usually relies on the harasser's feeling of being threatened at work by another employee, or can be based on personal hatred.

Vertical *mobbing* shall mean harassment by an employer or a person who is the director, boss, owner, or superior towards certain employees. This type of mobbing may occur in various alternatives and

[21] In addition to *mobbing*, we come across the term *Bullying*. See: David Beale, *Workplace Bullying and the Mobilisation of Collective Response*, The Fifth International Conference on Bullying and Harassment in the Workplace-The Way Forward, Dublin, 2006, page. 32; Sandra Garvey, "*Workplace Bullying: Should work come with a health warning?*, The fifth International Conference ..., Dublin, 2006, page. 79; although the terms have somewhat different meaning, compare: B.A. Lubarda, *Mobing/Buling/na radu*, Pravni kapacitet Srbije za Evropske integracije, Zbornik radova, knjiga III, Beograd, 2008, page. 69-71

[22] See: Franco, S. 2006. *Psychological Violence at Work: Causes and Perspectives*. The fifth International Conference ... Dublin, page. 77

[23] For effects and implications of *mobbing*, see: Lubarda, B., op.cit., page. 75; S. Franco, ibidem; Jovevski, L. 2016, System for protection of health and safety at work rartione personae. Skopje, page. 73-74.

forms. One frequent and recognized type of mobbing is, for example, hidden vertical mobbing which looks like horizontal mobbing. In fact, the employer is the one who incites the employees to harass another employee.

One special type of vertical *mobbing* is the psychological harassment of an individual who witnessed the employer's corruption or who is a whistleblower. Whistleblowers are usually individuals from the public sector who report corruptive and unlawful action by their superiors.[24] Given the importance of such action for the public interest, various steps are taken to protect persons who report cases of mobbing.[25]

2.2. National solutions

In response to this problem, our country amended the Law on Labour Relations and included the aforementioned provision on *mobbing*. Article 9 sets forth the prohibition of any harassment at the workplace, including sexual harassment. According to the Law, harassment (psychological and sexual) is specified as one type of discrimination (paragraph 2).

Article 9-a stipulates psychological harassment at work - *mobbing*. Accordingly, mobbing is considered as one special type of harassment. The Macedonian law prescribes that the perpetrator of *mobbing* can be an employee or employer. *Mobbing* is defined as negative behaviour that aims to compromise the dignity, integrity, reputation and honour of workers and to create fear, or to engage in degrading, hostile and offensive behaviour - paragraph 3. Any such behaviour must persist for at least 6 months in order to be considered as *mobbing*.

The time framework, as such, seems to be quite long and confusing. The provision does not clearly specify what happens if *mobbing* stops after a period of 5 months, and then continues after 6 months expire. In addition, it does not seem clear in which time-frame will the 6-months period is to be considered as valid. Is it within one calendar year or maybe longer, which is the case of successive and periodic *mobbing* which persists for a certain period of time, for example, three months, then is interrupted for 2 months, and then it is restored and continues endlessly? Based on the legal provision, *mobbing* will have to persist for at least 6 months in order to be considered as a punishable act and as discrimination.

The burden of proof (*onus probandi*) rests on the employer. This is a precedent in the Macedonian law; however that is considered as being necessary, and is well-known in the comparative law.[26] It is necessary for the reason that the victim of *mobbing* can come across difficulties to invite colleagues as witnesses, as employees have justified reason to fear that the employer might take less favourable measures if they furnish evidence in favour of the victim of *mobbing*, or in cases when other employees take part in the horizontal *mobbing* of the victim.

The special Law on Protection from Harassment at the Workplace, which was adopted in 2013, specifically deals with psychological and sexual harassment at work. Even though the wording of the law does not include harassment as a form of discrimination, bearing in mind the

[24] Such is the example in Republic of Ireland where the percentage in the public sector accounts for 9,5%, while the risk is 56% higher than in the private sector *Report of Task Force*, 2001, See: Margaret Hodgins, *Anti-Bullying policy in the poblic sektor-challenges and opportunities*, The Fifth International Conference ... , Dablin, 2006, page 99.

[25] For reversed, strategic, emotional and transitional mobbing, see Jovevski,L. op.cit., page. 75-76.

[26] See: Lubarda, B., op. cit., page. 78.

provisions stipulated in the Law on Labour Relations, this matter raises no doubts. In view of discrimination in labour relations, provisions on harassment in labour relations have a central place in this Law, and it is considered as the law that governs general subject-matters (*lex generalis*) that overrides the LLR. On the other hand, it is a law that governs special subject-matters (*lex specialis*) and overrides the Law on Prevention of and Protection against Discrimination.

The legal wording includes the same definition of harassment and sexual harassment as the Law on Labour Relations with some minor amendments. That is, the law specifies that the ultimate aim of harassment is to harm the physical and mental health, and compromise the professional future, of the employee, besides termination of employment.

A procedure for protection from harassment can be taken before the employer or before the court. These two procedures are not legally conditioned. The employer, irrespective of the procedure for protection, must ensure the dignity of employees, but the employees are also obliged to notify the employer about any harassment at work.

As part of the so-called internal procedure, any employee who believes himself or herself to be subjected to psychological harassment, i.e. sexual harassment, is given the opportunity to request protection from the employer. The written communication is called the preliminary procedure, and it aims to inform the perpetrator of harassment that the activities taken on his/her side are disturbing and need to stop. The right to file legal action is not subjected to the preliminary procedure for protection that was initiated with the employer.

If the employee files a harassment protection claim, the mediation procedure may start. Such a procedure is conducted by a mediator, who is selected by the employer from the roster of mediators. The mediator is employed in the company. The overall mediation procedure must be completed within a period of 15 days.

The deadline to file a harassment protection claim shall be 6 months, at the latest, from the day when the last act, considered as harassment at work, took place. Provisions on the preliminary procedure and the protection at the employer with a mediator are included in Article 17 to 30 in the Law.

Judicial protection is provided as a possibility for an employee who believes s/he was subjected to harassment in the workplace, and who is not satisfied with the outcome of the procedure for protection against harassment with the employer, even in cases when such a procedure was not initiated. These disputes have the character of labour disputes.

Any legal action pertaining to the protection against harassment at work may imply filing a claim to: determine if harassment occurred at the workplace; prohibit any future harassment; or other acts considered as harassment at work or their repetition, and to eliminate the effects from harassment at work. In addition, the lawsuit may include a claim for material and non-material damage compensation as a result of harassment.

The wording of the law fails to include direct provisions that specify cases when the employer is the perpetrator of harassment, although Article 6 of the Law makes mention that the employer may be the perpetrator of harassment. Given the specifics of such cases and their frequent incidence, it would be necessary to single out a group of provisions that specifically refer to cases when the perpetrator of harassment is the employer.

Up to the present time, there is one valid court decision in our country that refers to harassment at work, which was in the Basic Court in Skopje, and which has been successfully completed (RO. No. 1914/17). Also, at the moment there are a few decisions with positive outcome in first instance procedures. Lawsuits for protection from harassment at work are rarely filed, even though an insignificant increase is noted in the period from 2015-2022.

In this sense, it is most important that the difference between mobbing and harassment, as forms of discrimination, rests on the existence of discriminatory ground, which is an element of harassment. In order to determine harassment as one form of discrimination, there must be a discriminatory ground, such as sex, age, disability, ethnic background, etc., which is also the only reason for harassment to take place. Furthermore, there must a causality between the harassment and the discriminatory ground. As far as mobbing is concerned, the discriminatory ground is irrelevant and does not present its constitutive element, and therefore its existence is not essential.

3. Development of anti-discrimination legislation in the field of labour relations

Developments of anti-discrimination legislation in the field of labour relations may be viewed from the aspect of developments on the national as well as the international level.

3.1. National solutions

On the national level, the anti-discrimination legislation developed quite recently, as well as did the national legal framework dealing with labour-related matters. In historical and chronological contexts, protection from discrimination may be considered in view of three grounds. First, on the ground of the special anti-discrimination legislation which was designed; secondly, on the ground of the systemic Law on Labour Relations and other laws related to labour relations, mainly the Law on Employees in the Public Sector and the Law on Administrative Servants; and lastly, on the ground of the third normative act, i.e. the Law on Protection from Harassment at Work.

In general, the adoption of the Law on Prevention of and Protection against Discrimination, marked a new chapter in our legal history, both in terms of protection from discrimination and labour relations. The law, which was adopted in 2010, was not the first law that prohibited discrimination in labour relations; however, its relevance rests on the fact that prohibition of discrimination in labour relations is laid down in a general and systemic manner. Even though the law does not entail special provisions on discrimination in labour relations, yet, Article 4 stipulates the prohibition of discrimination in labour and labour relations. The law, as stated before, sets forth the grounds on which discrimination is prohibited and the societal areas where such protection applies. Distinguishing labour and labour relations as the first in the range of social and legal relations, where discrimination is prohibited on all discriminatory grounds from the law, is virtually self-explanatory about the place and meaning of protection from discrimination in labour relations.

The first law that deals with protection from discrimination in labour relations is the Law on Labour Relations from 1993. At the time when the law was adopted, there were no

provisions that prohibited discrimination. However, the changes of the law in 2003 included a new Article 8-a, which resulted from the obligation of the Government based on the Stabilization and Association Agreement between the European Union and our country. The realization of this Agreement in view of labour relations was ensured through implementation of several EU Directives, and any of the legislative changes reflected Directive No. 76/207 and Directive No. 97/80. According to the changes and amendments of the Law of Labour Relations, Article 8-a was worded as follows: "The employer shall not put a job seeker (applicant) or worker in a less favourable legal position on the ground of race, skin colour, sex, age, health status, i.e. disability, religious, political or other affiliation, membership in trade unions, national or social origin, family status, property status or any other personal circumstances. Women and men must be ensured equal opportunities and equal treatment in employment, promotion, social insurance, working conditions, working hours and termination of employment contracts".

Despite the fact that the provision fails to ensure the terminological compliance with the expression, such as the prohibition of discrimination, etc., yet it clearly sets out that putting someone in unequal position in employment or labour relations amounts to discrimination in line with the foreseen grounds. The provision on equal opportunities among women and men is also included here.

The initial wording of the Law on Labour Relations from 2005 stipulated discrimination as an unlawful and prohibited act. The changes that followed throughout the years implied several insignificant changes in this particular section of the Law concerning the equal treatment of men and women, as well as exceptions from discrimination in labour relations. However, one significant normative formulation that brought about a different quality of protection from discrimination, referred to the introduction of Article 9-a on the protection from harassment at work (mobbing) and Article 9-b on the prohibition of discrimination against female workers on the ground of pregnancy, birth, and maternity.

The development of anti-discrimination legislation was rounded off with the adoption of the Law on Protection from Harassment at Work from 2013, which deals with protection from psychological and sexual harassment at work.

Analysing three decades of existence of the national legal framework related to labour relations, the question of discrimination in labour relations and employment, prevention and protection from discrimination, we can say that there is a relatively good legal basis for building an equal and fair system on working relationships. However, the basic problem that has existed for decades is the lack of a real and true application of the legal provisions in practice. In the beginning, this was due to the lack of knowledge of the workers, the employers, as well as the employees in the institutions that are mandated to prevent discrimination or to protect the victims of discrimination. But in recent years, the excuse of "ignorance" can no longer be used, as it is a matter of systemic irresponsibility, social immaturity, and lack of good will to apply the provisions in practice.

To change this situation, not only high-quality legal solutions are enough, but also effective supervision, a strong penal policy, as well as the expansion of awareness among employers, institutions, and workers for the prevention and protection of discrimination in the work relationship and during employment.

3.2. International standards

The development of anti-discrimination provisions on the international level is specific for their different nature and lengthy existence, which does not hold true for our country. On the international level, these provisions in the field of labour relations are primarily seen with reference to the system of norms provided by the International Labour Organization (ILO). On the European level, one should also give due consideration to the acts of the European Union.

3.2.1. Acts of the International Labour Organization

The ILO disposes of a big number of acts dealing with the prohibition of discrimination, both in employment and labour relations. Many conventions and recommendations in other areas also include provisions that prohibit discrimination within their scope of regulation. For example, Convention No. 105 on the abolition of forced labour, makes mention of the prohibition of discrimination. This Convention embodies the right to equality and the prohibition of discrimination in exercising the right to work and rights from employment, as well as the choice for occupations. The same holds true for the protections in regard to pregnancy and maternity, migrant workers, etc.

Given its intentions to ensure equal opportunities to people, and the prevention of unequal treatment, the International Labour Organization in its approach towards the elimination of discrimination, targets the norms and policies in three main areas. *First*, the prevention of discrimination against certain categories of workers, i.e. women, older workers, migrant workers, farmers, workers on non-self-governing territories (protectorate), workers on plantations, etc; *second*, prevention of certain forms of discrimination against workers in certain areas, such as forced labour, employment services, employment, freedom to work, social security, dismissal, vocational education and promotion; and *third*, implementation of the general principles for the prohibition of discrimination in the field of labour relations.

The central acts pertaining to protection from discrimination in employment are Convention No. 111 and Recommendation No. 111 from 1958 on the prohibition of discrimination (ratified by our country). They also stipulate the standard of discrimination prohibition in employment, and include prohibition of discrimination concerning access to education, occupation and employment, as well as in requirements for employment.

In respect of prohibition of discrimination among women and men, the central role is given to Convention No. 100 from 1950 on equal remuneration (which is ratified by our country). It promotes the equal remuneration of the male and female labour force for work of the same value. Remuneration shall mean salary, benefits and any additional emoluments.

The International Labour Organization gave due consideration to the development of norms for the prohibition of discrimination that ensures equal opportunities and treatment of workers with family responsibilities. To that end, Convention No.156 was adopted in 1981 for workers with family responsibilities (which was ratified by our country) and the Recommendation concerning equal opportunities and equal treatment for men and women workers. These acts refer to all men and women workers with family responsibilities. In accordance with these acts, the conditions for these workers

need to be improved by taking measures that respond to their special needs, as well as measures that improve the working conditions, in general.

The International Labour Organization, in its normative activity, devotes special place and attention to migrant workers, starting with its First Assembly in Washington, which dates back to 1919, and continues to the present time. Numerous acts, as well as recommendations and conventions, were adopted. Some of the most relevant ones can be singled out, such as Recommendation No. 1 on employment. Important resolutions include Convention No. 19 from 1925, concerning equality of treatment for national and foreign workers as regards workmen's compensation for accidents; Convention No. 97 from 1949 concerning migration for employment; and Convention No. 118 from 1962 concerning equal treatment of nationals and non-nationals in social security. Later, it adopted Convention No. 143 from 1975 concerning migration in abusive conditions and promotion of equality of opportunity and treatment of migrant workers (which was ratified by our country).

Conventions No. 97 and 143 define the notion of migrant, i.e. establishing who the persons are who will be considered as migrants and non-migrants. It is relevant that both conventions promote the principle of equal treatment and treatment by member-states, i.e. the obligation of states to respect the principle of non-discrimination in their treatment of migrant workers. However, Convention No. 143 also sets forth the requirement that member-states should respect all human rights of migrant workers, and it also lays down measures for the oversight, detection, and prevention of illegal migration, and establishes the equal treatment of all migrant workers and their families.

Within the framework of the normative activity of the ILO, several Conventions and Recommendations have been adopted which aim at the special protection of certain categories of employees, such as women and youth. Moreover, these legal acts have an affirmative approach, where a special protection of women is determined, especially in relation to the protection of pregnancy and motherhood in the working relationship, as well as the protection of the health of young workers, which is part of the paradigm for healthy young people in work. Thus, Convention No. 79 from 1946, and the revised Convention No. 90 from 1948, refer to the prohibition of night work for young people in industry and in non-industrial professions. Also, in 1948 the revised Convention No. 89 addressed the prohibition of women's work related to construction, mining, and shipbuilding. However, this affirmative approach has been abandoned by some European legislation, where the approach to the full equality of men and women based on gender was accepted, and the unique special protection for pregnancy, birth, and parenthood remained.

In the spirit of the latter, within the framework of the ILO, there is already a legal framework that regulates maternity protection. The protection system is contained in several conventions and recommendations, such as the revised Convention No. 103 from 1952. Since the new date, a new system review has been implemented, in regard to Convention No. 183 of 2000 and Resolution 191 of the same year, which is an addition to the Convention. These acts protect women workers during pregnancy, childbirth and maternity from hard work, late work, overtime work and loss of work due to dismissal. Certain rights also apply to the father during parenthood, after the birth of the child. However, the system of parental protection is more developed within the framework of the EU.

On the international level a particularly important Convention--No. 190--on violence and harassment in the workplace was brought in 2019. This Convention is considered revolutionary because it greatly closes the existing gap in regulations regarding sexual harassment in the workplace. The Convention recognizes violence and harassment at work as a violation or abuse of human rights, a threat to equal opportunities between men and women, and the same is unacceptable and incompatible with the principle of decent work. The purpose of this Convention is to put an end to violence and harassment in the world of work, shaping a workplace future for everyone based on dignity, respect, and free from violence and harassment.

The first article of this Convention defines what is meant by "violence and harassment" in the world of work, that is, that it constitutes a series of unacceptable behaviours and practices or threats of such behaviours, whether they occur individually or repeatedly, which are intended, result, or are likely to result in physical, psychological, sexual, or economic harm, and include gender-based violence and harassment.[27]

The definition laid out in this way provides a wide scope for behaviours that can be considered harassment. Harassment is also considered if the action happens once, i.e. it is not necessarily necessary to have continuous behaviours for it to be considered as harassment at work. The Convention has a relatively wide scope of persons to whom it applies. According to the content of Article 2, the scope refers to workers and other persons, including employees as defined by national legislation and practice, as well as persons working regardless of their contractual status, persons in training, including trainees, workers who have had their employment terminated, volunteers, job seekers and job applicants, and individuals performing the powers, duties, or responsibilities of an employer.

This Convention applies to all sectors, whether private or public, in both the formal and informal economy and whether in urban or rural areas. Given this broad definition and scope, we can conclude that protection in the workplace from violence and harassment (psychological and sexual) applies to all persons who have the status of an employee, or a status that the national legislation brings closer to the employment relationship, even though the person has not established an employment relationship.

In the text of the Convention (Article 4) are presented and include the legal and other instruments which should be adopted by the national legislation of the countries that have already ratified it;. They include some of the following activities and measures: legal prohibition of violence and harassment; provision of relevant policies relating to violence and harassment; adopting a comprehensive strategy in order to implement measures to prevent and combat violence and harassment; establishing or strengthening enforcement and monitoring mechanisms; providing access to legal remedies and support for victims; providing sanctions; developing tools, guidance, education and training and awareness raising, in accessible formats, as appropriate; and providing effective means to check and investigate cases of violence and harassment, including through labour inspectorates or other competent bodies. In addition to these activities, preventive

[27] „The term "violence and harassment" in the world of work refers to a range of unacceptable behaviours 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"(Article 1).

measures are provided by the state and employers, as well as appropriate supervision and control for the application of national solutions.

The International Labour Organization is the main pillar for international protection from discrimination in the field of labour relations. The acts and policies of the ILO are operational in all member-states, as well as in regional organizations, such as the European Union. Its importance is significant and lays the foundation for the future development of anti-discrimination legislation in the field of labour relations on the international level.

3.2.2. Acts of the European Union

The development of EU equality law dates back to the Treaty of Rome from 1957. The search for gender equality in the course of time began to disperse into all labour areas, and at the present time, gender equality is the foundation of the *acquis communautaire* of the European Union. The beginnings can be traced back to Article 119 of the Treaty establishing the European Community (Treaty of Rome), which later transformed into Article 141 in the Treaty of Amsterdam from 1997, which traced the path for strong normative activity on establishing the right to equality in labour, and labour relations in general.

One of the general instruments for the prevention of racial and ethnic discrimination is Council Regulation 2000/43/EC, which, although it is a framework directive, also refers to equal access in labour relations. It is particularly significant that Article 11 of the Directive regulates the question of equal treatment within the framework of the social dialogue. Furthermore, this directive is the basis for the other individual issues of discrimination that may arise in the framework of labour, and labour relations in general. This directive is additionally significant because it is a legal basis within the framework of the Union for equal treatment of the Roma individual, in general, as well as in labour. On the European Union level, there are two more basic directives dealing with matters of equal treatment in employment, that is, Directive No. 76/207 and Directive No. 97/80. Directive No. 76/207 from 1976 concerns the equal treatment of men and women in view of employment, vocational training, promotion, and working conditions. The principle of equal treatment presupposes no discrimination on the ground of sex, both direct and indirect discrimination, especially with reference to marital or family status. The second directive concerns the burden of proof in cases of discrimination on the ground of sex.

In addition, Directive No. 75/117 EEC, on equal pay for men and women, guarantees the principle of equal remuneration among men and women for work of the same value.

Also, Directive No. 79/7/EEC addresses the advanced introduction of equal treatment in occupational social security schemes. This act is further complemented by Directive No. 86/378/EC and Directive No. 96/97/EC, the latter viewed with reference to the case *Barber* (Barber v. Guardian Royal Exchange, C- 262/88, [1990] ECR I-1889).

This set of directives also includes Directive No. 86/613/EEC on the equal treatment of farmers, which stipulates equal treatment of self-employed women and men. Especially important is Directive No. 96/34/EC concerning the harmonization of family and professional life, including parental leave. Also, the Council has issued separate directives that refer to specific groups of employees as they are: the Pregnancy Directive (92/85/EEC), which protects pregnant and breastfeeding women and women who have recently given birth; the

Work-life Balance Directive (2019/1158/EU), which provides a set of legislative and non-legislative measures to enhance rights to leave and flexible working arrangements for parents and careers; and the Part-time Work Directive (97/81/EC). In spite of that, these directives no longer have function and relevance after the adoption of Directive 2006/54/EC that ensures the equality of men and women in employment from all aspects, especially with regard to their equal opportunities and equal treatment. This Directive sets the principle of equal treatment and opportunities on the ground of sex as fundamental and without any exception, specifically from the aspect of special protection of women, which, on the other hand, is still maintained by the ILO. The Directive sets forth equality in all rights from employment, and focuses on equal pay and working conditions, and goes one step ahead and stipulates that social partners should identify and address problematic matters in compliance with the spirit of the Directive. This Directive also explicitly prohibits any discrimination on the ground of sex in occupational social security schemes. Further, it stimulates positive action in areas, as and where needed (areas where women are insufficiently integrated or women are discriminated against in labour matters). It ensures the protection of women with reference to pregnancy and maternity, especially from the aspect of their return to work. The preventive function of the legal system is encouraged, as well as protection from horizontal discrimination.

At the present time, this Directive is considered as a fundamental framework directive, which provides for general prohibition of discrimination among men and women in employment and labour relations, and also as a base for the harmonization of national legislations on the European level. EU law also targets a range of other areas which are addressed from the aspect of equality and the prohibition of discrimination. Discrimination is prohibited on several grounds, that is, on the ground of sex, marital status, racial and ethnic origin, religion or belief, sexual orientation, age, disability and citizenship. In that sense, we will single out a few directives among the most important: Directive 2000/78/EC against discrimination at work on grounds of religion or belief, disability, age or sexual orientation; Directive 2004/113/EC for the equal treatment of men and women in the access to and supply of goods and services; and Directive Proposal (COM(2008)462) against discrimination on the grounds of age, disability, sexual orientation and religion or belief beyond the workplace. In addition to employment, it includes areas such as working conditions, education, promotion, social rights as well as protection from discrimination for special categories of workers, such as women, juveniles, older workers and people with disability. Given the large context of application, one can note a big number of cases before the Court of Justice of the European Union that verify the application of EU acts, but also inspire changes and amendments to the acts, in view of ensuring real equality and practical implementation of the EU equality law in all EU member states.

Chapter VII

Special protection for certain groups in labour relations

1. Protection of women workers

Matters related to the protection of women in society were put on the agenda based on various standpoints, and at different time periods of development. Women as a separate group were recognized long before and after the Second World War, which further developed in various forms under the influence of feminist movements worldwide. In particular, this can be observed in the framework of labour relations in the societies where women's labour acquired different dimensions and manifestations.

The protection of women workers, from the aspect of anti-discrimination in labour relations, became a topical issue when women got involved in labour relations. Therefore, firstly, one can speak about protection from discrimination in employment, and second, about protection from discrimination in labour relations.

The protection of women workers in labour relations mainly concerns the equal pay for work of equal value, the anti-discriminatory concept for work on certain jobs on the ground of sex, as well as anti-discrimination and the protection of women workers with reference to pregnancy, birth, and maternity.

Matters of equality of men and women in labour relations gained momentum in Europe after the Second World War, under the influence of the French national legislation, that is, when the process of the anti-discriminatory development of the European law on equal opportunities started upon by the insistence of French lobby groups.

On the national level, matters of equal opportunities for women in labour relations, and the respective protection from discrimination, may be seen in respect of three time periods. The first period is until the Second World War, when practically no documents existed with provisions on protecting women from discrimination, or establishing the concept of equal opportunities.

After the war, the national normative solutions are viewed with reference to the common federal state--Yugoslavia—until 1991. In this period, our country, as well as the whole region, were affected by completely different legal standpoints deriving from the changes

of the political-economic system. In this period, one can observe provisions of an anti-discriminatory nature, but mainly in relation to the systems for safety and health at work, and the protection of women on the ground of sex, as well as on the ground of pregnancy, birth, and maternity. During this period, women were separated from men in labour relations and were conferred the rights within the so-called affirmative discrimination, as concept that was allowed with wide-ranging objectives in the society. Equality in employment, promotion, education and remuneration for the same work were not mentioned.

Once the country declared independence at the end of 1991, the change of the political and economic system brought about the change of the legal system, which also concerned protection from discrimination and equal opportunities among women and men.

1.1. Equal opportunities and equal pay for equal work and work of equal value

The development of our society at the end of 1990-ies of the past century, and the beginning of the XXI century, marked the path for the implementation of European and international standards on equality concerning equal pay to women and men for work of equal value. This resulted in the adoption of special provisions as part of the changing of the Law on Labour Relations from 1993, which then became standard solutions in the Law on Labour Relations from 2005. In addition to the labour relation laws, one can observe the assumptions on equal pay for equal work also in the Law on Equal Opportunities for Women and Men, that is, by virtue of establishing the system for equal opportunities, the law stipulates measures on equality both in employment and labour relations. It means equality, especially with reference to remuneration.

The provision on equal pay for equal work was included in 2003 as amendment to the basic wording of the Law on Labour Relations from 1993, specifically in Article 70-a. Article 70-a reads as follows: "The employer shall pay equal remuneration to employees for equal work with equal requirements, irrespective of their sex. Provisions in employment contracts and collective agreements, which are contrary to paragraph 1 of this Article, shall be declared null and void".

By virtue of this provision, the principle for equal pay to women and men for the same/equal work and work of equal value was introduced, in accordance with Article 119, i.e. the present Article 141 of the Treaty of Rome, and the Convention No. 100 of the International Labour Organization. In addition, Article 4 of the European Social Charter from 1961 recognizes the right to equal pay among women and men. Also, the aforementioned Directive 75/117/EEC stipulates that measures need to be taken to ensure that all national legislations are in compliance with the principle of equal pay. However, Directive 2006/54 EC from July 2006 on equal opportunities and the equal treatment of men and women in employment and occupation is the fundamental and most relevant directive that largely replaced all the previous directives. Article 4 of this Directive sets forth the prohibition of discrimination among men and women with reference to the amount of remuneration for equal work or work that contributes to equal value or scope.

The introduction of this principle in our country, through Article 70-a in the preceding Law on Labour Relations, clearly aims to eliminate any possible discrimination on the ground of sex with respect to all aspects and conditions for

remuneration. On the other hand, the relevance of the real application of this principle is reflected in paragraph 2, which specifies that any act contrary to the principle of equal pay for equal work shall be declared null and void. Even though the law specifies the payment of salary, yet, the scope is extended to all contributions and allowances on the ground of labour and labour relations.

This principle was incorporated with identical content also in the original wording of the Law on Labour Relations from 2005, which ensured continuity in the application of the principle of equal pay for equal work and for work of equal value. This right is set forth in Article 108 of the Law. Article 6 of the Law, which refers to the prohibition of discrimination, entails a provision with reference to providing equal opportunities, as well as equal treatment to work for women and men, which also implies equal pay for equal work (item 3, paragraph 2). This equal treatment is, in fact, the antithesis of discrimination.

We especially want to highlight one negative tendency,amely, equal access to pay. The promotion and retention of jobs between men and women can be seen in depth through the subtypes of discrimination on different grounds. Thus, for example, there is multiple discrimination in relation to Roma women, who can be discriminated against because they are women, but also because of their ethnicity. Thus, it is necessary to pay more attention to these compounding types of inequality, which further negatively affect and distance women with diverse identities from the labour market and a decent life.

1.2. Special protection

After 1991, all solutions on the national level concerning matters of special protection at work are contained in the Law on Labour Relations from 1993 and 2005, respectively.

The current Law on Labour Relations in some aspects is more restrictive than the Law from 1993 concerning the special protection of women. The last 25 years of independent legal development concerning the protection of women in labour relations--and enshrining women's equality and protection from discrimination-- were marked by evolutionary, but also by devolutionary, processes. Namely, several types of protection can be generally discussed. First, we observe protection with implications of equality, but with reference to gender diversity, which entails: a) prohibition against doing heavy work, working under water and underground, as well as doing work with harmful effects on the health and safety; b) night work in industry and in the construction sector; and c) a prohibition for doing underground work. This protection was subjected to changes with devolutionary characteristics.

On the other hand, the second corpus of protection refers to pregnancy, maternity and parenthood, which has evolved throughout the years. At the present time, one can only speak about the existence of the prohibition for working underground (with narrowed scope), protection of women during night work in the industry and in the construction sector, and the protection of workers during pregnancy and parenthood. All other rights used to be stipulated in the Law on Labour Relations from 1993; however, presently, they are either excluded or have a reduced scope.

The growing tendency at the European level to exclude the protective norms for women at work seems to be overstepping its boundaries. This process is present worldwide. The Macedonian protective labour legislation keeps track of, and is influenced by, European tendencies,

however, there is lack of courage to make the key leap forward in view of completely abandoning the concept of protecting the safety and health of women at work on the ground of sex, considered as a criterion, and to apply the European model of equality and the prohibition of discrimination among women and men. At the present time, the concept of protecting women at work on the ground of sex persists with a quite narrow scope, but the normative reality still exists. It is reduced to two key instruments, i.e. the prohibition for women to do night work in industry and in the construction sector, and a prohibition for women working underground.

1.2.1. Prohibition for underground working

The prohibition for doing specific work under the current Law on Labour Relations is reduced to doing underground work (Article 160). It means that underwater work or heavy physical work, as stipulated by the Law on Labour Relations from 1993, is no longer prohibited. This is a major change in the concept and scope of protection for women at work in the Macedonian protective labour legal system. Such a restrictive provision means that the dynamics of the protective legislation development concerning this matter is increasingly approaching the concept of European community law, which does not recognize protection for women on the ground of sex. In view of the exceptions from paragraph 2, as well as the wording of paragraph 1 of this Article, this prohibition refers only to underground working in mines, and not for above-ground digging sites, which proves the aforesaid conclusion. It is a matter of time when this provision will be also deleted. The exceptions from this prohibition are reduced to the following: a woman worker is the manager with power to make independent valid decisions; a woman must attend part of the vocational and practical education in mines; when a woman who is employed in medical or social services and also due to other non-physical work has to go inside a mine.

From the aspect of women's protection from discrimination, these provisions are in favour of ensuring gender equality among men and women in labour relations, and also in favour of addressing the divide in male and female jobs. However, how these normative changes will be reflected in the concept of our labour law system, will require a thorough analysis in the coming years.

1.2.2. Night work for women in industry and in the construction sector

The prohibition against night work for women in industry and in the construction sector (Article 131) is a right that was already established, and persists as a legal continuity from the past. The exceptions also remained the same. In fact, Article 65 of the LLR from 1993 was completely transferred to the current law. According to the current Law on Labour Relations, the prohibition is reduced to night work, if the work at that time prevents the worker from having a rest of at least 7 hours in the period from 10.00 p.m. until 5.00 a.m. the following day. The exceptions are also identical, and refer to: "possibility for a woman worker to do night work if she is given special authorizations; in health, social and other protection; in case of *force majeure* that requires prevention of any damage on raw or other materials; and under serious economic, social and similar circumstances based on previously obtained permission from a competent body in the field of labour relations" (paragraph 2, 3 and 4). The prohibition against night work by

women is not entirely encompassed and refers to an already established standard in our country. However, if provisions in Article 131 are restrictively interpreted, night work is possible not only in view of specified exceptions, but also when conditions from paragraph 1 of the Article are met, i.e. 7 hours of rest the following day between 10.00 p.m. until 5.00 a.m. Although certain academics have taken the attitude that prohibition for night work by women, as part of the special protection for women on the ground of sex in industry and in the construction sector, is a resolved matter, that is practically problematic and should not be considered in the context of paragraph 4 in Article 131. This paragraph is another exception with reference to night work for women (or night shift) every night, and not as the possibility to work at night every second day.

We have already underlined that this issue is regulated by the legal instruments of the ILO which, with the revised Convention No. 89, regulates the protection of women during night work. We have already underlined that this issue is regulated by the legal instruments of the ILO, where with the revised Convention No. 89 regulates the protection of women during night work. The solutions from the Convention are fully implemented in the national legislation, and there is full compliance in terms of norms.

1.3. Protection during pregnancy, birth and maternity

The concept of ensuring protection to women during pregnancy, birth and parenthood (previously-maternity) did not undergo significant changes in the current Law on Labour Relations from 2005. This type of legal protection for women is neither seen as problematic or questionable in the national labour legislation or by the academic community. One can only discuss the scope of protection provided on these grounds.

This section covers a wide range of rights, and only those which are relevant from the aspect of protection of discrimination will be analyzed.

One novelty in the law is that the wording of the law provides for, and therefore confirms, the special protection for workers on the ground of pregnancy and parenthood (Article 161). According to the latter, this protection refers not only to an employed woman, who is pregnant or is a mother, but also to a father, i.e. the custodian who exercises parental rights. This is further verified as a new and different concept in the wording of the law, which seems to be approaching the concept of child and family protection, and not only the protection of the employed woman. Therefore, it may be considered as compliant with the equality concept. This is further verified by the analysis of paragraph 2 of the Article, according to which employers should enable their workers to harmonize their family and work responsibilities. This is a very important paragraph in the Law on Labour Relations since it provides for a new methodology of understanding the substance of the needed protection (in this case, protection of woman) and, for the first time, this is provided as a normative solution.

The corpus of rights that imply their direct application and protection on the ground of pregnancy and parenthood, starts with the standard provision on prohibition against work which may be considered hazardous and harmful for a woman worker and the health of a child (Article 162). The prohibition is valid during pregnancy and one year after the mother delivered the baby.

Another novelty in the law is that the employer may not request data about pregnancy (Article 163). This provision results from previous abuse of women workers' employment rights by employers, especially in employment procedures when employers quite often request information about whether or not the applicant is pregnant or when she plans to get pregnant, which is considered a ground for discrimination. This prohibition is ensured by this Article, at least from the formal and legal aspects. On the other hand, women workers may and should individually provide data on pregnancy for the purpose of exercising their rights to special protection of health and safety at work during pregnancy (paragraph 1). However, this paragraph does not necessarily imply that a woman is obliged to do so. Under the changes of the LLR, it is in the interest of a woman worker to inform about her pregnancy if she wants to exercise the right to special protection on the ground of pregnancy.

According to Article 101 of the Law, dismissal during pregnancy, birth, parenthood and absence due to child care, shall not be allowed. This is valid for dismissal on all grounds, without exception. From this aspect, the full protection of the woman worker is secured.

The right to prohibited dismissal refers not only to pregnant women workers, but also to workers who are fathers and who exercise their rights on the ground of parenthood (paternity leave), adoptive parents during the placement of the child, parental care for children with developmental problems and special educational needs, as well as absence from work due to care for the child, up to the age of 3.

Another novelty in the law is that the legislative changes make direct reference to such dismissal as being null and void. However, there are other situations when a worker can be dismissed. Such dismissal refers to cases when the employment contract has expired, i.e. the employment was contracted for a limited period of time. In addition, a woman worker or parent may be dismissed from work in case of gross violation of order and discipline at work, or due to malpractice. In such a case, a worker is dismissed without notice. In order to ensure that such dismissal is lawful, the employer's will must be validated with consent from the trade union. If there is no trade union, the consent is given by a competent labour inspector.

Pursuant to Article 163, when the work done by a woman worker is deemed harmful for her and her child's health, the employer shall ensure the provision of other appropriate work and remunerate the worker as for her original work, if that is considered more beneficial for the woman worker (paragraph 2). (This paragraph, in fact, puts into operation the previous Article 162.) From our perspective, the notion of what may be possibly considered as other and appropriate work, might pose a problem. Is it considered as work that responds to her educational and professional background, or is it safe enough for her health and her child's health?

When the transfer of a woman worker is made on the ground of pregnancy, the new job should be compliant with two criteria. However, when this matter involves a dispute, the opinion of a medical doctor shall be considered as decisive (paragraph 3), which is seen as both acceptable and good solution given the required expertise (from a medical doctor) to put forward a fair solution. Otherwise, this shall open possibility for any abuse to take place, which may also amount to discrimination at the workplace.

The prohibition against night and overtime work is retained in the current

Law on Labour Relations, however, this prohibition is diversified and reduced. The prohibition that previously entailed the legal grounds, and was applicable for a child up to the age of 2, is now reduced to 1 year of age (Article 164). These rights can be enjoyed by the father, but only subject to situations when the mother dies, the mother abandons the child, or the mother is declared incapacitated for independent life and work by a competent commission (paragraph 3). This matter needs to be reexamined from the aspect of prohibition of discrimination and equal treatment. The father shall not enjoy the protection from night and overtime work, even in cases when the father is the caregiver of the child, and the mother does not meet any of the indicated conditions. The possibility for one of the two parents to exercise the rights on the ground of special protection for health and safety at work, and not only the mother, is stipulated in cases when one parent is the only caregiver of a child with physical or mental impairments, or is a child with a severe illness. Under such circumstances, the parent is entitled to refuse any night or overtime work, i.e. the parent can engage in such work only based on previously given written consent.

This right can be exercised by a parent who provides care to a child up to the age of 7 (paragraph 4). Pursuant to this paragraph, if both parents of a child (who is disabled or severely ill) live together and work, none of them will be protected from night and overtime work. Paragraph 4 explicitly prescribes that it refers to a single parent, i.e. parent who lives alone with the child and provides care for the child. The wording of this Article is contradictory and may be also misleading, since at the beginning it is worded "*...of one of the workers-parents...*", which means that the child lives with both parents. On the other hand, such a solution may pose a problem, given the following dilemma: why can such protection apply only to one of the parents, if a child lives with both parents? This is particularly important when a child is disabled and enhanced care and efforts are required from both parents. The intention of the legislator was to protect only one parent, whereby it is worded as follows: "to one of the parents..", with the meaning that it refers to a single parent who lives with the child. Such solutions seem to be inappropriate both from the aspect of family protection and equal treatment, as well as protection from discrimination, and it would be better if the Law on Labour Relations provides for more flexible and extensive rights that would contribute to the better harmonization of family and work responsibilities, especially in respect of certain categories of mothers, i.e. parents who take care of ill and disabled children.

In view of maternity leave, the current Law on Labour Relations has literally replicated the provisions from the previous Law, and no changes were made for long time (Article 165)[28], except that this right is exercised also for paternity, except for maternity.

The term "paid absence" is now used in the Law, instead of the term "maternity leave", while, on the other hand, the wording of the provisions includes the term "parental leave". The intention is to extend the scope of leave both to the mother and the father, i.e. both parents. Accordingly, paragraph 1 of this Article should be defined in view of the meaning of parental leave. Even though the law failed to provide such a definition, there is no doubt that the concept of protection underwent a significant change, that is, the focus on maternity was shifted to parenthood, which is in compliance with the principle of equality.

[28] Solutions for this article were taken over from Article 58 of the Law on Labor relations from 1993, previously discussed.

The protective system for maternity and parenthood includes one novelty, i.e. when a child is hospitalized due to health reasons or medical treatment, there is the possibility for termination of parental leave (paragraph 4). This possibility is stipulated as part of the protection of parental rights and may be exercised both by the mother and the father. The most recent change, as of 2015, is the obligation of the worker to inform the employer, 30 days in advance, when the parental leave will commence and when it will end.

Pursuant to Article 165, paragraphs 6 and 7, when a woman worker adopts a child, she is entitled to paid leave until the child is nine months old, for a newborn, i.e. during the adaptation period of the child according to the special regulations on family, when a child is older than 9 months. These regulations were adopted within the Law on Family, and this particular matter is stipulated in Article 104-k. As a matter of fact, these are special types of leave unlike the typical maternity leave for a woman, and resemble the leave for childcare which is specified in the legislation of neighbouring countries.

Use of leave when a child is older than 9 months does not seem to be problematic, however, in cases when a woman worker adopts a child who is still not 9 months old, she is entitled to maternity leave, but not for uninterrupted period of 9 months (as set forth in 1 for mothers giving birth), but only for a period until the child is 9 months old. In this case, the woman worker shall be discriminated against in view of her maternity leave, since it is impossible to adopt a child immediately after birth, and also because the formal procedure for adoption is time consuming.

One should make mention of the amendments to the Law on Labour Relations from 30.12.2013, when the scope of protection was extended in Article 170-a to the parental leave for an additional three months, until the child reaches the age of 3, and in cases when childcare is required.

The wording of the law includes the phrase "parental leave"; however, the provision refers only to mothers, which implies that a father is not entitled to this right, which is contrary to Article 165, and notably to Article 167 (which is discussed below). As previously stated, and according to the norm specified by the legislator, the phase "parental leave" refers to both parents. Therefore, being formulated as parental leave when it specifically refers only to the mother, is not only terminological and lexical inconsistency, but also a discriminatory ground because of the unequal formulation of the norm.

Article 167 of the law entails an entirely new concept concerning the use of parental leave by the father. According to this Article, when a woman worker does not exercise the right to leave, as well as other rights from Article 165, the right (i.e. parental leave) shall be exercised by the father. It implies an entirely new approach concerning the right to parental leave for the father, and refers to cases when the father is entitled to use parental leave. The special requirements, such as in cases when the mother dies, the mother abandons the child or when due to justified reasons the mother is incapacitated for childcare, are no longer applied. According to the current LLR, the father is not conditioned by the right to parental leave and parents can literally agree who will exercise this right. This was designed in compliance with the European solutions, which are based on Directive No. 96/34/EC and imply equal treatment.

Parental rights protection, in view of protecting health and safety at work, also entails the right of a parent of a disabled child to use annual leave that is extended by three more days (Article 137, paragraph

3). This right is set forth in the section on annual leave, and is compliant with the principle of equality as it makes reference to both parents, that is, either of the parents may exercise this right.

The system for protection during pregnancy, birth and parenthood provides for one standard right, and that is the right to salary compensation which is paid during maternal leave, or paternal leave if the father is exercising the right.

One very important right is stipulated in paragraph 2, i.e. the right to financial allowance on the ground of pregnancy, birth and parenthood in cases when the employment was for a limited period of time and was terminated. In such a case, the financial allowance is paid by the Health Insurance Fund. The right is also exercised by a father on the ground of parenthood.

Compared to previous laws, this may be viewed as a good novelty and advancement; however, it may include a hidden basis for unequal treatment. The time specified for breastfeeding is inadequate, and should be specified to last two hours, at least, or as "flexible hours". More specifically, it should be determined on a case-by-case basis, while the main criterion should be the distance of the home from the workplace. Otherwise, women workers who live close to the workplace will be put in a more favourable position, in comparison with workers who live at a bigger distance or in another town. As a matter of fact, women who live at bigger distance, are unable to exercise this right, and this amounts to real discrimination, even though it is prohibited in the LLR (Article 6 and 7). This implies the necessity for real, rather than formal, equality.

As we previously mentioned, protection during pregnancy, birth and parenthood is an area that enters the spectrum of international protection issues at the ILO, as well as within the framework of EU law. Convention No. 103 of the ILO for maternity protection refers to the protection of the mother and the child in industrial activities, non-industrial activities and in agriculture. The protection standards provided for in this act are implemented through the national legislations, while the Macedonian normative system fully corresponds with them. Within the framework of European law, the aforementioned Directive 92/85/EEC sets the basic legal standard for the protection of health and safety at work for women who are pregnant, who have recently given birth, and who are breastfeeding. National legislation should comply with the minimum standards in the Directive, which is actually done with our labour legislation.

2. Protection of child workers

Matters related to discrimination and unequal treatment of juveniles in labour relations, from the aspect of their protection at work, include two categories of questions. *First*, prohibition for juveniles entering labour relations until they reach a certain age and *second*, ensuring their enhanced rights when entering labour relations until they reach the age of maturity. Any treatment which is contrary to the aforementioned shall be considered as discrimination.

Matters related to the protection of juveniles against discrimination, in general, and in view of labour relations, are highlighted at the international level. Many international acts were adopted that lay down the protection of juveniles. In 1989, the UN General Assembly, for the first time, adopted the Convention on the Rights of the Child. This Convention largely contributed to the renewed and enhanced interest for matters of child exploitation

and discriminatory abuse. Also, Article 10 item 3 of the International Covenant on Economic, Social and Cultural Rights lays down the rights of children and youth, according to which their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development, should be prohibited.

In 1999, the International Labour Organization adopted Convention No. 182 on the prohibition and elimination of the worst forms of child labour, and Recommendation No. 190 concerning the prohibition of the worst forms of child labour with immediate measures to abolish such labour. In addition, the ILO adopted Convention No. 138 from 1973 concerning the minimal age, and Recommendation No. 146 from the same year, as well as Conventions No. 77 and 78 concerning the medical examination for fitness of young people for employment, and many other ILO acts.

The Preamble to the European Social Charter sets forth the protection of children and youth as part of their fundamental social rights, but fails to include a prohibition against exploitation. Provisions in respect of the rights of children and youth to social, legal and economic protection can be found in Article 17 concerning the protection of their personality, dignity, education, and the prohibition of their exploitation.

The prohibition against child labour and economic exploitation within European community law is expressly stated as a prohibition for work by juveniles below the age of 15. Directive 94/33/EC (for protection of young workers) was also adopted to secure the protection of young people at work.

2.1. National solutions

On the national level, this particular protection dates back to 1952 when the Ordinance on the prohibition of employment for women and young people at certain jobs was adopted, and further advanced in the context of normative solutions both on the federal and republic levels.

After the country gained independence and the national protective labour legal system was developed, the protection of juveniles was given an appropriate place in the Law on Labour Relations from 1993 and 2005, respectively. Without analyzing the provisions on juvenile protection in the Law on Labour Relations from 1993, one may conclude that the current Law on Labour Relations from 2005 largely stipulates the same solutions as the previous law. Those solutions concern the affirmative measures that provide extended scope of protection and which are not considered as discrimination.

The age limit for employment of juveniles is in accordance with the standards of the International Labour Organization, according to which a young person having reached 15 years of age can get employed (Article 18). According to Article 18, in addition to the prescribed minimal age of the worker, the young person must also enjoy good health. No other requirements concerning juveniles have been stipulated by the legislator that could possibly be validated or depend on juvenile's will. A juvenile, in view of the labour law and labour relations, acquires the capacity to work at the age of 15. This is an inadequate solution and needs to be subject of will that is validated either by parents or the custodian of a juvenile, or a competent body based on a previously issued opinion from a medical institution. On the other hand, following the adoption

of the Law on Secondary Education (LSE) which introduced mandatory secondary education in 2007, the right of juveniles to work, as set forth in the Law on Labour Relations, was largely restricted. As a result, the provisions on the employment of young people below the age of 18 become inapplicable. Overall, the special protection for this category of workers, which was additionally provided, has lost its relevance for a simple reason, that is, there will be no such workers, or there will be only a few of them. However, it is possible for a student to attend extracurricular education and work at the same time, or to complete secondary education before the age of 18 and to immediately get employed. In fact, the Law on Secondary Education stipulates a very specific position for juveniles on the labour market. On one hand, they are entitled to employment, but in reality, they cannot exercise this right. To some extent, this can be viewed as discrimination in the employment of migrant workers, who have not reached the age of 15 and are not included in the national system for mandatory secondary education. Therefore, one can draw the conclusion that the two laws were contradictory, and to certain degree, they are still mutually exclusive and contrasting.

Provisions pertaining to the special protection of juveniles are included in several articles. First, pursuant to Article 172, workers who have not reached the age of 18 shall be entitled to special protection. The prohibition against heavy physical work, underground and underwater working, as well as work which is risky and harmful for the health and healthy development, remains the same as in the Law from 1993. The only difference is that the new Law prescribes another prohibition for work with sources of ionizing radiation. In this context, the law fails to prescribe the obligation that other harmful work should be specified in the collective agreements, but this obligation is to be undertaken by the Minister of Labour in cooperation with the Minister of Health. Nevertheless, this novelty is not necessarily understood to mean that any job which is harmful and prohibited for juveniles cannot be specified in collective agreements by the employer. The rulebook which is drafted by the Ministry of Labour and social policy is considered a much better solution and would specifically list any job which is prohibited for juveniles.

The rulebook on the protection of young workers at work was adopted in 2012 and specified the minimal requirements for safety and protection of young workers, i.e. workers below the age of 18. The rulebook entails all activities which may involve specific risks in connection with the young worker's exposure to physical, chemical and biological agents. In order to prevent harmful consequences from exposure to such agents, the employer should take activities and measures, including the risk assessment concerning the work done by the young worker.[29]

The changes and amendments to Article 18 of the Law on Labour Relations provided for new quality in respect of prohibition for certain jobs and work. Paragraph 3 stipulates the obligation to protect young people from economic exploitation, as well as from any other harmful effects on the health and safety of a juvenile at work.

A juvenile may not work overtime, i.e. more than 8 hours a day, or more than 40 hours a week (Article 174). This is a standard prohibition in all modern systems for the protection of juveniles at work. Pursuant to Article 18, a young worker shall not work more than 8 hours during the day (24 hours), which is practically a repetition of

[29] See: Jovevski, L., Trajanov, C. 2014. Handbook for protection of juveniles at work- international legislation, national legislation and bylaws. Stobi Trejd Kocani, Skopje, page. 68-69.

the provision contained in Article 174.

In addition, the Law on Labour Relations entails provisions on reduced working hours for juveniles. According to the changes of Article 18, reduced working hours include two categories of juveniles. The first category is juveniles up to the age of 16, and paragraph 7 stipulates for them a maximum of 30 working hours per week. The second category is juveniles above the age of 16, with a maximum 37 working hours and 45 minutes per week.

Another novelty in the Law on Labour Relations from 2005 is paragraph 3 in Article 174, which creates confusion and becomes a contentious issue. It sets forth that a worker below the age of 18 is entitled to rest between two days for an uninterrupted period of 24 hours. It shall mean that the length of daily rest is increased from 12 to 24 hours compared to the standard norm provided for other workers. The provision is not worded as "between two consecutive days" but rather as "between two days for an uninterrupted period of 24 hours". What exactly does this mean?

It should be considered in the context of the extended right from Article 133 in view of the rest between two consecutive days, no matter that this provision fails to formulate it as such (consecutive days). In practice, it would be understood that a young worker will work every second day, or that the young worker will work with reduced working hours on the following day.

Overall, the system of norms for the special protection of juveniles at work, which comprises the Law on Labour Relations, the Law on Secondary Education, and the Law on Safety and Health at Work, was not designed in a conceptualized and systematic manner, no matter if such claims are altogether unfounded. It comprises a framework of various solutions, and fails to ensure their harmonization and interconnection. This results in the existence of an equilibratory combination which practically reduces or eliminates the participation of young people in labour processes, and fails to offer extensive labour protection in their employment.

In view of juvenile protection, our labour and anti-discrimination legislation show a tendency to improve some legislative provisions, compared to the past period. On the other hand, at the present time, these norms cannot be fully operational and functional due to the low numbers of juveniles on the labour market, which results from the failure of the overall normative solutions to function and the dynamics of the labour market.

3. Protection of workers with disability

Discrimination can also occur on the ground of disability. Whenever this type of discrimination occurs, it may be quite harmful and cause severe and far-reaching consequences in the society. People with disability are especially vulnerable to discrimination in employment and labour relations. Regrettably, these people are usually on the margins of the society, as well as in the labour sphere.

Finding solutions with regard to employment and prohibition of discrimination against people with disability would address a major and very sensitive social issue. The prohibition of discrimination concerning labour and employment means better inclusion of people with disability in the community and, on the other hand, develops the feeling of belonging and equality for a person with disability. Economic stability is

the basis in order to be able to secure the inclusion and integration of people with disability.

According to the international acts of the International Labour Organization, the Council of Europe and the European Union, any affirmative measures and legislative solutions which aim to enhance the rights of people with disability, their labour protection and benefits from their employment, shall not be considered as discriminatory.

3.1. International standards

The fundamental international instrument dealing with discrimination of people with disability is the International Convention on the Rights of People with Disabilities, adopted by the UN in 2006.

The most significant legal act of the European Union concerning the prohibition of discrimination and employment of people with disability is the previously elaborated Directive 2000/78/EC. In addition to this act, and Recommendation No. 86/379 EEC, in view of the protection of people with disability, the European Union adopted several other acts that prohibit discrimination in many other areas, except for labour and labour relations.

Also, one can single out the Council resolution on promoting the employment and social integration of people with disabilities from 2003. This Resolution promotes the full integration and participation of people with disabilities in all aspects of society, recognizing that they have equal rights with other citizens.[30]

Also, Directive No. 76/207/EE3 on equal treatment and Directive 2002/73/E3, which were replaced by Directive 2000/78/EC, fall in line with the prohibition of discrimination. The new Directive is the basic directive on equality that prohibits discrimination on several grounds, including disability. It lays down that employers should refrain from discriminating against people with disability at work, and should provide adequate conditions and accommodation at the workplace, as well as equal treatment. The Joint Declaration was adopted in 1999 with regard to the professional integration of people with disability, and stipulates that discrimination on the ground of reasons considered to be irrelevant for the concerned work, shall be considered as socially unacceptable and economically unjustified.

The Council Resolution from 1996 on equal employment opportunities for people with disabilities stipulates that member-states within the framework of their national employment policies, and in cooperation with the social partners and non-governmental organizations, shall place particular emphasis on the promotion of employment opportunities for people with disabilities. Equal employment opportunities are realized through workplace accommodation, development of qualifications and skills required at work, access to vocational guidance and placement services, and access to new information and communication technologies, which corresponds to the Council of Europe Resolution No. 3.

The European Union has adopted many other acts that prohibit discrimination against people with disabilities and prescribe their rights to social and professional integration. Among others, the Charter of Fundamental Rights of the European Union from 2000 (adopted in Nice) prohibits discrimination on the ground of disability; however, this

[30] See: Stojkova, Z. 2004. International Norms and Standards for People with Handicap: Comparative Analysis. Justiciana, Skopje, page. 113.

prohibition is higher graded than the prohibition stipulated in Article 14 in the Treaty of Amsterdam. In addition, many other acts were adopted with reference to the prohibition of discrimination in access to information technologies, violence against people with disability, access to culture, integration of children and youth in the mainstream educational system, acceptance of parking tickets, and equal educational opportunities for students with disability, etc.

3.2. National solutions

In our country, the protection of this category of workers is stipulated on two levels, i.e. in the Law on Labour Relations and the Law on Employment of People with Disabilities.

The Law on Labour Relations generally provides for special protection with two articles in the section on special protection and one article in the section on annual leave. This protection from the Law on Labour Relations underwent significant changes in 2008, so that the special protection refers only to disabled people with right to occupational rehabilitation.[31] The wording of the law that was initially adopted, referred to all people with disability, without any further specifications. According to the Law on Labour Relations, the employer shall ensure special protection for the people with disability when they are employed, as well in their qualification and requalification (Article 177). Thus, special protection refers to the overall working cycle, starting with the employment up to possible reassignment to another job, in line with the rehabilitation. The protection in employment is also stipulated in the aforementioned Law, while rights arising from occupational rehabilitation are part of the Law on Pension and Disability Insurance. The changes of the LLR from 2008 also affected the Article 178. When an occupationally disabled worker is declared incapacitated for work, the worker will be sent to occupational rehabilitation and then assigned to a full-time job according to the regulations of the Law on Pension and Disability Insurance (paragraph 1). Two rights can be distinguished here, that is: "the right of the worker to receive occupational rehabilitation, and to be reallocated to another job in accordance with the (remaining) capacity for work". The solution concerning the full-time work seems to be problematic. It needs to be interpreted from the aspect of the Law on Pension and Disability Insurance, whereby half-time work shall be considered as full-time work. Otherwise, if full-time work of 40 hours weekly is taken into account, it may be understood that the worker might not be able to perform such work in that time period.

According to this Article, the worker has the right to be transferred to another appropriate job, when an imminent threat exists which may cause disability (paragraph 2). Several aspects need to be taken into account when a worker exercises this right. First, another adequate job may be a job that responds to the worker's education and ability. This derives from paragraph 3 of this Article. On the other hand, an imminent threat which may cause disability shall be considered only when all measures for protection at work have been taken, and the harm to the worker's health persists (paragraph 3). These matters need to be examined and specified in the findings of the Commission for evaluation of working capacity at the Fund for Pension and Disability Insurance (paragraph 4).

[31] Occupational rehabilitation is currently the central point for development of the concept for protection of people with disabilities at work, in accordance with the LRL and LPDI.

From the foregoing, one can draw the conclusion that the Law on Labour Relations prescribes the rights of people with disability to special protection in a rather restrained manner. These rights are now provided with reference to other special laws that stipulate some of the matters of special protection of health and safety at work for this category of worker. In addition, having in mind the specifics of these people, the special protection does not only refer to protection during the employment, but also in the employment procedure, which will be discussed later. Accordingly, one can distinguish three situations when protection of the rights is provided. *First*, it refers to the employment process; *second*, it refers to the employed people with disability during their employment, and *third*, it refers to the protection of workers who have become occupationally disabled workers in the course of their employment".

3.3. Reasonable accommodation

The previous discussion on some of the international acts included an elaboration of matters related to the creation of adequate employment and working conditions, which imply adjustments and accessibility to employment for persons with disability. This can be reasonably expected for the reason that, when adequate conditions for people with disability are not properly integrated in policies and planning related to transportation, physical infrastructure and the educational system, the people with disability will be excluded from employment opportunities.

The conditions for reasonable accommodation in the context of employment are accepted in different parts of the world; however, this might be considered as a huge novelty in many other countries. Therefore, both employers and workers will need to be provided with assistance and explanations about the types of reasonable accommodation which are necessary. To that end, the UN Convention on the Rights of the People with Disability stipulates the reasonable accommodation and the respective requirements thereof.

Article 2 of the Convention defines reasonable accommodation as follows: "reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". This definition refers generally to the system of reasonable accommodation in all areas of the life for the people with disability. Thus, one can distinguish between reasonable accommodation in all areas of society and reasonable accommodation in labour and employment, as separate types of accommodation. The general and specific type of reasonable accommodation needs to be considered conditionally, since the accommodation at the workplace, and in the working environment, is directly linked to the accommodation, for example, in education, transportation, physical access, etc.

The Convention recognizes the fact that non-provision of reasonable accommodation shall be considered as discrimination on the ground of disability. Any refusal to undertake reasonable accommodation shall be considered as discrimination. According to the definition, the reasonable accommodation implies the obligation to make adjustments to ensure to persons with disability that they fulfill their needs in all areas, including employment. That would mean

reasonable corrections, adaptations or measures, effective and appropriate modifications in the working environment, and even more than that. The provision of reasonable accommodation means, for example, making adjustments in the workplace and working environment, in the educational system, healthcare facilities, and transportation services, in order to eliminate the barriers that prevent a person with disability to take part in activities of overall social importance, as well as in the field of labour and employment. In view of employment, the reasonable accommodation usually means physical changes in the working conditions, procurement or modification of equipment, providing adequate training and oversight, changing the standard working hours, or transferring the working duties to another person.

Reasonable accommodation has a very broad scope, which is reflected in other areas, beyond employment. Even though some jobs are available to people with disability, still, they may be discouraged from application and job seeking. For example, if people with disability do not have access to job advertisements or lack adequate education, or transport to and from the workplace is inaccessible, this may have dissuasive effect in their search for employment.

In the area of employment, one should distinguish the reasonable accommodation from the specific affirmative measures, which aim to increase the employability of people with disability, mainly from the quantitative aspect. The most prominent measure of this type is the quota for employment of people with disability. Such measures aim to promote equal opportunities in order to tackle certain structural difficulties for a given group of people. The measures have an interim nature and apply until the structural difficulty is resolved (for example, unemployment of people with disability). Unlike the affirmative measures, the reasonable accommodation shall imply meeting the individual needs of the person with disability in the field of labour, or any other social area.

The authors hold the opinion, which is also supported by the legislation of many countries, that the obligation for reasonable accommodation, on one hand, should be seen as element of the non-discrimination principle and, on the other hand, as distinct from the affirmative measures. As a result, one raises the following question: if reasonable accommodation is considered as part of the anti-discrimination framework, does it include only the negative obligation, i.e. does unjustified non-provision of reasonable accommodation constitute discrimination, or also a positive obligation, i.e. the right to accommodation? Article 5 of Directive 2000/78/EC stipulates the obligation for reasonable accommodation clearly construes the positive obligation, even though it does not include an expressly stated provision that any non-provision of reasonable accommodation constitutes discrimination. This paragraph exists in the legislation of almost all EU member-states, except for some countries that opted for the negative obligation, such as: Sweden, Belgium, Austria and Luxembourg. Having said that reasonable accommodation falls in the scope of anti-discrimination legislation, one can raise the question – how does it fit into the existing anti-discrimination framework? Member-states have different opinions and positions on this question, especially how the unjustified lack of accommodation is treated. It should definitely be considered as one form of discrimination; however, that there is no unified position on whether it should be considered as direct or indirect discrimination, or *sui generis* discrimination.

Thus, whenever an unjustified absence of reasonable accommodation is identified with direct discrimination, it shall acquire the characteristic of one of the most serious forms of discrimination, and adequate sanctions will be imposed. However, such a step would create a new justification for direct discrimination that currently does not exist as part of the anti-discrimination legislation of the European Union, and that is the disproportional burden which is closely related only to the reasonable accommodation. The other alternative is recognizing the unjustified absence of reasonable accommodation as being a separate *sui generis* form of discrimination. This brings about advantages because this is the only way to emphasize the specifics of the individual character of the obligation for reasonable accommodation, i.e. the fact that less favorable treatment, because of refusing to provide reasonable accommodation, is suffered only by one person with disability, and not by all or a bigger group of people with disability.

Another matter is the personalized scope of the reasonable accommodation, where various approaches apply. The approach in Directive 2000/78/E3, which is reflected in the provision of Article 5, is restrictive and includes only people with disability who have the ability and qualifications to do certain work, that is: job applicants, currently employed (as well as formerly employed people) when they start using benefits from employment. This is for the reason that reasonable accommodation requires strict application of the asymmetric model of anti-discrimination legislation, i.e. only people with disability may have benefits from reasonable accommodation. However, this does not address the problems faced by close family members of people with disability, because sometimes, they also need reasonable accommodation, such as in the example of the case *Coleman*. The EU member-states transposed the respective standpoint in the national legislation. (*Court of Justice of the European Union, S. Coleman v Attridge Law, Steve Law, Case C-303/06, OJ C 224, judgement from 17 July 2008*). In view of comparative findings from EU member-states, in order to conclude if the accommodation is appropriate, one may apply the test which consists of two phases, that is: *first*, one should establish if the accommodation is *appropriate/ reasonable*, or if is it feasible and responds to the needs of the affected person (does it enable a person with disability to perform regular work?), and is it necessary; and *second*, whether the accommodation will result in a disproportional burden for the employer. This test is included in the Explanatory Memorandum to the Act on Equal Treatment on Grounds of Disability and Chronic Illness of the Netherlands. Matters of reasonable accommodation are considered separately from matters of disproportional burden, as they focus on the potential to ensure equal opportunities for people with disability, and not the required costs. This is a predominantly European perspective, which is supported by the authors of this book.[32]

Reasonable accommodation may be considered as the *modus vivendi* of the non-discrimination concept for people with disability and also a base for the possibility for those people to get employed and work. Furthermore, reasonable accommodation in labour relations provides the protection of the health of people with disability. This is very important in cases when, even though people with disability have an opportunity to work without any special accommodation at the workplace, it remains a question of whether such conditions would be harmful to their

[32] See: Poposka, Z. Shavreski, Z., Amdiju, N. 2014. Guide for reasonable accomodation. OSCE Mission to Skopje and Commission for protection from discrimination.

health. Finally, or maybe from the very start, the conditions required for reasonable accommodation should be seen as part of the non-discrimination concept for people with disability and part of the special protection in employment. Therefore, this shall be the foundation for any further development of the European and international normative system, as well as the idea to provide protection to people with disability.

3.4. Open labour market versus protective workshops

Given the construct of disability as a social phenomenon, as well as the structure of the labour market, steps are being taken towards the improvement of the qualities of an open labour market through the introduction of special affirmative measures that stimulate the employment and job retention of people with disability. There are two main models for additional inclusion of people with disability, and a number of alternatives to these models. The first model refers to the establishment of so-called protective workshops that employ people with disability. A range of advantages are provided in terms of protective workshops. They are either established out of existing companies or completely new companies are established– protective workshops that fully or partially employ people with disability. The second model refers to the introduction of the so-called quota system as an affirmative structural measure for the employment of people with disability.

Our legal system recognizes the first model that gives a possibility for the establishment of protective workshops that employ people with disability. The employers are entitled to a range of benefits. This matter is regulated by the Law on Employment of People with Disabilities (LEPD). It refers both to unemployed people with disabilities and occupationally disabled workers. The Law stipulates measures and conditions for employment of these categories of people, most notably as financial incentives (subsidies) for the employer as well as measures for providing special education and qualifications based on the needs of the employer and the worker. This Law stipulates, to a lesser extent, the working conditions for people with disability who entered in labour relations.

The Law sets forth the special conditions for employment and work of persons with disability and occupationally disabled persons (Article 1), and specifies all areas of employment, in the economy, and in the public and private sector. One novelty of the Law is the possibility for the establishment of protective workshops that employ persons with disability (Article 9 and 10).

By providing various benefits, primarily, this Law aims to stimulate the employment of these people, and partially, to specify the rights of these people from employment. It concerns the procedures and requirements for employment, and not only rights from employment. The measures that imply financial incentives for the employers, such as exemption from payment of personal income tax, and fringe benefits and non-refundable funds, in fact, ensure the external protection of these persons, which makes them competitive on the labour market. Our national legislation stipulates such measures only for these categories of persons, which is logical and desirable in the context of ensuring their wider social inclusion and demarginalization in the society. Which would be the better place and manner for such an endeavor than the area of employment and labour relations? These norms are not specific only to our country, since such external protective

measures can be seen from European experiences, which mainly concern incentives for employment.

However, the practice has shown that legal provisions are often evaded or abused. Despite the aim to stimulate the employment of persons with disability, one cannot say that the law fully accomplished its goal. The numerous abuses on the part of employers concerning the exercising of the rights from employment by the persons with disability, creates a relatively negative picture. Problems persist regarding the abuse of funds provided from the special fund, the incentives concerning the exemptions from payment of fringe benefits, as well as the remuneration of persons with disability. There are various kinds of examples of abuse which cannot be addressed and prevented through the controls undertaken by the Employment Agency and the Labour Inspection. Therefore, in the course of 2015, an attempt was made to adopt a new law that would eliminate the abuse, and included a major change that implied introduction of the so-called quota system for the employment of persons with disability in the private sector. The proposal for law was received with resistance from the business community in the country.

The current Law on Employment of People with Disability mainly refers to unemployed disabled people and the occupationally disabled people who are unemployed, whereas the Law on Pension and Disability Insurance provides for many rights and solutions for employees who become occupationally disabled persons.

Article 2 of the Law on Employment of Persons with Disability specifies the respective category of persons, which is also verified by the findings of the Commission at the Fund for Pension and Disability Insurance. The Law, among the rights, also specifies the obligation of the employer to provide adequate conditions, both general and specific, to ensure that the disabled person will be able to work, while on the other hand, a worker cannot be shifted from one to another place when the conditions are not met (Article 5). The LEPD also stipulates the right to remuneration (Article 6) which is considered as unnecessary since it is set forth in the LLR. The LEPD does not recognize a special regime for employment outside the Law on Labour Relations and does not put under question the unification of labour relations, and therefore, it does not pose any dilemmas. The employer is also obliged to provide adequate working conditions for a person with disability, and adjustment and proper equipment at the workplace in line with the working capacities of the disabled person (Article 7 and 8).

As already mentioned, the Law stipulates certain fiscal incentives and exemptions from the payment of fringe benefits for these workers by the employer, which are paid from the Budget (Article 9). In addition, other financial benefits from the Special Fund are foreseen in order to improve the working conditions, as well as the work done by these persons (Article 19 to 23). In view of the protection of health and safety at work, the LEPD provides for the awarding of non-refundable funds required for the adjustment of the workplace and the provision of adequate equipment, in order to secure successful and safe work by the worker. The procedure and the conditions for awarding such funds are also prescribed by the law.

The Law on Employment of Persons with Disability includes provisions on providing vocational training required for work, without reference to any other specifics, but only to the provision of such training. Such vocational training will be provided by the employer for employed persons

with disability, whereas the Employment Agency provides such training for unemployed persons (Article 14). The Law does not specify what is included in the vocational training programme, and this is provided by the Agency within a special act (paragraph 4).

Finally, there are also provisions with regard to overseeing the implementation of the law, where the Ministry of Labour and social policy through the labour inspectorate has the main role (Article 24), as well as misdemeanor provisions.

From the foregoing, one can conclude that the protection of persons with disability in labour relations and employment, from the aspect of anti-discrimination, implies a very complex system of protection embedded in the Law on Labour Relations, the Law on Employment of Persons with Disability, and the Law on Pension and Disability Insurance. Therefore, the system of protection is considered as adequate, which is based on its normative structure that provides for the overall scope of special protection.

3.5. Occupational rehabilitation

Our labour and social legislation do not provide many or sufficient number of provisions related to occupational rehabilitation. The aforementioned provisions in the Law on Labour Relations do not provide for the complete and adequate application of this important protective mechanism for vocational training – rehabilitation for return to work or to another working position based on the remaining work capacity. In the past, the terminology used for rehabilitation was referred to as vocational or professional training, which was stipulated in a relatively broad and comprehensive legal framework, notably in the labour legislation and the Law on Pension and Disability Insurance.

Article 42 of the Law on Pension and Disability Insurance sets forth that occupational rehabilitation provides vocational training to an insured person for a full-time job. Occupational rehabilitation does not imply any medical rehabilitation. It results from health problems, however, and so the employee receives vocational training about doing the respective work. The Law on Pension and Disability Insurance specifies a range of measures and requirements for occupational rehabilitation, as well as salary compensation during the period of occupational rehabilitation (Article 43 to 47). Occupational rehabilitation is usually provided to occupationally disabled persons at the expense of the Fund.

Occupational rehabilitation is stipulated in a range of regulations on the international level. The acts of the International Labour Organization include Convention No. 159 on the vocational rehabilitation and employment of disabled persons from 1983, and Recommendation No. 168 from 1983 concerning the Convention. This Convention, in this form, is an act that was adopted merely by the International Labour Organization. The general goal of the Convention is the creation of a framework for vocational training of persons with disability to enable a disabled person to secure, retain and advance in suitable employment. The secondary goal is to secure the integration and reintegration of these people in society. Measures which are taken to ensure that vocational rehabilitation shall be considered as non-discriminatory.

Recommendation No. 168, concerning vocational rehabilitation and employment opportunities, relies on the principle of equal opportunities in the access to, retention of, and advancement in,

employment (paragraph 7), both for male and female workers with disability. The Convention also relies on the principle that these measures shall not be considered discriminatory against other workers.

In the European Union, the framework for protection of persons with disability is based on the concept of professional integration and reasonable accommodation, which also broadly implies vocational rehabilitation. The system established on the basis of Directive 2000/78/EC implies the development of system for the wide integration of persons with disability into economic and social life. This is largely achieved in the area of labour relations.

4. Protection of older workers

This is an era of longevity. Life expectancy has now increased more than ever in the history of humankind. In general, demographic changes bring about new challenges in the social environment and the society. It is believed that old people will outnumber children in 2047.[33] Also, it is believed that the population will decline in developed industrial countries, such as France, Italy, Japan[34], while Eastern Europe will be confronted with an aging population which will create a range of unique needs and conditions in this particular region.[35] Even countries considered to have relatively "young" populations will undergo some aging changes, such as the region of Africa and the Near East. Also, as of 2008, half of the world population lives in urban areas.[36] This is an indication that the next 40 years will bring about dramatic changes in the age structure worldwide, which in turn will result in major socio-economic and political changes. This holds true as the increase in population age has financial effects on the society, i.e. it costs money. The amounts allocated for every person older than 60 are on the increase. In 1950, it amounted to 8 cents a day, while nowadays it amounts to 11 cents a day. It is believed that it will amount to 22 cents in 2050. Therefore, longevity results in increasing costs for retirement pensions, healthcare, etc. It is also an indication of certain shifts with economic consequences that influence the labour market, investments, pension system, etc. .

The world trend of aging population and demographic changes puts many matters on the agenda concerning older people, and especially their status in labour relations and on the labour market. In this context, discrimination as well as infringement of the rights of older workers are quite possible.

Discrimination is more prevalent among women since they can be discriminated against in employment on the ground of age, gender, lower pay, part-time work, etc. Globally, special problems regarding older people, which are also recognized by the International Labour Organization, the Council of Europe and the European Union, refer to poverty, healthcare and pension benefits (insurance). These problems contribute to having older people included in the black labour market as they are unable to get employment for the reason of their age. Older women are especially endangered, and even though, on average, they have a longer life span, they are less employed than men.

33 See: UN. 2007. *World Population Ageing DESA*, Population Division, xxvi

34 See: *Rights, jobs, and social security: New visions for older women and men*, page.1

35 See: Chawla, M. 2007. From Red to Gray: The "Third Transition" of Aging Populations in Eastern Europe and Former Soviet Union. World bank, Washington DC, стр.1.

36 See: United Nations Expert Group Meeting on Population Distribution, *Urbanization, Internal Migration and Development*, UN, DESA Population division, 2008, стр. Iii

Discrimination against older workers is considered from the aspect of the retention of their job and employment. As said before, the shift in age limits and change of socio-cultural factors improved the older workers' ability to work and their productivity. They are now confronted with the dilemma of whether to continue working or exercise the right to a decent old-age pension. This is a matter which is discussed by the society in general, and will bear enormous weight in future.

Older workers should be protected against discrimination at work and in employment, and should be included in the social system that secures their health protection and right to a decent pension.[37] One should develop a sense for the growing needs of older men and women in view of their discrimination on the grounds of age, employment opportunities, and access to social insurance.

4.1. International standards

On an international level, age may be seen as a ground for additional concession to the principle of equal treatment concerning discrimination. It means that certain differences in the treatment of older people may exist on the ground of age, and such differences are considered as advantages in the national legislations. Those need to be objectively justified and have a legitimate goal. These concessions derive from the Madrid International Plan of Action on Aging from 2002, which made it clear that "in order to build a society fit for people of all ages, the international community needs to rethink the conventional course of working life".[38]

Recommendation No.162 from 1980 was adopted by the International Labour Organization, while the European Union subjected the protection of older workers to the framework and strategy for protection from discrimination. On the other hand, the paradigm of the system and the main agenda refer to intergenerational solidarity (reform of social benefits) and to the shifts in the labour market caused by the aging of the working population and their increased longevity.

4.2. National solutions

This category of workers is new in the system for protection at work within the national protective labour legislation. This might be the reason that provisions are only "tentatively" provided in two articles of the LLR. That is, Article 179 defines who the workers are who may be considered as older workers, i.e. employed women who reached the age of 57 and employed men who reached the age of 59. The right to special protection is subjected to the prohibition for overtime and night work for these workers without their consent (Article 180). As far as the length of the annual leave is concerned, this category of workers enjoys additional protection within the meaning of Article 137, that is, their annual leave is increased to three more days. That is the content of the special protection for this category of workers. These provisions imply an increased scope of rights and are considered as non-discriminatory.

However, the concept as such, and the respective content, pose many dilemmas. First, it refers to the different age limit for women and men, which is the base to apply

[37] See: ILO Governing Body March 2007, *Employment and social protection in the new demographic context*, GB,298/2 page. 11.

[38] See: ILO Gender Equality campaign highlights need for rights, jobs and social security for older women and men.

the special protective provisions, or Article 137, 179 and 180. The age distinction made sense when the current Law on Labour Relations was adopted in 2005, since the age limit for the retirement of men and women was different at that time, 64 and 62 years of age, respectively. Therefore, the concept of distinct age of women and men to exercise the special protection was justified and compliant with the legal logic. However, the Constitutional court abolished that provision of the Law on Labour Relations (Article 104) on exercising rights from the Law on Pension and Disability Insurance, whereby it provided the possibility that both women and men can retire at the age of 64. This was inspired by the principle of non-discrimination and equality of women and men. For that reason, in the past, it was necessary to change the provision of the Law on Labour Relations (Article 179) on the age limits for older workers, i.e. to be standardized both for women and men, and to make the system consistent and non-discriminatory. Otherwise, the existence of such a legal solution neither makes legal or any other sense. The starting age, which is taken for a worker to be considered as older, must be in compliance with the age for retirement, and needs to be equal both for women and men. The constitutional court's decision provides the possibility for women to retire at the age of 62 on their request with declarative meaning, while the right to retirement can be automatically exercised at the age of 64. Unfortunately, this right is exercised in practice in quite the opposite way.

However, the Law on Labour Relations underwent changes on 29.07.2014, and the new paragraph 2 was added to Article 104 that provides for a distinct legal ground when it comes to continuation of employment for men and women. Men can work until they reach the age of 67, and women until they reach the age of 65. This is just an optional and not a mandatory right, and may be exercised if the employee provides a written statement.

This is considered to be a transitory solution, and years of age will be fixed relatively soon, since it is expected that there will be an increased number of citizens who will be stimulated (above all, financially) to continue working until the upper age limit, especially in the business sector. One can say that the psychological moment would be decisive in order to make a shift from one stage of labour to another stage of life, or to shift from work to utilize the benefits of the work.

However, such a solution is confronted with two major challenges that need to be addressed in the future. The first challenge would come from a situation of increased scope of extended working life. The question is what the effect will be on reduced unemployment, especially concerning the young population, since statistics show that they comprise the biggest number of unemployed people in the country. If that becomes reality, or if the unemployment rate for this category of citizens is significantly on the increase, it may influence the drain of a young, capable, and highly qualified labour force from the country. This would be the secondary effect of the possible problem, especially given the fact that most young people who leave the country have no intention to return, at least not in a time period when they would be able to contribute with their labour to the development of our society. Therefore, such a solution provided by law must be accompanied with enhanced measures that stimulate the employment of young people, mainly through action programmes, measures, information and education for the employers and young unemployed people which, on a positive note, has so far been noticed in practice. It

remains to be seen what the results in the next two to three years will be.[39]

This solution is also confronted with the second challenge, which is of a legal nature. The academic and professional communities have already raised the question about the discriminatory nature of this solution, which makes a distinction in the age of retirement of men and women, that is, 67 and 65, respectively. This has been the subject of review by the Constitutional court; however, until the beginning of November 2016, the court did not issue its final decision. Nevertheless, in accordance with the interim decision of the Constitutional court, women can retire until they reach the age of 67. Under such circumstances, it will be necessary to await the court's decision, whose outcome may be assumed, but it is worth pointing out something that seems to be forgotten. The reviewing of this institute needs to be made in view of gender equality of men and women in labor relations, and also from the aspect of protection at work. At first sight, it does seem to be discrimination, but historically, it is a fact that women were fighting for reduced working hours and bigger rights. In such a case, if the provision is considered from the aspect of the protection of health, it can mean that women enjoy bigger protection on the ground of sex, and this is not considered as discrimination. Nevertheless, given that the provision stipulates this right only for employed women, it seems that the distinction in age is completely unnecessary. Each employee may decide about the years of work, and the upper limit can remain the same. That would secure the realization of the principle of full and realistic non-discrimination and will prove beneficial for all citizens.

5. Discrimination of Roma in the Labour Market: A Persistent Struggle

The challenges faced by the Roma on the labour market are numerous and often multi-layered and systemic. Basically, the competitiveness of the labour market is conditioned by the educational capacities of the person, his skills, experience, as well as the contribution he can make in solving the problems faced by a company. Very often, the Roma community has a lack of knowledge, competences and experience, and this keeps them away from work. These disadvantages, as we mentioned before, are often conditioned by discriminatory policies or relationships within the framework of education or employment; however, removing from the labour market to the greatest extent can be due to discrimination in employment, promotion and job retention. This especially applies to the Roma community. In labour relations, for the Roma population, discrimination often manifests in multiple forms, ranging from hiring practices to unfair treatment and wage disparities. Some of the forms of discrimination related to labour occur especially in several main areas such as: hiring practices; wage disparities; segregation and informal employment.

Hiring practices refer to the fact that Roma individuals frequently face discrimination during the hiring process, where employers may reject applicants solely based on their Roma ethnicity, without considering their qualifications or skills. Studies have shown that even when possessing similar qualifications as non-Roma counterparts, Roma job seekers are less likely to receive job offers or be invited for interviews. On the other hand, for those Roma who manage to secure employment, wage

[39] See: Jovanovski, L. 2014. Pravnik - struchno spisanie. Skopje, No.270/14, page 48-49.

disparities become evident. Roma workers often receive lower salaries than non-Roma colleagues, even when performing the same tasks with equal proficiency. Also, the issue of segregation within labour relations and working in the informal economy of the Roma is a wider social problem in a number of countries in Europe and in the world. Due to discrimination, Roma individuals are frequently confined to informal and precarious work, such as day labour or seasonal work, lacking proper employment contracts and social protections. Moreover, they often face occupational segregation, where they are confined to low-paying and menial jobs.

The impact of discrimination on the Roma community of discrimination is very deep. The ramifications of labour market discrimination on the Roma community are profound and far-reaching. Such discrimination exacerbates poverty and social exclusion, perpetuating a cycle of disadvantage and marginalization. The lack of opportunities for meaningful employment denies Roma individuals access to decent living standards, education, and healthcare, further entrenching their vulnerability. Moreover, labour market discrimination has broader implications for society as a whole. By excluding a significant portion of the population from active participation in the formal economy, economies miss out on the potential contributions of talented individuals and diverse perspectives, hindering innovation and productivity..

To combat discrimination against the Roma in the labour market, a multifaceted approach is necessary, involving various stakeholders, including governments, employers, civil society organizations, and the Roma community itself. First of all, Governments should enact and enforce anti-discrimination laws that explicitly protect against ethnicity-based discrimination in the labour market. Effective implementation and monitoring mechanisms are essential to hold accountable those who violate these laws (European Union Agency for Fundamental Rights, 2016). Also, raising awareness about the contributions and capabilities of the Roma community is crucial in challenging negative stereotypes and prejudices. Education and sensitization programmes should target employers, employees, and the broader society to promote inclusivity and understanding. Next, steps should be taken that employers should actively seek to diversify their workforce and create inclusive workplaces. This involves promoting equal opportunities, offering training programmes, and ensuring fair treatment and remuneration for all employees. Last, but not least, is that encouraging self-empowerment within the Roma community is essential. Providing access to education, vocational training, and entrepreneurship opportunities can foster self-sufficiency and reduce dependency on the informal labour market.

The discrimination of Roma in the labour market is a deeply rooted and persistent issue that requires urgent attention. By tackling this problem head-on, governments, employers, and civil society can promote social justice, economic growth, and social cohesion. By embracing diversity and providing equal opportunities for all, societies can unlock the potential of the Roma community and move towards a more inclusive and prosperous future.

PART FOUR

Antigypsyism

Chapter VIII

Antigypsyism

The acknowledgement of historical racism and discrimination directed at the Roma, referred to as antigypsyism, has gained traction among mainstream political actors and institutions. Prominent entities such as the Council of Europe, the European Parliament, the European Commission, the OSCE, governments, and senior officials have recognized the pivotal role played by historical racism and discrimination in shaping the present difficulties faced by the Roma in Europe. This recognition represents a significant step towards addressing the ongoing challenges and fostering a more inclusive and equitable society.

The Council of Europe's Strategic Action Plan on Roma and Traveller Inclusion (2020-2025) translates the strategic objectives concerning the safeguarding and advancement of human rights, democracy, and the rule of law into a policy framework aimed at advancing the inclusion of Roma and Travellers in Europe. Among its primary goals is the combating of antigypsyism and discrimination. The European Commission acknowledged that antigypsyism is a root cause of Roma exclusion in Europe. In its EU Strategic Framework for Roma equality, inclusion, and participation, the EU set level objectives and associated quantitative targets, as minimum progress to be achieved by 2030 by the Member-States. Among its seven objectives to be achieved by 2030, the very first one is fighting and preventing antigypsyism and discrimination.

While the recognition of the historical oppression of Roma is important, there are a number of challenges in relation to the concept of antigypsyism that scholars have to address. The diverse terminology used by scholars, activists, and policymakers to describe the historical experiences of Roma in Europe, the diversity inside the Roma minority, and the multiple facets of Romani identity, the different meanings associated with the concept of antigypsyism, are some of the most significant challenges to be addressed by those using the concept.

This chapter aims to provide students with an understanding of the concept of antigypsyism and its practical translation into the legal field. Hence, the chapter explores the current state of research and debate surrounding the racism directed towards the Roma, as well as relevant case law of the European Court of Human Rights, national courts, national equality bodies, as well as other judicial or quasi-judicial institutions. The structure of the chapter contains sections on terminology,

definitions of antigypsyism, its origins, the main manifestations and mechanisms of antigypsyism, the features of antigypsyism, and conclusions.

1. Terminology

Racism against Roma is a controversial issue, starting with the terminology used to describe the historical experiences of Roma in Europe. There are competing terms describing these historical experiences such as Romaphobia, Antigypsyism, anti-Romaism or anti-Romism, antiziganism/ antiziganismus or anti-Roma racism. This section provides the students with an overview of the complexities surrounding racism, history, and identity as part of the analysis of these terms.

The term "antigypsyism," whether written as a single word or hyphenated, with or without a capital 'G,' stands as the most prevalent expression when addressing racism directed at the Roma. In addition to activists and scholars, this term has gained traction within international institutions like the Council of Europe, the United Nations, and the European Union. Numerous European governments have also officially employed this term in various documents, identifying specific historical actions that subjected the Roma to legal and regulatory frameworks. Additionally, it finds use in the nomenclature of specialized commissions tasked with investigating historical occurrences involving the Roma. The term was originally coined by Roma activists in the Soviet Union during the 1920s' open policies towards national minorities. Martin Hollers credits Aleksandr Germano as the inventor of the term 'antitsyganizm', the equivalent version of antigypsyism in Russian.[40]

The dispute surrounding the term 'antigypsyism' is further rooted in the diverse designations used for the ethnic group, the varying interpretations these designations hold among local communities and activists, as well as the nuanced connotations associated with these terms within the national languages and cultures in which Roma are living. This controversy is amplified by the intricate process of constructing a Romani identity within the broader framework of the European political project.

Roma individuals occasionally opt for alternate identities, distancing themselves from the label "Roma", and instead adopting other appellations, including pejorative terms like "tigan," "cigány," "cigane," "tsigane," and "zigeuner," along with their derivatives. In some cases, different names are embraced by certain groups to sidestep these derogatory designations; examples include "Ashkali," "Egyptians," "Beash," or "Rudari." The intricacy of Roma communities, encompassing those identifying as Sinti, Kale, Caminanti, Manoush, Gitanos, or Travellers, adds to the complexity of self-identification and the categorization of Roma. Adding to the intricacy, communities within the United Kingdom often identify themselves as 'Gypsies.' Notably, the favoured terminology for denoting these communities is 'Gypsy, Roma, and Travellers,' a broader and more inclusive phrasing that unites both indigenous and more recently arrived groups in the UK.

The cultural and national context in which the different labels and terms are used may also affect their meanings. For instance, the word "tigan" has a very negative connotation in the Romanian context, historically referring to a lower

[40] See Holler M. 2015 Historical Predecessors of the Term 'Anti-Gypsyism'. In Jan Selling and others (eds.) Antiziganism: What's in a Word?, Newcastle upon Tyne: Cambridge Scholars Publishing.

social status for slaves. It is clear that other labels, such as "Gypsies" in English and the UK context, or "Gitano" in Spain and the Spanish cultural space, do not carry the same significance as the term "tigan" in the Romanian cultural context. Hence, due to the different terms and their meanings in different cultural spaces and national contexts to refer to these groups, the solution might be the contextualisation of the terms according to national cultures and the meanings attached to each term.

"Romaphobia" is a term rooted in the medical field, incorporating the ethnonym "Roma." Some scholars and activists view it in a favourable light, drawing parallels with terms like "Islamophobia" or "homophobia." Objections to the term stem from its medical origins and the suggested implications. "Phobia" typically denotes an intense, persistent, and irrational fear of specific objects, situations, or feelings. However, the historical narrative of the Roma does not readily align with having its origins rooted in such fear. The complexities of Roma history, including the experiences of slavery, the Holocaust, "Gypsy hunts," forced sterilizations of Romani women, and other forms of extreme violence, cannot be adequately explained by the majority's fear alone. These actions are more accurately rooted in deep-seated prejudices, stereotypes, and systemic injustice.

Furthermore, the term "Romaphobia" appears to propose a predominantly medical solution – therapy or psychiatric treatment. Yet, the multifaceted injustices and oppression faced by the Roma demand a much more comprehensive approach. Effectively addressing these issues necessitates inclusive and robust policies aimed at rectifying past wrongs, encompassing affirmative actions, ending impunity, prosecuting those accountable for crimes and atrocities against the Roma, and initiating a broader process of reconciliation between the Roma and the majority society.

Other words for racism directed at Roma include "anti-Romism" and "anti-Romaism," which some activists and scholars view as more positive than "antigypsyism." However, these terminologies also have a number of disadvantages. They do not include people who do not identify as Roma or who are not perceived as Roma by others, akin to Romaphobia. Second, despite using a positive ethnonym, it makes little mention of the historical pain caused by the states and majority cultures and the stigmatization of individuals who are called "Gypsies".

One advantage of the phrase "anti-Roma racism" is that it facilitates communication with media or wider audiences less familiar with the identity and history of the Roma. The linkage of the oppression of the Roma with that of other groups simplifies the message and makes it easier to comprehend in the current context, when arguments on racism, injustices, and the effects of colonialism on oppressed people are prominent. The disadvantage of the term "anti-Roma racism" is that it tends to encompass more generalized forms of oppression of other groups, which obscures the particularity of Roma people's experiences of oppression and injustice. Supporters of the term "antigypsyism" specifically highlight the particular instances of the oppressions of Roma. In their view, Roma were oppressed and stigmatized for being labeled as "Gypsies", "tigani", etc., and includes diverse experiences that are lost if encompassed in more generalized forms of oppressions.

Roma scholars, activists and organizations should be the main actors in deciding the best term to be used to describe the historical experiences of Roma in Europe. Due to the different terms and their meanings in different cultural spaces and

national contexts to refer to these groups, the solution might be the contextualisation of the terms according to national cultures and the meanings attached to each term.

2. Definitions

Despite its increasing use by activists, academics, and politicians, there is not yet a consensus on how to define the concept of antigypsyism. There are different definitions of antigypsyism provided both by academics and institutions. This chapter reviews those definitions provided by institutions which play an important role in shaping policies and public discourse on Roma.

The Council of Europe's European Commission against Racism and Intolerance (ECRI) adopted in 2011 a general policy recommendation on combating antigypsyism and has defined antigypsyism as follows:

> *„anti-Gypsyism is a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination".*

The Alliance against Antigypsyism, a coalition of 95 Roma and pro-Roma organizations led by the European Roma Grassroots Organization (ERGO) network, provided the following working definition of antigypsyism:

> *„Antigypsyism is a historically constructed, persistent complex of customary racism against social groups identified under the stigma 'gypsy' or other related terms, and incorporates:*
> - *a homogenizing and essentializing perception and description of these groups;*
> - *the attribution of specific characteristics to them;*
> - *discriminating social structures and violent practices that emerge against that background, which have a degrading and ostracizing effect and which reproduce structural disadvantages".*

In 2020, the International Holocaust Remembrance Alliance provided the following non-legally binding working definition of antigypsyism to guide its work:

> *„Antigypsyism/anti-Roma discrimination is a manifestation of individual expressions and acts as well as institutional policies and practices of marginalization, exclusion, physical violence, devaluation of Roma cultures and lifestyles, and hate speech directed at Roma as well as other individuals and groups perceived, stigmatized, or persecuted during the Nazi era, and still today, as 'Gypsies'. This leads to the treatment of Roma as an alleged alien group and associates them with a series of pejorative stereotypes and distorted images that represent a specific form of racism".*

The ECRI definition of antigypsyism has been adopted by the European Union institutions and categorizes it as a specific form of racism. It also includes some features of antigypsyism -dehumanization, institutional racism, historical discrimination – as well as some manifestations - violence, hate speech, exploitation, stigmatisation, and discrimination. However, this definition does not explain what makes racism against Roma different from other forms of racism and might be confusing to an audience by listing the mixture of features and expressions of antigypsyism.

Essentially, the Alliance against Antigypsyism definition closely aligns with the one articulated by Markus End in his

writings about antigypsyism.[41] It highlights both the historical aspect of antigypsyism, and the processes involved in generating and perpetuating this phenomenon. On the other hand, it lacks specificity as the described features are valid for many other forms of racism.

The International Holocaust Remembrance Alliance definition of antigypsyism is a middle ground solution between the positions adopted by participating governments in relation to the use of a historically pejorative term for Roma. While other governments favoured the word "antigypsyism," the United States and Canadian government delegations insisted on adopting the term "anti-Roma racism." In fact, the participating governments indicate the geographic range of use of each term in a footnote to the definition. This compromise, however, caused antigypsyism to be mistakenly equated with anti-Roma prejudice, because antigypsyism encompasses more than just discrimination.

The provided definitions employ a blend of terminology and concepts, potentially causing confusion among readers. Within these definitions, terms such as racism, ideology, discrimination, hate speech, dehumanization, and essentialization are intertwined. It becomes apparent that a common thread among these various definitions is the portrayal of antigypsyism as a manifestation of racism. It is worth noting that these definitions are not based on empirical research, and no endeavours to quantify antigypsyism based on these definitions have been undertaken.

Drawing upon empirical research conducted across five EU member states and at the EU level,[42] as well as across seven countries within the Western Balkans,[43] and the in-depth research on antigypsyism conducted in Kosovo[44], the conceptualization of antigypsyism employed herein stems from a comprehensive analysis of distinct phases of policy formulation directed towards the Roma population in Europe.[45] Throughout the course of these different empirical investigations, the definition of antigypsyism has evolved, reflecting the insights gained and experiences amassed. This nuanced definition encapsulates an array of highly derogatory terminologies employed to marginalize these communities, while also alluding to the notion of social imagination, thereby aiding readers in comprehending the intricate dynamics of this pervasive social phenomenon.

> Antigypsyism is a special form of racism directed against those stigmatized in the social imagination as "Gypsies", "tsigane", "țigan", "Zigeuner", "tatars", "zingari" or other related terms, that has at its core the assumptions that they are an inferior and deviant group, and which justifies their dominance and oppression. Other key assumptions of antigypsyism are orientalism, nomadism, rootlessness, and backwardness.[46]

41 See End M. 2014. Antiziganism as a Structure of Meanings: The Racial Antiziganism of an Austrian Nazi. In Timofey Agarin (ed.) When Stereotype Meets Prejudice: Antiziganism in European Societies. Stuttgart: Ibidem Verlag.

42 Carrera S., Rostas I., Vosyliūtė, L. 2017. Combating Institutional Anti-Gypsyism: Responses and promising practices in the EU and selected Member States, Brussels: Center for European Policy Studies.

43 Rostas I., Jovanovic T., Zharkalliu K., Kostic I., Baysak S., Amet S., and Leucht C. 2021. Combating Institutional Antigypsyism in the Western Balkans and Turkey - A Policy Assessment. Belgrade: Regional Cooperation Council Roma Integration Action Team.

44 Hyde A. M., Rostas I., Telaku D., Spatareanu D. 2022. National Research on Antigypsyism in Kosovo. Prishtina: VORAE/ HEKS/EPER/TdH.

45 Rostas I. 2019. A Task for Sisyphus: Why Europe's Roma Policies Fail, Budapest: CEU Press

46 Rostas I. 2019. A Task for Sisyphus: Why Europe's Roma Policies Fail, Budapest: CEU Press, p:19-20. See also

What does racism mean? What is race? How does a group of people become a race? How is race different from ethnicity? What is the difference between racism and discrimination?

According to Michael Banton, race is a social construct that refers to the classification of human beings into groups based on perceived physical or biological differences. Ethnicity, on the other hand, is a social construct that refers to the identification of human beings with a cultural group based on shared history, language, religion, or other factors. Banton argues that race and ethnicity are not fixed or natural categories, but rather dynamic and changing ones that are influenced by social, political, and historical contexts. He also suggests that race and ethnicity are often conflated or confused in everyday usage, leading to misleading or harmful notions of human diversity and social relations. He supports his arguments with various examples and evidence from sociology, anthropology, philosophy, and comparative politics.[47]

According to Grosfoguel, "racism is a global hierarchy of superiority and inferiority along the line of the human that have been politically, culturally and economically produced and reproduced for centuries by the institutions of the 'capitalist/patriarchal western-centric/Christian-centric modern/colonial world system'".[48] One of the advantages of this definition of racism is that it covers multiple forms of racisms. The hierarchy along the line of the human can be constructed through different racial markers such as colour, ethnicity, language, culture and/or religion. As will be seen in the next section of this chapter, skin colour has been used to differentiate and describe Roma since their arrival into Europe. Hence, racism against Roma was present since their arrival into Europe.

The term "racism" refers to more than only racial discrimination. It involves the view that one racial group is superior to another, as well as the idea that an individual's behaviour, ethics, and character may be attributed to their race. When discrimination comes into play, the focus shifts to acting upon these prejudiced beliefs. Racism transcends mere biases in thought or behaviour. It occurs when prejudice is accompanied by the power to discriminate against, oppress or limit the rights of others. Any distinction, behaviour, or act that is based on a person's race, whether intentional or not, is racial discrimination. It has the result of placing burdens on a person or group that are not placed on others, or that denies or restricts access to benefits provided to other members of society. The process of socially constructing race is known as racialization. It is the method through which civilizations create the idea that races are actual, distinctive, and unequal in ways that have an impact on social, political, and economic life.

In light of the definition of antigypsyism provided by Rostas, the assumptions shed light on the racialization and mode of production of antigypsyism. The idea that Roma are less human and more closely associated with the animal world is linked to inferiority. Since the first Roma-related writings, animal metaphors have been used frequently to describe the Roma. The perception that Roma are unable to uphold even the most basic social norms

Rostas I., Jovanovic T., Zharkalliu K., Kostic I., Baysak S., Amet S., and Leucht C. 2021. Combating Institutional Antigypsyism in the Western Balkans and Turkey - A Policy Assessment. Belgrade: Regional Cooperation Council Roma Integration Action Team

47 Banton M. 2015. What We Now Know About Race and Ethnicity. New York: Berghahn Books, pp. 1-15, 45-67, 101-120.

48 Grosfoguel R. 2016. What is Racism, Journal of World-System Research, Vol. 22, Issue 22:1, p. 9.

and values is linked to inferiority. Deviance, which is frequently associated with criminality and other habits deemed Roma-specific, underlines the outsider status of Roma. The bulk of society frequently views criminality as a genetic or innate trait of Roma people. Based on skin tone and other ethnic features, orientalism highlights the orientalism. The non-European roots of the Roma are highlighted through skin tone and other ethnic features, which opens the door for their marginalization. Roma fill the function of the "significant other" by serving as the foundation upon which the majority populations' identities are based. Roma are portrayed as unstable, untrustworthy individuals that travel around on their own volition because of their nomadism, which is considered characteristic of their way of life. Nomadism is portrayed as a lifestyle choice made by the Roma, as a means of avoiding societal responsibility for taxes paid and alleged crimes committed, or as a primitive and antisocial way of life in stark contrast to that of the settled bulk of the population. Nomadism and rootlessness are closely related, as the latter emphasizes the absence of identity, which is strongly related to nomadism and paints Roma as being unable to have relationships with the land, as being lacking in communal memory, and having no feeling of belonging. Backwardness is the portrayal of Roma as being illiterate, uncivilized, and leading a completely different and primitive lifestyle from the majority. The solution is to modernize the Roma, which entails their absorption by taking on the standards and ideals of the dominant community.

3. Origins

The section identifies the root causes of antigypsyism since the arrival of Roma into Europe by analyzing relevant historical records and bibliographical sources by renowned authors in Romani Studies.

Thomas Acton traces the origins of antigypsyism to the fifteenth century, when Roma people first arrived in large numbers in western Europe and faced hostility and persecution from the local authorities and populations. He shows how antigypsyism evolved from scientific racism and popular racism to a discourse that is influenced by political and economic interests, as well as by the lack of recognition and representation of Roma identity and culture.[49] He attributes the origins of this prejudice to the early perceptions of the Roma by Byzantine occultists and fortune tellers in the 8th century. Additionally, Acton suggests that the misrepresentation of the Roma emerged as a response to the presence of Muslim adversaries. This misrepresentation depicted the Roma as "heirs of the wisdom, skills and aesthetics that the Zoroastrians had inherited from the ancient Egyptians of the pyramids".[50] The customary animosity towards nomadic populations residing within settled regions, coupled with concerns about the potential for violence and invasion by pastoral nomads, are additional elements that might have contributed to the growth of antigypsyism.

In his article "The Longue Durée of Antiziganism as Mentality and Ideology",[51] and in his 1997 book ""Wie die Zigeuner."

[49] Acton T. A. 2012. Social and Economic Bases of AntiGypsyism, in Hristo Kyuchukov (ed) New Faces of Antigypsyism in Modern Europe, Prague: Slovo 21.

[50] Acton T. A. 2012. Social and Economic Bases of AntiGypsyism, in Hristo Kyuchukov (ed) New Faces of Antigypsyism in Modern Europe, Prague: Slovo 21, p. 34.

[51] Wippermann W. 2015. The Longue Durée of Antiziganism as Mentality and Ideology. In Jan Selling, Markus End, Hristo Kyuchukov, Pia Laskar, and Bill Templer (eds.) Antiziganism: What's in a Word?, Newcastle upon Tyne: Cambridge Scholars Publishing.

Antisemitismus und Antiziganismus im Vergleich"[52] Wolfgang Wippermann explores the historical roots of antiziganism, or the hostility and discrimination against Roma and Sinti people.[53] He claims that antiziganism is not only a form of racism, but also a specific mentality and ideology that has a long history and has adapted to different political and social contexts. He identifies the medieval period as the origin of antiziganism, when Roma and Sinti were seen as heretics, sorcerers, and spies by the Christian majority. He argues that this negative image of Roma and Sinti was based on religious, cultural, and ethnic differences, and was reinforced by stereotypes and prejudices. He provides citations to support his depiction of Roma as "heretics, sorcerers and spies", such as the Roman Inquisition, the Medieval Inquisition, and the beliefs about magic in Western worldviews.

Nicholas Saul and Susan Tebbutt's edited volume "The Role of the Romanies" explores the images and counter-images of "Gypsies"/Romanies in European cultures from the Middle Ages to the present.[54] The book is divided into four parts, each focusing on a different aspect of Romany studies and representations. One of the main questions that the book addresses is the origins of antigypsyism, or the hostility and discrimination against "Gypsies". The book traces the roots of antigypsyism to the fifteenth century, when the first wave of Romany migration arrived in Western Europe and encountered a hostile reception from the authorities and the public. The book argues that antigypsyism was based on a combination of factors, such as the perceived threat of the "other", the fear of nomadism, the religious intolerance, and the economic competition. The book also shows how antigypsyism evolved over time and influenced the legal, social, and cultural treatment of Romanies in different countries and contexts.

The chapter by Donald Kenrick, included in the volume edited by Saul and Tebbutts, explores the origins of antigypsyism in Western Europe in the fifteenth century, when large numbers of Romanies first arrived in the region.[55] He challenges the common view that these Romanies were mostly criminals and impostors who pretended to be refugees or pilgrims. He argues that this view is based on selective and biased sources that ignored the majority of Romanies who were working as artisans and farmers in Central and Eastern Europe. According to Kenrick, Romanies were viewed in Western Europe with a mixture of curiosity, fear, hostility, and contempt. They were seen as exotic strangers who spoke a different language, dressed differently, practiced a different religion, and followed a different way of life. They were also seen as potential threats who could endanger the security, order, and morality of Christian society. They were accused of being spies, heretics, sorcerers, beggars, thieves, kidnappers, or impostors. They were often discriminated against, persecuted, expelled, enslaved, or killed by the authorities or the populace. They were also subject to stereotypes and myths that portrayed them as either romantic wanderers or sinister outcasts. These views persisted for centuries and influenced the attitudes and policies of later governments and institutions toward Romanies.

52 Wippermann W. 1997. "Wie die Zigeuner." Antisemitismus und Antiziganismus im Vergleich. Berlin: Elefantenpress.

53 In the German context the term used to refer to racism against Roma is antiziganismus.

54 Saul N., Tebbutt S. (eds.) 2005. The Role of the Romanies: Images and Counter-Images of 'Gypsies'/ Romanies in European Cultures, Liverpool: Liverpool University Press.

55 Kenrick D. 2005. The Origins of Anti-Gypsyism: The Outsiders' View of Romanies in Western Europe in the Fifteenth Century, in Nicholas Saul and Susan Tebbutt (eds.) The Role of the Romanies: Images and Counter-Images of 'Gypsies'/ Romanies in European Cultures, Liverpool; Liverpool University Press.

In his article, Kenrick cites several early writers on Roma who witnessed or reported their arrival in Western Europe. These include Conrad Justinger (d. 1426), a clerk to Berne Council; Hermann Korner (d. c. 1437), a monk; a 'Gentleman of Paris' writing in 1427; and an anonymous chronicler from Bologna. He also mentions Andreas, another cleric who wrote partly from hearsay. These writers provide some of the earliest accounts of Roma in Western Europe, but they also reflect the prejudices and misconceptions of their time. For example, Justinger describes Roma as "a people who are blacker than any other people" and claims that they were expelled from Egypt for their sins. Korner calls them "the most wicked people under heaven" and accuses them of stealing children and livestock. The Gentleman of Paris reports that they were sent by the sultan of Babylon to spy on Christian lands. The chronicler from Bologna says that they were cursed by St. Stephen for mocking him. Andreas states that they were descendants of Cain who fled from India after a great plague.

Radmila Mladenova explores the concept of the "imagined gypsy" as a way of understanding the antiziganist attitudes and practices that target Roma people in Europe.[56] (Mladenova, 2015) The author argues that the "imagined gypsy" is a palimpsest - a text that has been overwritten by different layers of meanings and interpretations over time - of the "human being", a term that has been historically used to exclude and dehumanize certain groups of people. The author traces the origins and evolution of the "imagined gypsy" from the medieval period to the present day, showing how it has been shaped by various political, economic, social and cultural factors. Some examples of these factors are: (1) the association of Roma with foreignness, nomadism and exoticism; (2) the persecution and marginalization of Roma people by feudal lords, church authorities, and local communities, who viewed them as heretics, spies, thieves or beggars; and (3) the influence of literature, art and folklore that depicted Roma people as either romanticized or demonized figures, such as fortune-tellers, musicians, witches or outlaws. Mladenova lists animalization, mortification, demonization, dehumanization and de-subjectivization as the preferred strategies for the portrayal of Roma since their arrival into Europe. The author also examines the consequences of the "imagined gypsy" for the Roma people, who are subjected to discrimination, violence, marginalization, and erasure. The author calls for a critical reflection on the concept of the "human being" and its implications for the recognition and respect of Roma people's rights and dignity.

In his text “The roots of antigypsyism: to the Holocaust and after”, Professor Ian Hancock (1997) examines the causes and effects of the hostility and persecution that the Roma people have endured in Europe and beyond.[57] Hancock has traced the historical origins of antigypsyism by identifying several contributing factors:

- The initial association of Roma with Islam and Asian invaders during their arrival in Europe.
- The medieval Christian belief that dark skin indicated sin.
- The cultural guideline among Romani people to avoid interaction with non-Roma, leading to mistrust.

[56] Mladenova R. 2015. The Imagined Gypsy: The Palindrome of the ‘Human Being’. In Jan Selling, Markus End, Hristo Kyuchukov, Pia Laskar, and Bill Templer (eds.) Antiziganism: What’s in a Word?, Newcastle upon Tyne: Cambridge Scholars Publishing.

[57] Hancock I. 1997. The roots of antigypsyism: to the Holocaust and after. In Colijn G. J. and Littell M. S. (eds) Confronting the Holocaust: a mandate for the 21st century, University Press of America, Lanham, pp. 19-49.

- Roma's adaptation strategy in a hostile environment, where they exploited the non-Roma population's exotic and mysterious perceptions of "Gypsies".
- Non-Roma manipulation of images and stereotypes to define their own identity boundaries.
- The economic, military, and political vulnerability of Roma due to the absence of their own nation state, making them susceptible to scapegoating.
- The portrayal of "Gypsies" as symbols of freedom in literature and media, which is mixed with both fascination and resentment.
- Limited interaction between non-Roma researchers and Roma, resulting in stereotypical accounts being published due to lack of firsthand understanding.

4. Manifestations

The section will present and analyze the most common manifestations of antigypsyism. For a better understanding, these manifestations have to be contextualized. Antigypsyism can manifest as:

- prejudice and stereotyping;
- labeling, hate speech and hate crime;
- discrimination – individual, institutional and structural;
- school segregation of Romani children;
- residential segregation;
- housing discrimination and forced evictions;
- environmental racism;
- racial profiling;
- violence by police and other law-enforcement agencies targeting Roma;
- forced settlement;
- proletarianization;
- forced sterilization of Romani women;
- assimilation policies (prohibition of language use, wearing of traditional clothes, placement of Roma children in foster care, change of names, etc.);
- lack of identity documents;
- mob violence and skinhead attacks;
- deportations, including ethnic cleansing;
- killings and other atrocities;
- extermination attempts;
- Roma Holocaust, its denial, distortion and misrepresentation;
- cultural appropriation;
- knowledge production domination.

The below paragraphs analyse the most frequent manifestations of antigypsyism and present relevant case-law.

Stereotypes and prejudices towards Roma are the very basis of antigypsyism. They determine specific reactions and behaviour of other persons towards how to interact with Roma. The domestic and international case-law involving Roma are full of the prejudices and stereotypes about Roma, from the fact that Roma are considered not to value education, or that education is not part of their culture (see segregation cases) to the fact that Roma are believed to be more prone to criminality (see racial profiling, hate crime and police violence).

Discrimination against Roma is persistent and widespread throughout Europe. When analyzing the situation of Roma, one must differentiate between discrimination as a legal concept and as a sociological one. From a sociological point of view, there

are different levels of discrimination: individual, institutional, and structural. Legal definitions of discrimination address individual discrimination. However, institutional and structural forms of discrimination have a major impact on the life of marginalized and oppressed groups and should be addressed through policies and laws. Fred Pincus has defined the three levels of discrimination as: "Individual discrimination refers to the behaviour of individual members of one race/ethnic/gender group that is intended to have a differential and/or harmful effect on the members of another race/ethnic/gender group. Institutional discrimination, on the other hand, is quite different because it refers to the policies of the dominant race/ethnic/gender institutions and the behaviour of individuals who control these institutions and implement policies that are intended to have a differential and/or harmful effect on minority race/ethnic/gender groups. Finally, structural discrimination refers to the policies of dominant race/ethnic/gender institutions and the behaviour of the individuals who implement these policies and control these institutions, which are race/ethnic/gender neutral in intent but which have a differential and/or harmful effect on minority race/ethnic/gender groups".[58]

Roma school segregation is an egregious form of discrimination against Roma. There is no internationally agreed definition of school segregation. Roma school segregation was defined by scholars as a physical separation based on ethnic or racial grounds: "Within the educational system, with the exception of those schools or classes where Romani is the teaching language, segregation consists of physical separation, whether intentionally or not, of Roma children from non-Roma children in schools, classes, buildings and other facilities in which the number of Roma students compared to the number of non-Roma students is disproportionately higher as compared with the percentage of the Roma children of school age within the total school age population in a territorial administrative unit, i.e., city or town."[59] Rostas and Kostka point out that "It differs from other discriminatory behaviour, such as placement in the back row of the classroom, using a lower standard curriculum, or lower requirements for Romani children, since these practices do not physically separate them from, and deny interaction with, other pupils."[60]

School segregation limits the right to education of Roma children as in segregated schools, classes and facilities, Roma children receive a lower quality education. Moreover, by separating Romani pupils from their non-Roma peers, all the children are negatively affected because they are denied their full right to education, as this separation severely limits their socialization, an important component of the right to education

The European Court of Human Rights (ECtHR) has so far addressed Roma school segregation in nine cases: D.H. and Others v. the Czech Republic (2007), Sampanis and Others v. Greece (2008), Oršuš and Others v. Croatia (2010), Lavida and Others v. Greece (2013), Horváth and Kiss v. Hungary (2013), Sampani and Others v. Greece (2013), X and Others v. Albania (2022),

58 Pincus L. F. 2000. Discrimination Comes in Many Forms: Individual, Institutional, and Structural. In Maurianne Adams Warren J. Blumenfeld Rosie Castaneda Heather W. Hackman Madeline L. Peters Ximena Zuniga (Eds.) Readings for Diversity and Social Justice, London: Routledge, 2000, p. 31.

59 Rostas I. 2012. Judicial Policy Making: The Role of the Courts in Promoting School Desegregation. In Iulius Rostas (ed) Ten Years After: A History of Roma School Desegregation in Central and Eastern Europe. Budapest: CEU Press, p. 118.

60 Rostas I., Kostka J. 2014. Structural Dimensions of Roma School Desegregation Policies in Central and Eastern Europe. European Educational Research Journal, 13(3), p. 272.

Elmazova and Others v. North Macedonia (2022), and Szolcsán v. Hungary (2023). DH v Czech Republic was a breakthrough case as it clarified the legal standards on the prohibition against discrimination. In the case of D.H. v. the Czech Republic in 2007, the ECtHR introduced significant principles, such as the admissibility of statistical evidence to establish discrimination (para 187), the shift of burden of proof (para 195), and the avoidance of proving discriminatory intent in educational cases (para 194). The court emphasized that educational discrimination based on ethnicity demands the highest level of justification (para 175-76). The ECtHR identified Roma as a vulnerable minority needing special protection due to their history (para 182). The court held that exclusive or predominantly ethnic-based differential treatment lacks objective justification in a democratic society (paras 175-76), and no waiver of the right to be free from racial discrimination is acceptable (para 204). Subsequent cases, such as Sampanis v Greece (2008) and Orsus v Croatia, reinforced these principles and extended them. The ECtHR's stance evolved from requiring negative consequences to merely the presence of overrepresentation as sufficient grounds for discrimination claims. The court also highlighted that segregation could be proven beyond statistical evidence. In Lavida v Greece, the court condemned perpetuating segregation, even in the absence of discriminatory intent, and rejected justifications based on opposition from non-Roma parents. Horvath and Kiss v Hungary added a new dimension by discussing positive obligations to rectify historical racial segregation in special schools and scrutinizing the fairness of testing methodologies. The X v Albania case introduced the concept of breaking the circle of marginalization through early desegregation and recognized overrepresentation as discriminatory without the need for additional negative consequences. Elmazova v North Macedonia emphasized that residential segregation doesn't justify school segregation and placed the onus on states, not parents, for desegregation. It expanded the definition of desegregation to include various appropriate measures. Szolcsan v Hungary further rejected segregation through school districting and imposed a duty on states to end Roma school segregation to uphold democratic values. Overall, these cases signify a progressive reduction in the required evidence for demonstrating school segregation as discriminatory, emphasizing the ECtHR's commitment to inclusive education and combating discrimination.

The case of Elmazova and Others v North Macedonia is of central importance for the manual as it is intended for the law school students in the country concerned. The case centred on accusations of segregation between students from Roma and Macedonian backgrounds. These students were predominantly assigned to separate schools within the same catchment area in Bitola and were allegedly placed into distinct classes in Shtip. The group bringing the case included 87 Macedonian citizens of Roma origin, all of whom were students attending state-run primary schools in Bitola and Shtip, along with their parents. As per the applicants' claims, during the academic year 2018-19, those from Bitola were supposedly denied admission to their preferred nearby school, or were occasionally transferred to other schools. As a result, this led to the establishment of what was referred to as a "ghetto school," comprised of 80% Roma students, in contrast to a non-Roma school. Within the former school, students of ethnic Macedonian origin were reportedly placed in separate classes, giving rise to allegations that the

education offered to these children was of an inferior standard. In Shtip, between 2017 and 2019, the child applicants were purportedly placed exclusively in Roma classes, segregated from their non-Roma counterparts. Concurrently, numerous ethnic Macedonian students were relocated to different schools. The applicants contended that this exclusion from mainstream education denied their children the same prospects as non-Roma students in terms of their future education, employment opportunities, and integration into society. Both groups of applicants submitted constitutional complaints. In the Bitola scenario, the court observed that one school had a student population of 83.5% Roma and the other had 95.1% ethnic Macedonian students. Nevertheless, despite this evidence, the Constitutional Court dismissed the complaint. Regarding the Shtip school, the pertinent constitutional complaint was declined, with the Court expressing the view that the separation of students into different classes based on ethnicity did not qualify as discriminatory behaviour.

In the case of Elmazova v North Macedonia, the European Court of Human Rights (ECtHR) emphasized that residential segregation cannot be considered a valid and reasonable justification for the segregation of students in schools (paragraph 73). Furthermore, the responsibility for desegregation lies with the State, which must actively implement effective measures to rectify the existing inequality faced by the applicants and prevent the perpetuation of discriminatory practices stemming from their disproportionate representation. This obligation is not placed upon Roma parents to enroll their children in alternative schools (paragraph 74). According to the ECtHR's perspective, achieving school desegregation holds the State accountable for fostering equality between Roma and non-Roma individuals. This is seen as a means to break the cycle of marginalization, allowing both groups to lead lives as equal citizens from the early stages of their development (paragraph 74). Additionally, the ECtHR clarified that desegregation entails more than just actions to address ethnic imbalances within a school or adjustments to the geographical distribution of school districts. It encompasses a range of appropriate measures aimed at promoting integration (paragraph 74). Notably, the ECtHR regarded the presence of overrepresentation alone as adequate grounds to establish a violation of Article 14. This stance indicates a notable stride towards lowering the threshold of evidence required to demonstrate that school segregation is indeed discriminatory under the provisions of the Convention.

School segregation, in addition to being an institutional form of discrimination, represents a structural factor that reproduces inequalities between Roma and non-Roma in society. Receiving a lower quality education and having reduced networking opportunities due to limited socialization means that Roma are less prepared to compete in the labour market, which most probably leads to poverty, lower access to housing market and health care, thus, reproducing existing inequalities.

Police and other law enforcement officials' violence targeting Roma is a pervasive issue that extends across European countries. Despite its prevalence, a significant number of cases remain unrecorded and unreported through official channels, creating an alarming underrepresentation of the true extent of the problem. Furthermore, the existing incidents often lack thorough investigation, contributing to a climate of impunity. The European Roma Rights Centre has created an open-source map of incidents of police

brutality across Europe covering the past three decades.[61] (ERRC, 2022) The findings of the ERRC cover police harassment, police brutality, disproportionate use of force, torture of Romani individuals while in police custody, and other law enforcement actions resulting in the death of a person. The police violence cases reveal that the occurrence of such acts, carried out by groups of officers from various police departments, spans virtually every European nation. Equally startling is the cooperation and involvement of institutions in denying racism. These entities display indifference toward the challenges faced by marginalized Romani communities and the well-being of those who have suffered as victims. Moreover, there is a deliberate fostering of an environment of impunity within law enforcement agencies regarding their actions toward Roma, exacerbating the issue.

Racial profiling and police raids are two other widespread police practices in relation to Roma. Racial profiling[62] by the police is one of the most visible and frequent manifestations of antigypsyism within the police. This practice underscores the state's inability to ensure equal protection of its citizens' rights. As police single out Roma individuals as presumed criminals, the fundamental principle of being presumed innocent until proven guilty is compromised from the very beginning. The erosion of this presumption of innocence carries significant consequences: the erosion of freedom and the undermining of the rule of law. Police raids represent a severe form of racial profiling by law enforcement, with entire Roma neighbourhoods being targeted under the pretext of combating criminal activity. These operations are characterized by a collective assumption of guilt, resulting in violence and abuses. Frequently conducted as preventive measures, these raids follow a predictable pattern documented by human rights organizations. Residents are subjected to ID checks and questioned about their presence. The justification often hinges on rumours of criminals in the area. Raids typically lack search warrants and frequently occur at night. These actions lead to law enforcement abuses, including excessive force, invasion of privacy, property damage, and, tragically, deaths due to the unwarranted use of firearms.

The case of *Nachova v Bulgaria* was a landmark decision by the ECtHR that established the obligation of states to investigate and prosecute racially motivated violence. The case involved the killing of two unarmed Roma conscripts, who had escaped from a military construction crew, by military police in Bulgaria in 1996. The military police shot them with automatic weapons in a Roma neighbourhood, and one of them allegedly shouted "You damn Gypsies!" at a witness. The Bulgarian authorities failed to conduct an effective and impartial investigation into the killings and upheld the lawfulness of the use of force by the military police. The ECtHR found that both the killings and the investigation were tainted by racial discrimination, and that this violated Article 2 (right to life) and Article 14 (non-discrimination) of the European Convention on Human Rights. The main reasons of the Court were that: (a) there was

[61] European Roma Rights Center (ERRC) 2022. Brutal and Bigoted: Policing Roma in the EU. Brussels: ERRC, May 2022.

[62] Racial profiling is defined by the UN as "the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity". See UN 2001 Declaration and Programme of Action of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, para 72, available at: https://www.un.org/en/conferences/racism/durban2001.

no absolute necessity for the use of lethal force against persons who posed no threat to life or limb and who were not suspected of having committed a violent offence; (b) there was a plausible allegation that a racial motive played a role in the events; (c) there was no prompt or adequate examination of whether or not discrimination may have influenced the actions of the State agents; and (d) there was no effective remedy for the applicants to challenge the alleged discrimination. The ECtHR also held that the state had a procedural obligation to investigate possible racist motives behind acts of violence, without the need for a complaint, and that this obligation applied to all articles of the convention. The case was the first in the ECtHR's history to find a violation of Article 14 on grounds of racial discrimination, and set a precedent for addressing hate crimes in Europe.

The case of *Anguelova v Bulgaria* deals with the death of a 17-year-old Roma boy, Anguel Zabchekov, who died in police custody in 1996 after being arrested for attempted theft. His mother, Assya Anguelova, brought a claim against the Bulgarian government, alleging that her son had been ill-treated by the police, denied timely medical care, and had been discriminated against on the grounds of his ethnic origin. She also claimed that the authorities had failed to conduct an effective investigation into his death and to provide her with an effective remedy. The European Court of Human Rights examined the case under Articles 2, 3, 5, 13 and 14 of the Convention..

The court found the state responsible for Mr. Zabchekov's fatal injuries, dismissing the claim that the injuries occurred before his arrest. The state's failure to protect his life and explain his death was noted. The court identified a violation due to the lack of timely medical care for Mr. Zabchekov, which disregarded his deteriorating condition, potentially contributing to his death. The authorities' ineffective investigation into Mr. Zabchekov's death led to a violation, criticized for not securing evidence or identifying those responsible. Contradictory medical reports and a failure to explore alternative hypotheses were noted. All these constituted a violation of Article 2 regarding the right to life. In addition, the court found that Mr. Zabchekov was subjected to inhuman and degrading treatment as he was left untreated for hours, causing unnecessary pain and suffering (violation of Article 3 prohibition of inhuman or degrading treatment); unlawful and arbitrary detention was identified due to lack of legal grounds or procedure, absence of documentation, failure to inform of the reasons for arrest , and lack of access to legal representation were noted (violation of Article 5 right to liberty and security); and Ms. Anguelova's lack of access to a thorough investigation into her son's death and compensation for violations suffered was deemed a violation of her right to an effective remedy (violation of Article 13 right to an effective remedy). The Court acknowledged that there was evidence of widespread discrimination against Roma in Bulgaria, especially by the police. However, the Court stated that it could not establish beyond reasonable doubt that Mr. Zabchekov's death or the authorities' response to it had been motivated by racial prejudice. The Court considered that there was no direct or indirect proof of such discrimination in the present case. The case was novel in that it was one of the first cases in which the Court applied a positive obligation on the State to protect the right to life of persons in custody, and to conduct an effective investigation into deaths resulting from the use of force by State agents.

In the case of *Lingurar v Romania*, decided on April 16, 2019, by the European Court

of Human Rights (ECtHR), four Roma family members residing in a primarily Roma village in Romania alleged that they had been subjected to a violent police raid in December 2011. The raid, which involved excessive force, injuries, and verbal abuse, was perceived as stemming from ethnic profiling and racial discrimination. The subsequent investigation into their claims was deemed ineffective and biased. The ECtHR ruled that Romania violated Article 3 (prohibition of inhuman or degrading treatment) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights. The court awarded the applicants 25,000 Euros for non-pecuniary damage and 2,000 Euros for costs and expenses. The court's main reasons in the judgement were as follows: (a) the disproportionate use of force during the raid was unjustified. The applicants were unarmed, while the police officers involved were trained for rapid intervention. The court found no evidence to support claims of resistance or attack. (b) Ethnic profiling and discrimination were evident as the Roma community was targeted based on a perception of criminality. The raid was part of a preplanned operation, using derogatory language and stereotypes. (c) The investigation was ineffective and biased, being conducted by the same police unit involved in the raid. It relied on law enforcement officers' statements without considering independent evidence or witnesses.

The case introduced new elements to ECtHR jurisprudence: applying principles of ethnic profiling to a police raid on a Roma community, recognizing systemic discrimination and violence against Roma people in Romania, and setting a rigorous standard of proof to assess discriminatory motives. Specifically, the ECtHR required Romania to provide convincing and weighty reasons to justify any difference in treatment based on ethnicity, and to rebut any *prima facie* evidence of discrimination presented by the applicants (para 80). As such the case marked a significant step in acknowledging and addressing systemic discrimination within law enforcement practices.

The criminalization of Roma in Europe has a long history. Already in the XIV century Roma were enslaved in the Principalities of Wallachia and Moldova. As Roma arrived in Western Europe, Roma were criminalized because of their nomadic lifestyle, being characterized as vagrants, outlaws, and beggars, people who were not bound to a landowner or a tradesman. (Fraser, 1992) This negative portrayal of Roma consolidated through the next centuries with the first representations of Roma in visual arts, in literature, and in academic circles, which used few direct sources, relying instead on stories, legends, and myths.[63]

The complex interplay of unreported incidents, inadequate investigations, and the absence of meaningful representation underscores the urgent need for comprehensive reforms in how law enforcement agencies engage with and protect Roma communities. Addressing this issue requires not only improving documentation and reporting mechanisms, but also fostering an inclusive environment within law enforcement and creating avenues for Roma individuals to participate as officers, thereby contributing to a more just and equitable society.

Hate speech and hate crimes are fueled by stereotypes and prejudices, serving to reinforce these unfounded notions. Furthermore, hate speech and hate crimes,

[63] See Willems W. 1997. In Search of the True Gypsy – From Enlightenment to Final Solution. London: Frank Cass Publishers. See also Glajar V., Radulescu D., (Eds.) 2008. "Gypsies" in European Literature and Culture. New York: Palgrave Macmillan.

which manifest as violent acts, wield significant power as tools of intimidation, impacting both those striving to combat antigypsyism and its victims. Hate speech and hate crimes against Roma and affiliated groups are practices that maintain the subordinated status of these groups within society by discouraging them from taking action in using the legal means to defend their rights. In countries all over Europe these concepts are transposed into domestic legislation in different ways, often not meeting international human rights standards. Hate speech against Roma is very common in media and social media. The definition of these legal concepts in domestic legislation, and the deficient implementation of the law, makes them inefficient as tools to effectively combat antigypsyism.

Mob and skinhead violence against Roma has been a significant issue all over Europe. The mob or skinheads attack Roma as an act of revenge or self-made justice. Sometimes, law enforcement and even priests were part of the mob attacking Roma. The ECtHR has addressed several cases related to this matter. The ECtHR has emphasized the special protection required by the Roma, noting that they are a specific type of disadvantaged and vulnerable minority. In the case of *Lăcătuş and Others v. Romania*, the Court addressed an attack on Roma homes in a village by a mob of non-Roma villagers, during which a person was beaten to death. The Court found that the authorities' failure to prevent the attack, and to carry out an adequate investigation, deprived the applicants of their rights. Similarly, in the case of *Gergely v. Romania and Kalanyos and Others v. Romania*, the Court dealt with the burning of houses belonging to Roma villagers by the local population, the authorities' failure to prevent the attack, and their failure to conduct an adequate criminal investigation. The case of *Moldovan and Others v. Romania*, which was brought before the European Court of Human Rights, involved a tragic incident that took place in September 1993 in the village of Hădăreni, Romania. A conflict between some Roma and non-Roma individuals resulted in the death of a non-Roma man, leading to a violent backlash against the Roma community. A mob of non-Roma villagers, including members of the local police force, gathered where the Roma men were hiding and demanded that they come out. The Roma men refused to appear, and the mob set fire to the house, leading to the death of three Romani men and the destruction of fourteen Romani houses. The Court found that Romania had violated multiple provisions of the European Convention on Human Rights for failing to provide justice in connection with the 1993 pogrom and its aftermath. In fact, human rights groups have documented a pattern of mob violence against Roma communities in Romania during the 1990's and 2000's, following this pogrom model from Hădăreni.

Skinheads and other ideologically motivated attacks on Roma communities have been reported and documented by human rights groups in the Czech Republic, Slovakia, Hungary, Bulgaria, Serbia, Greece and Germany.[64] These forms of violence, whether ideologically motivated or not, mobilize large support among the public, underlying the effects of racism not only as beliefs but also as active behaviour in imposing dominance on Roma. For example, in school segregation cases such as *Sampani v Greece* or *Orsus v Croatia*, the authorities mentioned as a reason for segregation the pressure from, or the protests of, the non-Roma parents.

[64] See for example, European Roma Rights Center country reports series on these countries, available at www.errc.org

Housing discrimination and forced evictions are part of the everyday life of many Roma families throughout Europe. According to a synthesis report by the Roma Civil Monitor (RCM) a high proportion of the Roma population was often systemically discriminated against in their access to the water supply and sanitation services. There are disproportionately isolated Roma communities and shanty towns which lack not only clean water and proper sanitation facilities but also are devoid of basic sewage systems and indoor plumbing. This deficiency significantly affects the well-being of the residents and contributes to increased occurrences of disease outbreaks. Forced evictions without meeting the international standard of providing alternative accommodation and better conditions happen in many European countries. As a 2009 report on the situation of Roma housing within the European Union found "forced evictions, including unlawful evictions, of Roma and Travellers still occur in several Member-States, discrimination against Roma and Travellers in access to accommodation is rampant, and in general the level of housing for Roma and Traveller people is far below anything considered'adequate'".[65] (FRA: 2009: 92) Without programmes to build social housing, the victims of these forced evictions are in no position to receive alternative accommodation.

One of the most important cases of the ECtHR regarding the Roma is the case of *Yordanova and others v Bulgaria*. The case involves Roma families residing in a Sofia neighbourhood on state-owned land for decades without legal authorization. After the land was transferred to a private investor, authorities ordered the Roma residents' removal, but they have-not been evicted due to external pressures.

The court examined the proportionality of this removal, noting the absence of a proper assessment of its impact and the community's long-standing presence.

The Court emphasized the significance of the established community life among the Roma residents and criticized the lack of consideration for their circumstances and consequences of eviction. It recognized their reluctance to seek alternative housing due to their established lifestyle and community ties, emphasizing the infringement not just of their right to homes but also their private and family life. Furthermore, the Court highlighted the applicants' status as a socially disadvantaged group, stressing that their needs should be a crucial factor in the assessment of proportionality. It rejected arguments that addressing their specific needs would amount to discrimination against the majority, advocating for a more substantive idea of equality. However, while the judgment focused on poverty more than racial issues, it acknowledged the racial tensions underlying the case, notably mentioning the discriminatory demands from some neighbours. It urged authorities to act in a manner that does not fuel hostility between social and ethnic groups.

On 24 April 2012, the ECtHR handed down a unanimous judgment. The Court's decision served as a warning to governments, emphasizing that disregarding the housing needs of socially disadvantaged groups is unacceptable, hoping it would prompt meaningful action. Yet, some critique arose concerning the Court's lack of explicit references to broader human rights instruments addressing racism against Roma, suggesting room for further improvement despite the judgment's overall strength.

[65] European Union Agency for Fundamental Rights (FRA) 2009. Housing conditions of Roma and Travellers in the European Union. Comparative report. Vienna: FRA, October 2009

Environmental racism is another complex phenomenon that has a significant impact on Roma. According to Robert Bullard, a prominent scholar and activist in the field of environmental justice, environmental racism is "any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or colour".[66] Roma in Europe are disproportionately exposed to environmental hazards, do not receive the same environmental benefits, and lack access to such resources, and rarely participate in decision-making regarding the environment in which they live. A recent report by the European Environmental Bureau (EEB), a network of environmental NGOs across Europe, has revealed that Europe's Roma communities often reside in areas contaminated with pollution, and they lack access to essential amenities like running water and proper sanitation.[67] The EEB has identified 32 instances of environmental racism across five European countries: Hungary, Bulgaria, Romania, Slovakia, and North Macedonia. The EEB's study revealed that Roma communities frequently face exclusion from fundamental services, such as clean drinking water, waste disposal, and proper sanitation. Alarmingly, many Roma communities are situated near or on landfills and highly polluted industrial zones. The difficult situation is compounded by discrimination in housing, forced evictions, lack of infrastructure, lack of access to health care services and unequal access to legal services to defend their rights.

Sterilization of Romani women is one of the practices which reveal the gendered dimension of antigypsyism. In the effort to manage the size of the Roma population, state authorities employed various tactics, including the forced sterilization of Romani women. However, the target of the control of population practices were not Roma men but Romani women. Certain demographic markers, such as birth rates, are seized upon by demographers and populist politicians to instill fear of Roma potentially outnumbering the majority population. By excluding Roma from political participation, they are portrayed as a national threat, leading to calls for measures to halt their purportedly swift population growth. The practice of sterilizing Romani women without their informed consent emerged during communism as a means to curtail the Roma population in several states. Even after the regime's downfall, this practice persisted and was documented in the former Czechoslovakia and in Hungary.

The case of *V.C v Slovakia* was a landmark ruling by the ECtHR in 2011, which recognized the violation of the rights of a Romani woman who was forcibly sterilized in a state hospital in Slovakia in 2000. The woman, identified as V.C, was coerced into signing a consent form for sterilization while she was in labour, without being informed of the nature and consequences of the procedure. She later suffered from physical and psychological harm, as well as social stigma and discrimination. She unsuccessfully sought justice in the Slovakian courts, before bringing her complaint to the ECtHR. The ECtHR found that Slovakia had breached her right to freedom from inhuman and degrading treatment and her right to respect for private and family life, under Articles 3 and 8 of the European Convention on Human Rights. The ECtHR rejected the Slovakian government's argument that sterilization

[66] Bullard R. D. 2007. The Black Metropolis in the Twenty-First Century: Race, Power and the Politics of Place. Lanham, MD: Rowman & Littlefield Publishers, p. 6.

[67] Heidegger P., Wiese K. 2020. Pushed to the Wastelands: Environmental Racism against Roma Communities in Central and Eastern Europe. Brussels: European Environmental Bureau

was medically necessary and emphasized the importance of informed consent and respect for reproductive autonomy. The ECtHR ordered Slovakia to pay V.C 31,000 EUR in damages and legal costs. The case was the first of its kind to be decided by the ECtHR and set a precedent for other cases of forced sterilization of Roma women in Europe.

The lack of identity documents among the Roma community stands as a stark manifestation of systemic racism and societal marginalization - antigypsyism. For generations, the Roma have faced egregious discrimination, with one of the most pervasive issues being their struggle to obtain and maintain identity documents. This lack of official recognition not only denies them basic citizenship rights but also perpetuates cycles of poverty, exclusion, and vulnerability. Firstly, the denial of identity documents is a clear violation of fundamental human rights. Without proper documentation, individuals are stripped of access to essential services such as healthcare, education, employment, and even the right to vote. This exclusion from basic rights perpetuates a vicious cycle, making it immensely challenging for the Roma community to break free from the chains of poverty and social marginalization. Moreover, the absence of official recognition leads to systemic discrimination in various facets of life. Roma individuals without identity documents often face prejudice and bias when attempting to access public services or secure employment. They encounter barriers in legal systems, encountering difficulties in proving their identity, leading to unfair treatment and, in some cases, wrongful accusations or arrests.

The roots of this issue lie in deeply ingrained societal prejudices and historical marginalization. The Roma have been subjected to generations of discrimination, leading to their systematic exclusion from mainstream society. This discrimination perpetuates a cycle where authorities are often unwilling to provide necessary assistance to help Roma individuals obtain the required documents. This lack of recognition also hampers efforts to address broader issues faced by the Roma community. It impedes accurate data collection on the Roma population, hindering policymakers' ability to understand and effectively tackle issues such as poverty, healthcare disparities, school segregation and wealth gaps.

Efforts should focus on facilitating the process for Roma individuals to obtain legal documentation, ensuring they have equal access to citizenship rights and services. Education and awareness campaigns are equally crucial in combating stereotypes and biases against the Roma. By fostering understanding and empathy, societies can begin to dismantle the barriers that have perpetuated the marginalization of this community for centuries.

Cultural appropriation is a concept which defines the taking over of creative or artistic forms, themes, or practices of a group by a more powerful group or representatives without proper acknowledgment, exploiting and dominating that group. In legal terms, the closest concept is that of copyright infringement. Often Romani music, visual artistic forms or cultural performances are taken over by non-Roma artists or institutions without proper acknowledgement and/or without giving back to Roma communities. For example, the Spanish Government and UNESCO declared flamenco as a Spanish cultural heritage without acknowledging the contribution of Roma to the development of flamenco within the Iberian cultural space. Another example is the use of multiple Romani songs from the former Yugoslavia by Goran Bregovic without due acknowledgement of their source.

Lack of identity representation in institutions is another manifestation of antigypsyism which fuels prejudice and stereotypes against Roma. There are almost no Roma theatres, museums, cultural centres and other important institutions which are supported by the states and are meant to communicate to the larger public the contribution of Roma to the development of arts and culture in Europe. Their presence is rather exceptional. Although many European countries recognize Roma as a national minority, the Romani language is, as a norm, not taught within the educational systems, even as a foreign language. In fact, the support for Romani language in comparison to other minority languages reflects the belief of the inferiority of the Romani culture in comparison to the culture of other ethnic groups, be they majority or minority. Without such institutions it will be difficult to dismantle the deeply entrenched prejudices and stereotypes towards Roma in European societies.

Holocaust denial, distortion and misrepresentation is another manifestation of antigypsyism. Within the context of the Second World War, Roma residing in regions occupied by the Nazis and their allies across Europe faced a series of atrocities due to their ethnicity. This included property seizures, being forced into ghettos, deportation, internment in labour and extermination camps, being subjected to medical experiments, being subjected to mass killings, and enduring hunger and illness due to appalling conditions. Similarly to Jews, Roma were considered by the Nazis and their allies as an "inferior race" which should be exterminated. It is estimated that the extermination policies of the Nazis and their collaborators led to the death of approximately half a million Roma.[68] These experiences from the Holocaust left a profound scar on the collective memory of the Roma and are an integral aspect of their identity.

Despite European Parliament resolutions and repeated calls from the Council of Europe, only a handful of countries officially recognize the Roma Holocaust. Tragically, denial or distortion of this event remains prevalent, leading to Roma exclusion from certain official Holocaust remembrance events. One common distortion narrative suggests that the persecution and killings of Roma were not racially driven, instead blaming so-called "anti-social" behavior. Disturbingly, the denial and distortion of the Roma Holocaust often coincide with inadequate support for researching and accurately documenting Roma experiences before, during, and after the war. For instance, recent research has shed light on the fact that Roma in France were detained in camps even after the war's conclusion, and the liberation of all occupied territories by the Allies.[69]

Knowledge production domination is one of the most perverse from of oppression and domination of Roma. Romani identity was and is mostly defined by non-Roma scholars and institutions. The establishment of the first academic society concerned with the study of Roma – the Gypsy Lore Society – and the knowledge produced by scientists have cemented the largely held popular prejudices and stereotypes against Roma, or as Thomas Acton put it, helped the transition from popular antigypsyism to

[68] Hancock I. 1997. The roots of antigypsyism: to the Holocaust and after. In Colijn G. J. and Littell M. S. (eds) Confronting the Holocaust: a mandate for the 21st century, University Press of America, Lanham, pp. 19-49.

[69] Foisneau L. 2022. Do French 'Nomads' Have a War History? A Review of Seventy-five Years of Historiography. Critical Romani Studies, 4(2), 34-54.

scientific antigypsyism.[70] In the name of scientism – claims of neutrality, expertise, and objectivity in offering 'the real truth" – Romani scholars have been excluded from academia and knowledge production institutions. The externally produced knowledge and discourse are considered "the real truth" by the powerholders, while Roma-produced knowledge, including experiential knowledge, is relegated to "activism/nativism and NGO knowledge". Hence knowledge production became a form of epistemic and symbolic violence against Roma.[71]

5. Mechanisms and Features

The manifestations of antigypsyism are made possible through several mechanisms:

- The passivity of state authorities in protecting the rights of Roma, often in breach of the European Convention on Human Rights, in view of the positive obligations doctrine;
- The lack of information about Roma in mainstream educational curricula;
- The denial of equal protection of Roma before the law;
- The ignorance of the Roma history of oppression;
- The lack of gender sensitivity and intersectionality;
- The selective implementation of laws and policies.

The state authorities play a dual role of in perpetuating antigypsyism. States can either actively foster assimilation of Roma by implementing inclusive policies, or passively contribute to antigypsyism by neglecting to include Roma-related topics in education and failing to ensure equal protection under the law. Selective enforcement of laws and policies is another mechanism through which antigypsyism is sustained. For example, often Roma children are taken into state custody exclusively on the basis of the family's material deprivations, under the pretext of protecting their best interest. However, when Roma children are segregated in education, or excluded from healthcare services, the principle of their best interest is overlooked. Very often, states do not consider the long history of oppression and exclusion of Roma from different processes such as land reforms, recognition as a national minority and/or denial of the right to self-organize. By refusing to effectively combat antigypsyism, states are reproducing the historical disadvantages Roma have been subjected to for centuries.

What differentiates antigypsyism from racism experienced by other marginalized and oppressed groups? What makes antigypsyism a special form of racism?

This section analyzes the features of antigypsyism, aiming at providing a deeper understanding of the specificity of this form of racism in comparison to other racisms.

Antigypsyism represents a systemic oppression of Roma. This means that the society as a system has antigypsyism inherent in the way it operates. Antigypsyism is present in various aspects of society such as education, healthcare, criminal justice, employment, housing, and more. It perpetuates unequal outcomes and opportunities for Roma in society, disadvantaging them while favouring others.

[70] Acton T. A. 2016. Scientific racism, popular racism and the discourse of the Gypsy Lore Society, Ethnic and Racial Studies, 39:7, 1187-1204.

[71] Cortés Gómez I. 2020. Antigypsyism as Symbolic and Epistemic Violence in Informative Journalism in Spain, 2010–2018. Critical Romani Studies, 3(1), 4-25.

Antigypsyism includes a powerful gender dimension. The intersection of gender and racism plays a significant role in producing inequalities between Roma and the rest of society. Roma women and Roma LGBTIQ face additional disadvantages in comparison to Roma men and/or the rest of the society. When gender is taken into account, Roma women, girls and LGBTIQ face multiple forms of discrimination in various areas, including health, employment, education, and political participation, visible through underrepresentation in these fields, and through the lack of their voices within the reported incidents and/or policymaking processes. The lack of an intersectional approach in sensitive cases such as human trafficking, begging or domestic violence shuts down their voices and contributes to the culturalization of racism, certain practices being labeled as Romani cultural practices. The fact that these vulnerable groups inside Roma communities do not enjoy equal protection adds up to the oppression they face in everyday life. The oversexualization of Romani bodies, especially those of Roma women, girls, and LGBTIQ contributes to their exploitation and is part of antigypsyism.

Historically the state, especially the nation state, played a key role in producing and reproducing antigypsyism. According to Aidan McGarry, in the process of shaping national boundaries and political authority, the conceptualization of territory and sovereignty led to the marginalization of Roma communities. These communities were not regarded as integral to the national identity due to their perceived nomadic nature, thus undergoing exclusion rather than inclusion. Through processes of exoticism and essentialism, the Roma were relegated to a distinct "otherness" during the formation of solidarity and inclusion within dominant societies.[72] Through the education systems, army and law enforcement agencies, nation states excluded, developed and reproduced specific narratives on Roma based on stereotypes and prejudices which cemented exclusionary practices, norms and values.

The impunity enjoyed by the perpetrators is another feature of antigypsyism. The failure of the state to protect the rights of Roma similar to other citizens has encouraged those who violated the human rights of Roma and has sent out a message to society that such practices are not punishable. The list of cases before the ECtHR involving law enforcement officials and non-state actors who violated the rights of Roma, and in which states have failed to conduct a proper investigation and to punish the perpetrators, provides part of the image regarding this impunity.

Antigypsyism is less about those practices that affect individuals and mostly about those affecting the Roma collectively. For example, the denial of access to a restaurant of an individual because he or she is believed to be a Roma is an unacceptable practice in a democratic society and a violation of the equal treatment of that individual. However, antigypsyism is about practices that disadvantage all Roma as a group, not only individuals, such as school segregation, racial profiling by law enforcement agencies, police raids, lack of identity representation institutions, environmental racism, and institutional discrimination in general.

Antigypsyism is about power relations in society. As a form of racism, the belief in the superiority over Roma due to different physical characteristics is always accompanied by power. Antigypsyism creates and reproduces structures of

[72] McGarry A. 2017. Romaphobia: the last acceptable form of racism. London: Zed Books.

domination because power reinforces prejudices and stereotypes against Roma. In this context, power represents the authority vested through social structures and conventions, often supported by coercion, and the ability to utilize communication channels and resources to impose a certain aim. For this reason, analyzing the situation of Roma without taking into consideration power relations in a given community, misses important dimensions regarding the situation of Roma, the sources of inequalities between Roma and non-Roma and, thus, has limited value.

Often, antigypsyism is presented as being a "Roma problem". It must be openly said that antigypsyism is a problem of the whole society, as racism against Roma is an expression of the majority way of thinking and acting, and is embedded in institutions, affecting the very fabric of society. Antigypsyism is a moral and ethical problem that violates the principles of justice, equality, and human rights in a society. It denies the inherent worth and dignity of every human being, regardless of their racial, ethnic, cultural, religious, or linguistic background, undermining the dignity, rights, and well-being of all human beings. Antigypsyism creates social divisions and conflicts that undermine social cohesion, trust, and cooperation among different groups and individuals, affecting the stability of democratic institutions. It hinders the economic development and innovation of a society by excluding or marginalizing talented and diverse people who could contribute to its progress and prosperity. It damages the psychological and physical well-being of both the victims and the perpetrators of racism, as well as the bystanders who witness it. Antigypsyism fuels hatred, violence, extremism, and terrorism that threaten the peace and security of a society and the world at large. In this sense, antigypsyism is a challenge for the whole society that requires collective action and responsibility from all members of society to eradicate it.

Antigypsyism is a dynamic and evolving phenomenon. While some long-standing stereotypes and prejudices against Roma have endured over time, antigypsyism has adapted and taken on new forms influenced by progress in areas like economics, society, science, and culture. For example, advancements in communication technologies, such as the internet, have provided new platforms for certain expressions of antigypsyism. In various parts of Europe, social media is rife with hate speech against Roma, and some governments inadvertently contribute to antigypsyism due to their misunderstanding of the issue, effectively enabling it. Moreover, antigypsyism can manifest differently in various geographic regions. Within a particular national and cultural context, the phrases and expressions used to stigmatize Roma in public may carry distinct connotations. Hence the need for a comprehensive definition of antigypsyism that is applicable to diverse geographical and historical situations, and which should provide the audience with the understanding of the racism as a form of oppression and Roma specificity.

Researchers studying antigypsyism should recognize the diversity both among Roma and within the Roma community. In essence, adopting an intersectional approach is crucial. This approach enables researchers to comprehend the various forms of oppression and domination that affect Roma, while also acknowledging that certain groups within the Roma community, such as Roma women and members of the LGBTIQ community, may confront additional and specific types of oppression.

One proposed solution to address the diversity of Roma experiences in Europe is the concept of contextualization. Nevertheless, contextualization poses a significant question: can scholars create a cohesive narrative of Roma history in Europe without taking into account the nuances of local and regional histories? This is a challenge that future research must grapple with. However, it is evident that contextualization offers numerous benefits. Such an approach would enable a more profound comprehension of the unique histories of Roma communities in various regions, the varying impacts of nationalisms in distinct cultural settings, and the multiple viewpoints regarding specific historical events like slavery, assimilation policies in the Habsburg Empire, or the Great Roundup in Spain. Additionally, contextualization would accommodate the array of languages spoken by Roma communities across Europe and tailor the terminology to the particular cultural context in which it is used.

Antigypsyism is translated into the legal field through its manifestations, mostly linked to discrimination. However, the antidiscrimination legal framework has its own weaknesses. Probably, the most efficient way to increase the efficacy of the antidiscrimination legal framework is a combination of criminal, civil and administrative sanctions that have a deterrent effect and provide immediate compensations and remedies to the victims. Nevertheless, multiple challenges remain about the capacity of historically marginalized groups to use legal means to achieve social justice.

It is evident that social justice will not be achieved by using legal means to address the antigypsyism in Europe. Recently, scholars suggested an additional avenue for combating antigypsyism in Europe – the use of extrajudicial means to address antigypsyism or what is usually called transitional justice.[73] (Rostas and others, 2022) The ethical foundation of the Roma's demand for social justice concerning their historical oppression in Europe revolves around a trio of fundamental rights: the right to know, the right to truth, and the right to justice. These scholars argue that the tools of transitional justice could constitute additional avenues to traditional courts of law in pursuing justice and could emphasize several potential advantages: "(1) the claim for justice is collective, (2) the redresses are collective and do not exclude the individual compensations for victims of human rights violations, (3) recognition of the past sufferings becomes contingent on archives, testimonies and historical documents and not on legal technicalities, (4) there are several ways to compensate the unidentified victims: recognition, memorialization, remembrance, commemoration, public education and affirmative action being the tools most used."[74]

[73] Rostas I., Vosyliūtė L., Kalotay M. 2022. Transitional Justice for Roma in Europe, Brussels: Center for European Policy Studies, available at: antigypsyism.eu

[74] Rostas I., Vosyliūtė L., Kalotay M. 2022. Transitional Justice for Roma in Europe, Brussels: Center for European Policy Studies, available at: antigypsyism.eu, p. 28.

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Меѓународна организација на трудот, Конвенција бр. 19 (К-19) од 1925 година за еднаково постапување кон странските и домашните работници во поглед на обештетување од несреќи на работа.

Меѓународна организација на трудот, Конвенцијата бр. 77 (К-77), Конвенција која се однесува на минималните години за вработување.

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Меѓународна организација на трудот, Конвенцијата бр. 111(К-111) и Препораката на МОТ бр. 111 (П-111) од 1958 година за забрана на дискриминација.

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Меѓународна организација на трудот, Конвенцијата бр.156 (К-156) од 1981 година за работниците со семејни обврски.

Меѓународна организација на трудот, Конвенција бр. 97 (К-97) од 1949 година за работниците мигранти.

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Меѓународна организација на трудот, Конвенцијата бр.143 (К-143) од 1975 година за миграциите и условите со кои доаѓа до злоупотреба и унапредување на еднаквоста во поглед на можностите и тртманот на работниците мигранти.

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