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# Is it expedient to adopt a separate 'non-discrimination law'?

legal research

Government of the Netherlands

EURASIA PARTNERSHIP FOUNDATION

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# FOREWORD

It is with great pleasure that I present this legal study. Anti-discrimination is one of the cornerstones of Dutch human rights policy, which is why we are supporting Eurasia Partnership Foundation (EPF) to promote this principle in Armenia. We hope that this study can help Armenia design its own comprehensive mechanism for combating discrimination.

In the Netherlands, our dedication to anti-discrimination is part of our national history, as the search for religious freedom was one of the most important reasons behind our struggle for independence. But implementing anti-discrimination policy is not easy. To this day we have constant debates within society about how best to ensure diversity and equal rights, as is the case around the world. Economic development, globalization, increasing mobility and migration flows between countries will continue to influence and shape our debates on diversity and discrimination. This is precisely why each country needs to develop clear and comprehensive anti-discrimination legislation. The implementation of anti-discrimination policies may be a complex and evolving process, but their underlying principles are clearly described in international conventions.

These principles of anti-discrimination apply first and foremost to individual members of society. It guarantees that each and every one of us can freely enjoy individual fundamental rights and organize their lives accordingly. Yet banishing discrimination is equally important for societies as a whole. Social exclusion and tension resulting from discrimination can foster extremist views that result in intolerance, even violence. Comprehensive and effective anti-discrimination policies are therefore a key prerequisite for any stable and truly democratic society.

We trust that this legal analysis will help all stakeholders in Armenian society to take the discussion forward. I would like to congratulate Eurasia Partnership Foundation on their work and thank all other actors, including the Ministry of Justice of Armenia, for their active engagement. The Kingdom of the Netherlands stands ready to continue supporting Armenian human rights reforms in the coming years.

H.E. Hans Horbach

Ambassador of the Kingdom of the Netherlands to Armenia and Georgia

# FOREWORD

Elimination of discrimination and intolerance stemming from it is one of the priority issues of the international community today. It is impossible to imagine the exercise of human rights and freedoms on an equal basis in any democratic society without prohibition of discrimination.

The Constitution of the Republic of Armenia declares the Republic to be a democratic State governed by the rule of law, one of the most important criteria of which is the existence of mechanisms that guarantee real protection of human rights. In this respect, exclusion of any form of discrimination against persons is of fundamental significance.

Although the Constitution and a number of legislative acts of the Republic of Armenia stipulate legal norms prohibiting discrimination, they are mostly of episodic and non-comprehensive nature. It is obvious that protection against discrimination is not simply a matter of listing the grounds of discrimination (gender, age, race, religion, belief, political or other views, etc.) and passing legislation which declares that discrimination on those grounds is prohibited. Therefore this legal study on the prohibition of discrimination, which has been conducted with the support of the Eurasia Partnership Foundation, has covered not only the forms of discrimination but also the effective legal mechanisms for protection against discrimination.

The legal study on prohibition of discrimination conducted by the Eurasia Partnership Foundation is the first of its kind and has an important role in the formation of an atmosphere of tolerance in the Republic of Armenia, in the introduction of more effective mechanisms for the protection of human rights in the country and in promoting the creation of comprehensive and progressive regulatory arrangements prohibiting discrimination. In this respect, this study may become an important foundation for the development of a unified state policy in the field of exclusion of discrimination.

Minister of Justice of the Republic of Armenia
Hovhannes Manukyan

# INTRODUCTION

EPF is implementing anti-discrimination programs with the financial support of the Government of the Kingdom of the Netherlands. The programs aim to break stereotypes in Armenia and to promote an atmosphere of tolerance by raising awareness.

This program, which targets the adoption of anti-discrimination legislation, is the logical continuation of programs initiated earlier, because the best obstacle to discriminatory behavior is the existence of a corresponding law. With this objective in mind, the program includes the organization of debates and discussions between the government of the Republic of Armenia and civil society on the issues of discriminatory behavior and anti-discrimination legislation.

The following objectives have been set for implementing the program -

- to improve the understanding of the government of the Republic of Armenia, civil society and the wider public of the need for anti-discrimination approaches.
- to support the government and the efforts of the international community to create strong and comprehensive anti-discriminatory legislation, which will then be adopted by the parliament and accepted by the public.

The program activities include analyses, the production of educational documentary films, online interviews as well as the organization of training sessions for NGOs and the media.

Legal analysis has a fundamental role to play in this program. One should note that no legal analysis has ever been conducted on this topic in Armenia and this in itself will be the best way to assist the RA government in developing a general state policy eliminating discrimination. Therefore, the legal analysis will be the cornerstone on the journey to creating anti-discriminatory legislation.

It is for that specific purpose that this research has been conducted.

The need for a study of this kind comes both from the National Human Rights Strategy as well as our program priorities.

We are happy to be collaborating with the RA Ministry of Justice, Chamber of Advocates, National Assembly, European Union, Council of Europe and local organizations, and we expect this study to encourage professional discourse.

Within the scope of this legal analysis

- the issues and gaps relevant to anti-discrimination were studied in RA legislation,
- the current anti-discrimination draft law was studied and compared to the existing laws in Great Britain, Ireland, Moldova and Georgia,
- comments were provided on the necessity for a corresponding law, based on specific cases,
- specific recommendations were presented to improve the situation.

One should note that various legislative acts of the Republic of Armenia contain legal norms against discrimination, but their wording alone cannot provide the effective means for legal defense. Those legal norms mainly define the most accepted bases for the absence of discrimination

(gender, age, race, views, and so on) and there is no legal norm which defines the mechanisms for putting this into practice. This means that even the existence of a law that includes some of the basis for anti-discrimination does not provide the opportunity to combat discriminatory behavior.

One of the first steps in the state anti-discrimination policy can be considered to be the adoption of decision 303-N by the RA government on 27 February 2014.

That decision adopted a program of activities based on the national strategy of the Human Rights Defender. The 8th point of the program states that the Ministry of Justice will study the conformity of RA legislation to international legal norms against discrimination, and will discuss the suitability of adopting a separate law 'on combating discrimination.'

In our opinion, the absence of a separate anti-discrimination law ends up depriving citizens of their means to an effective legal defense in a number of situations.

EPF will continue its anti-discrimination programs and its collaboration with the government, international organizations and local civil society to facilitate the adoption of an anti-discrimination law and the formation of an atmosphere of tolerance in the Republic of Armenia.

Arman Khachatryan

Izabella Sargsyan

Gevorg Ter-Gabrielyan

## EXECUTIVE SUMMARY

This survey has been conducted in order to find out whether a separate non-discrimination law is needed for the domestic legal system of Armenia as an effective remedy for people who claim to be victims of discrimination. The central question discussed is whether the existing statutory legal norms can together act as a substitute or an alternative to a law on non-discrimination as far as concerns the constitutional right of citizens to effective legal remedies , in order to be protected from arbitrariness and violations. The approach of this survey is in line with the National Action Plan on Human Rights adopted by the Government of Armenia on 27 February, 2014, paragraph 8 of which states the necessity of studying the compatibility of the legislation of Armenia with non-discrimination norms of international law and examining the appropriateness of adoption of a separate law 'On the Fight Against Discrimination'.

In order to answer the above question, researchers compiled all existing legal norms regulating the prohibition of discrimination and compared them to international legal norms and domestic regulations of several Council of Europe member states. Naturally, the UN and European non-discrimination concepts and the underlying legal principles were taken as comparators, including non-discrimination laws adopted in some developing democracies in our region, such as Moldova and Georgia.

The comparative approach reveals that the local legal norms regulate a very small portion of the entire concept of non-discrimination. Such important substantive grounds as associative discrimination, harassment, victimization, affirmative measures, reasonable accommodations etc. are missing from domestic legal framework, and some other concepts, such as indirect discrimination, instigation to discrimination, etc. are construed narrowly and as such regulate very specific and distinct areas, which eliminate the possibility of referring to them as general principles (such as the concept of 'instigation' in the criminal law, which concerns solely the issue of racial discrimination). For example, the survey shows that in various instances the government has implemented special projects that can be interpreted as affirmative measures, or there are many reported cases, where the state agency as an employer made changes in the work place in order to accommodate the work conditions to the needs of disabled employees. Although such measures indicate that the concepts of 'affirmative measures' and 'reasonable accommodation' are generally accepted by the State, the absence of the same concepts in the laws prohibits the citizens from referring to them as effective legal remedies when they have disputes with, for example, their employers at their work places.

The procedural aspect of discrimination cases is another major area that this survey covers. The survey compares the international principles of compilation of *prima facie* discrimination cases to traditional standards of domestic procedural laws and concludes that these two distinct frameworks conflict in many areas. For example, the standards of admissibility of evidence and the standard of

proof under domestic procedural laws (criminal, civil or administrative procedural laws) essentially differ from similar standards under which evidence is collected under international law in discrimination cases. It would be very difficult and at times even impossible to argue successfully a discrimination case before domestic courts by relying solely on traditional procedural law standards stipulated in domestic laws.

Special attention is given also to the need of establishing a specialized non-discrimination dispute resolution body, such as the equality councils in developed democracies. In this context, a detailed study was conducted regarding the specifics of the domestic constitutional framework, in order to give recommendations as to the nature and form of the proposed body and its place in the domestic legal system. It is presumed that the proposed body would not only be involved in resolving disputes between parties, but would also develop policies for enhancing general public awareness about the international concept of non-discrimination.

The survey concludes with a set of recommendations on the need to establish a separate law on non-discrimination, on the basis that cosmetic changes in statutory codes will not bring expected results for creating a coherent non-discrimination legal framework. The survey further recommends establishing a specialized non-discrimination dispute resolution body, which will be independent from government structures. In this context, it was recommended to establish it, either within the Ombudsman's office, or independently of any governmental or public bodies.

# IS IT EXPEDIENT TO ADOPT A SEPARATE 'NON-DISCRIMINATION LAW'?

## EXECUTIVE SUMMARY

This survey was conducted to assess whether the absence of a stand-alone anti-discrimination law in the Armenian legislation had led to possible negative impacts. One of the questions was also whether the import of provisions on equality and non-discrimination into Armenian legislation would be possible by means of amending and changing a number of existing laws.

It is well known that numerous legal acts and the Constitution of the Republic of Armenia (RA) have provisions that prohibit discrimination; hence the question is whether the existing regulatory framework sufficiently ensures a platform for the citizens to enjoy full protection from discriminatory conduct.

To answer this question, we decided to compare the existing national regulations with the principles, criteria and standards embodied in international laws and assess whether the national legislation can comprehensively serve as an efficient legal protection substitute to the aforementioned principles, criteria and standards. Respectively, the sphere of comparison embraced the whole substantive and procedural dimension of prohibition of discrimination doctrine, the prohibited grounds of discrimination, types of discrimination, exceptions to substantive grounds and the concept of evidence in discrimination cases, the standard of proof, distribution of the burden of proof and compilation of evidence as procedural basis. The absence of extrajudicial dispute resolution machinery was also considered as a relevant sector for the survey. In order to make the comparison, UN and CoE regional documents, as well as aspects of certain EU documents were used as a benchmark. Corresponding legislative acts of certain CIS countries were also referred to.

# I. PROHIBITION OF DISCRIMINATION IN THE NATIONAL LEGISLATION

The principle of non-discrimination is enshrined in the RA Constitution (Article 14.1), and in a number of legal acts, e.g. the Labor Code (Arm.)(Article 3), Law on Education (Arm.) (Article 6), Criminal Code (Article 6), Code on Administrative Violations (Article 248), etc. Prohibition of discrimination occurs integrally in these laws, in one or two provisions of similar substance. Some laws do not have any provisions prohibiting discrimination, e.g. the Civil Code and the Law on Fundamentals of Administrative Action and Administrative Proceedings. There is only one law, in this context, entirely devoted to non-discrimination: the Law on 'Equal rights and equal opportunities for men and women' (Arm.) (hereinafter the 'Gender Law'), which, however, regulates only one sub-sector of anti-discrimination, namely gender.

Below is an overview of non-discrimination provisions in Armenian law.

| Legal Act | Article |
|---|---|
| Constitution | 14.1 |
| Criminal Code | 6 |
| Criminal Procedure Code | 8(2) |
| Labor Code | 3(3), 114(4)(4), 180(3) |
| Family Code | 1(5) |
| Law on Education | 6 (1) |
| Law on Television and Radio | 22(1)(2) |
| Law on Protection of Economic Competition | 7(2)(ա) |
| Code on Administrative Violations | 248 |
| Law on Social Protection of Persons with Disabilities | 17(2) |
| Law on Procurement | 3(2)(1) |
| Law on Medical Assistance and Services to the Population | 4 |
| Law on Donation of Human Blood and Blood Components and Blood Transfusion | 14(6) |
| Code on Penitentiaries | 8 |
| Law on Penitentiary Service | 14 |
| Judicial Code | 15(2), 89(9), 90(3)(6) |
| Electoral Code | 3(3) |

| | |
|---|---|
| Law on Political Parties | 3 (3)(2), 9 |
| Law on Citizenship | 3(2) |
| Law on Foreigners | 22, 32 |
| Law on the Rights of Children | 4 |
| Law on the Police | 5 |
| Law on Civil Service | 11 |
| Law on Non-Governmental Organizations | 3(2), 21 |
| Law on Treatment of Arrestees and Detainees | 2(3), |
| Law on Service in the Police | 11(1) |
| Law on Principles of Cultural Legislation | 9 |
| Law on Protection and Use of Immovable Historical and Cultural Monuments | 7 |
| Law on Service in Bodies of National Security | 14(1) |
| Law on Human Rights' Defender | 8 |
| Law on Service of Compulsory Enforcement of Judicial Acts | 9(1) |
| Law on Community Service | 11 |
| Law on Special Civil Service | 11 |
| Law on Public Service in Staff of the National Assembly | 11 |
| Law on Public Service | 11 |
| Law on Public Service in the Department of Investigation Committee | 15(1) |
| Law on Remuneration of Public Officials | 4(1)(7) |
| Law on Libraries and Library Works | 18(1) |
| Law on Barristers | 29(3) |
| Civil Code | no references |
| Law on Fundamentals of Administrative Action and Administrative Proceedings | no references |
| Law on Equal Opportunities for Men and Women | Fully related to non-discrimination |

Legal regulation in the statutory acts, in accordance with prohibited grounds of discrimination (e.g. sex, age, ethnic origin, health, religion, creed, political and other views, etc., (hereinafter: the prohibited grounds) is as follows:

| Prohibited grounds | Yes/No |
|---|---|
| Race | yes |
| Skin color | yes |
| Ethnic origin | yes |
| Social origin | yes |
| Place of birth | yes |
| Sex | yes |
| Gender | yes |
| Sexual orientation | no |
| Genetic information[1] | yes |
| Citizenship | yes |
| Language | yes |
| Religion and belief/creed | yes |
| Health, illness | yes |
| Age | yes |
| Political or other views | yes |
| Family, marital status | yes |
| Education | yes |
| Place of residence | yes |
| Property | yes |

Having established the extent of non-discrimination legislation, the next step is to consider whether this legislative framework is able to effectively substitute the international non-discrimination concepts, principles, criteria and standards, mentioned below:

## 1. DEFINITION OF 'DISCRIMINATION

*'Discrimination is a demonstration of different treatment of persons appearing in relevantly similar circumstances, without objective reasons or any reasonable explanation to act so'.*[2] This classical definition of discrimination is mentioned in the ECHR case law, and largely accepted in European human rights law. However, there is no such formulation in the legal framework and law enforcement practice of Armenia. Nevertheless, the first step that the alleged victim of

[1]This Constitutional concept needs clarification

[2] *Virabyan v. Armenia*, #40094/05, 02/10/2012, §199

discrimination takes when claiming discriminatory treatment, is the incremental justification that, first: he/she had been subjected to **marginalization,** compared to the others (interference); second: that such a marginalization was based upon one of the prohibited grounds, third: that he/she had been under relevantly similar circumstances (comparator), fourth: that the mentioned distinctive approach had no **objective** basis (reasonable link between the means and the purpose) and/or that there was no reasonable **explanation** by the authorized agencies or persons for such distinction.[3]

Hence, the aforementioned legal definition sets out those criteria which help in deciding whether the given treatment (decision, action or inaction) is discriminatory in its nature. Moreover, the definition above pronounces the concept of 'treatment' in certain cases, according to which it can be any 'differentiation', 'exclusion', 'restriction' or 'prejudice'.[4]

Conclusion

**In the absence of such definitions in legislation, the remedies against discrimination in the hands of individuals can never be effective, as the definition of discrimination is the milestone that serves as the ground for such remedies.**

## 2. TYPES OF DISCRIMINATION

International legislation contains a number of types of discrimination, e.g. *inter alia:* direct discrimination, indirect discrimination, associative discrimination, harassment (including sexual assault), segregation, victimization or instigation. Most of these concepts are not regulated in legislation; neither the general public nor the law enforcement bodies are aware of them. It means that in an asserted presence of certain types of discrimination, individuals are deprived of any protection means, given the lack of corresponding substantive grounds. Below are those types of discrimination, which, in our opinion, are not regulated in Armenian laws:

### 2.1. NDIRECT DISCRIMINATION

Indirect discrimination is apparently neutral law, policy, precondition, action, criterion or practice, the application of which brings limitations on enjoyment of rights of certain groups, on the basis of one of the prohibited grounds (sex, age, belief, health conditions, property, etc.) and puts them at a particular disadvantage compared to the others.[5]

[3]Absence of the mentioned definition is the reason that both the legislators and the law enforcement bodies consider any differentiated treatment as expression of discrimination.
[4]See Anti-Discrimination Law of Moldova, Article 2.
[5]UN Committee on Economic, Social and Cultural Rights, General comment §13. See also, for example: Anti-discrimination Law of Moldova, Article 2.

Several forms of indirect discrimination are, e.g. numerous job announcements like: *'Seeking an attractive girl of 28 or younger, for the position of Sous Chef in a BISTRO'*[6], where the employer must justify the terms 'attractive' and '28 or younger' as inherent requirements specific for accomplishment of the given errand, otherwise all persons beyond the mentioned age group, including those of 'not attractive' appearance will be subjected to indirect discrimination, even if the mentioned restrictions do not apply thereto.

'Indirect discrimination' is largely applied in international law.[7] In national legislation **the concept of 'indirect discrimination' is mentioned only in the Gender Law** (Section 2 of Article 3, and Section 3 of Article 6). Point 2 of Article 3 of the Law on Political Parties, which prohibits refusal of membership on professional, ethnic, racial, religious grounds, can also serve as a basis for preventing indirect discrimination.

**Conclusion**

**Apart from the examples mentioned above, victims of indirect discrimination, per all of the remaining prohibited grounds, have no ability to enjoy legal protection, given the inability to prove the existence of substantive grounds in a case. In other words, they are deprived of remedies.**[8]

## 2.2. ASSOCIATIVE DISCRIMINATION

**Associative** discrimination is discriminatory treatment of a person which is directed at one, but is associated with another person. For instance, the employee asks his/her manager to establish an individual working schedule, which starts and closes an hour earlier for him/her only. The employee motivates such a request by the need to take care of an ill child of his/hers. The manager denies the request, and some time later dismisses that employee. Hence, the dismissal was associated with the illness of his/her child. Health of the person is a prohibited ground of discrimination. In this case the employee was subject to associative discrimination.

Another example: the manager dismisses the employee because he is married to a woman of a different race. In this case, the discriminatory treatment (the legal consequence) targeted the employee, but was associated with the skin color of his spouse, which constitutes another prohibited

[6]See: http://haytinfo.ru/c174-32-pahanjvum-e-xoharari-ognakan-minchev-28-tarekan-baretes-axjik-ashxatanqayin-pordzy-partadir-che.html (Arm.)
[7]See footnote 4, above.
[8]Such persons will not be able to bring a claim under Article 14 of the European Convention on Human Rights, because the enforcement of that article requires a violation of at least one right enshrined by the Convention. The issue behind such legal relations is the right to work, which is not defined as a separate substantive ground in the Convention. Article 8 of the Convention (in the context of personal life) can be referred to at best, but remains noticeably weak in the connotation of 'ratione materie'.

ground. Associative discrimination is largely recognized by international law[9] and in the national legislation of a number of countries.[10]

Conclusion

**There is no definition of associative discrimination in the national legislation of Armenia. It means that citizens have no remedies against that specific type of discrimination, given the absence of substantive grounds.**

## 2.3. HARASSMENT

**'Harassment'** is the undesirable treatment of a person, the consequences of which are in the establishment, or the purpose of which is to establish repulsive, adversarial, degrading or insulting atmosphere around a person. Hence, the presence of premeditation is not relevant. This type of discrimination mostly occurs at workplaces.

Harassment and sexual assault, as one of its forms, are largely recognized in international law.[11] However, **there is no such concept in the RA national legislation.** However, sexual assault is an exception, as it is regulated by the Gender Law (Arm.) (Article 3, Point 21).

Conclusion

**Citizens are not protected from this form of discrimination (apart from sexual assault), given the absence of substantive grounds.**

## 2.4. INSTIGATION OR INDUCEMENT TO DISCRIMINATION

**Instigation or inducement** to discrimination is an instruction, a direction or a solicitation to act differently against a person or a group. This type of discrimination is recognized by national legislations in a number of countries.[12]

Instigation to discrimination is also enshrined in international law, though often identified in 'hate speech' contexts.[13] When discrimination is not instigated, but rather instructed and not through the prism of hate speech, it is still considered instigation to discrimination.[14]

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[9] EU Directives 2000/43/EC and 2000/78/EC; it was not until the ruling on *Colemen v. Attridge* C-303/06, 17/07/2008, when the European Court of Justice first pronounced associative discrimination a stand-alone substantive ground.

[10]See: analysis of 'Equality Act 2010' of England, p.2. See also: Chapter VII of US Civil Rights Act of 1964, interpreted in the light of Parr v. Woodmen of the World Life Ins. Co court case, as covering also associative discrimination. See also: Bulgarian Law on Non-Discrimination, Article 5.

[11]EU Directive 2000/78, Article 2; see also: Directive 2006/54 and also provisions 117, 178 and 180 of 'Beijing Declaration and Action Program', adopted in 1995 by IV World Conference on Women.

[12]For example, Bulgarian Law on Non-Discrimination; See Article 5

The RA legislation regulates instigation to discrimination only in the context of hate speech, i.e. in the framework of criminal law (Article 397[1] or 226, RA Criminal Code). **Substantive grounds of instigation or instructions to discrimination are not present in civil or administrative relations.**

Conclusion

**Citizens will not be able to enjoy legal protection from the afore-described discriminatory conduct in the administrative or civil dimensions. For instance, if discrimination occurs in a non-criminal context, e.g. an open statement (not hate speech) on defining privileges or incentives under one of the prohibited grounds (property, health, political views, etc.), then an individual will not have the ability to challenge its legal disproportionality, because of the absence of substantive grounds.**

## 2.5. VICTIMIZATION

**Victimization** is an action or inaction that results in negative consequences for an individual, solely for the reason that the given individual had attempted to find legal remedies to protect his/her rights, or reported a violation of rights to law enforcement bodies, or provided information on violations of rights, including on discrimination. A good example would be a situation in which the employee files a court suit against his/her employer, and the latter terminates the contract and dismisses him/her merely because of that, but with a different justification for dismissal.

Victimization is recognized by ECHR case law,[15] EU Acquis,[16] CoE documents.[17] Victimization is germane to protection of **whistleblowers**, in which context the CoE urges its member states to establish 'regulatory, institutional and judicial entities' in their respective legislations, with the aim to protect such individuals.[18]

Conclusion

**The concepts of victimization or whistleblowing are absent from Armenian legislation. Hence, the victims of such types of discrimination are deprived of any forms of protection, given the lack of substantive grounds.**

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[13] Section 2 of Article 20 of International Covenant on Civil and Political Rights, which pronounces any expression of national, racial or religious hatred an act of discrimination, instigation of hostility and violence, punishable by law.

[14]For example, Article 4 of EU Directive 2004/113/EC enshrines the principle of equal treatment of men and women, and bullet 4 thereof qualifies all instructions to direct or indirect discrimination on the basis of sex as discrimination. Similarly, EU Directive 2006/54/EC, which is also related to equal rights and opportunities for men and women, also defines in point 2(b) of Article 2 that instructions to act differently on the basis of sex constitute discrimination.

[15]*Fogarty vs. UK,* #31112/97, 21/11/2001

[16]EU revised directive on equal treatment 2006/54/EC, Article 7

[17] Recommendation of Committee of Ministers CM/Rec(2014)7 on protection of whistleblowers, Point 21

[18] See recommendation CM/Rec(2014)7 above, Point 1

## 3. AFFIRMATIVE MEASURES

**'Affirmative measures'** are provisional actions enacted by public agencies or private entities for the purpose of eliminating inequality between a specific group and society at large, by granting the members of that disadvantaged group the ability to enjoy the same rights as other members of society do. In general, affirmative actions are as follows:

1) Positive **measures** aimed at eradicating traditionally/historically endured discriminatory practices against specific groups,
2) Implementation of *prima facie* neutral **policies**, aimed at supporting the disadvantaged group,
3) **Programs** developed to involve under-represented groups,
4) **Preferential treatment** (e.g. establishing quotas) and
5) **Redefinition of merit**, in order to consider a prohibited ground as qualification for a job position.[19]

The Armenian Government has been enacting a number of affirmative measures. In order to restore the ability of non-competitive persons (e.g. persons with disabilities) to find jobs in the labor market or to slightly mitigate the competitive disparities, on 13/07/2006 the Government of Armenia adopted decision 996-N[20], which envisaged a number of incentives for those employers which recruit persons with limited physical abilities. Point 5 of that decision states that, for every recruited non-competitive person, the employer is entitled to receive from the state budget reimbursement of 50% of the salary defined by the employer for the position occupied, but not more than the minimum salary set by law. This measure tried to possibly mitigate the health related disparities in the labor market, which impacted persons with disabilities[21] when looking for jobs, as such disparities were mere examples of indirect discrimination.

A different initiative of the RA Government is another instance of affirmative measures: a draft law has been circulated which would prohibit relevant medical institutions to communicate any data on the sex of the child (fetus) before the thirtieth week of pregnancy. The RA Ministry of Health drafted these changes in a more rigorous attempt to combat selective abortions, given that sex-based terminations of pregnancy have been practiced widely in the population and have led to gender inequality, the elimination of which would have needed changes in the law and application of the aforementioned restriction, as an affirmative action. Changes in the RA Family Code constitute another example of affirmative measures[22], defining 18 years of age as the matrimonial

[19] See 'Non-Discrimination in International Law'. A Handbook for Practitioners. Interights 2011 Edition, p.84
The manual is available here

[20] *'RA Government Decision on Approval of Procedure, Size and Terms of Reimbursement of Salaries for Recruited Non-Competitive Persons'*

[21] If by saying 'non-competitive person' we mean a person with a disability, because non-competitiveness in the labor market can be due not only to a health condition, e.g. sex, race, skin color, age, ethnic origin and other prohibited grounds.

[22] RA AL-26, (Arm.) adopted on 20.05.2013

minimum, compared to the former 17 and 18 years for women and men, which contributed to gender inequality.

The concept of 'affirmative actions' has been largely applied in international law[23] and exists in a number of national legislations.[24]

Strange though it may seem, affirmative actions as such are a type of differentiated approach to a specific group of the population. In other words, the affirmative action is an exception to the non-discrimination rule, being a distinctive treatment in essence, but enacted for eradicating discrimination. Meanwhile, if such actions occur with the goal of eliminating historically developed and objectively persisting inequalities formed among groups of people, and also for restoring the balance therein, then it should not be considered as discriminatory. Therefore, such actions are rephrased as 'positive discrimination'.

The idea of positive discrimination is mentioned in a number of international documents, e.g. General comment #18 of the UN Human Rights Committee, which is the interpretation of Section 1 of Article 5 of International Covenant on Civil and Political Rights (hereinafter: the Covenant). The Committee thereby stated that such actions shall not be interpreted as discrimination, as *'the principle of equality sometimes requires the Member States to enact positive steps to minimize or eliminate conditions, which are discriminatory or can contribute to discriminatory conduct, which is prohibited by the Covenant'*.[25] As the adage goes: the prohibition of discrimination presumes: *'equal to equals and unequal to unequals'*.[26]

## Conclusion

**Despite the fact that the RA Government has been applying sundry affirmative actions in different sectors, the concept of 'affirmative measures' is not present in the national legislation of**

[23]When interpreting the International Covenant on Civil and Political Rights, the UN Human Rights Committee has openly stated the concept of 'affirmative actions' in point 10 of its General Comment #18. In General Comment #4 the Committee defines the same concept when interpreting Article 3 of the International Covenant on Civil and Political Rights (equal rights of men and women), stating that the given article requires both negative and positive obligations, to ensure unimpeded enjoyment of prohibition of discrimination by the citizens. Point 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination defines the concept of 'special measures', according to which such measures shall be *'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals…, which… shall not be deemed racial discrimination'*. Point 2 of Article 2 of the same convention mentions 'special and concrete measures', that '*States Parties shall take, when the circumstances so warrant, take, in the social, economic, cultural and other fields, to ensure the adequate development and protection of certain racial groups or individuals belonging to them…*'. Such formulations exist also in the Convention on the Elimination of All Forms of Discrimination Against Women (Section 1, Article 4), Convention on the Rights of Persons with Disabilities (Section 4, Article 5), Convention 111 of the International Labor Organization (Section 1, Article 5) and other international documents.

[24]For instance, in United States of America, Serbia, South Africa, England, Canada, Moldova, Italy and numerous others. See the summary at http://en.wikipedia.org/wiki/Affirmative_action#cite_note-44. The concept of affirmative actions has also been stated in a number of EU documents, e.g. Treaty on the Functioning of the European Union (Article 157) and the Equal Treatment Directive 76/200/EC.

[25]UN Human Rights Committee General Comment #18, Point 10

[26]Equality and non-discrimination in the European Convention on Human Rights. ISBN 90-411-1912-4: ©2003 Klewer Law International, p.9, §1.

**Armenia. One way or another, the application of such measures completely depends upon the discretion of the Armenian authorities. As the law does not regulate 'affirmative measures', disadvantaged groups of citizens have no substantive ground to demand such measures from the Government. Hence, such groups are unable to interpose under the slogan of 'unequal treatment of unequal' and demand legal remedies, whereas the authorities, in their turn, are not obliged to enact such affirmative measures and eliminate disparities, in case the latter actions are demanded by citizens.**

## 4. REASONABLE ACCOMODATION

**Reasonable accommodation** is another form of positive discrimination or an exception to the non-discrimination rule. This is an obligation for the (private or public) employer, according to which the latter has to ensure necessary and reasonable measures in the workplace (both physically and socially), in order to guarantee full operational performance of the disadvantaged employee (e.g. a person in a wheelchair), instead of dismissing such employees or not hiring them at all.[27] Reasonable accommodation is mostly related to workplaces and persons with disabilities.

An example of reasonable accommodation is when the employer installs ramps in the office space, to ensure the safe travel of persons in wheelchairs to their workplaces. Other examples are the construction of such ramps in the streets, at entrances to residential or office buildings, at elevators and buses, etc. Hence, both reasonable accommodation and affirmative measures presume differentiated approaches to specific groups, as the conditions of the latter differ from the others. Nevertheless, such a differentiation occurs only in the format of 'unequal treatment of the unequals'.

The principle of 'reasonable accommodation' has been largely regulated by international law. In particular, it is mentioned in the UN Convention on the Rights of Persons with Disabilities, Articles 2 and 5, in the International Covenant on Economic, Social and Cultural Rights,[28] Article 14 of the European Convention on Human Rights,[29] Article 5 of EU Framework Directive 2000/78/EC, dated 27/11/2000 and cases of the European Court of Justice[30], etc.

[27]Draft (Arm.) non-discrimination law interprets the concept of 'necessary accommodation' in the sense of 'appropriate opportunities'.

[28]In point 9 of its General comment #20, the UN Committee on Economic, Social and Cultural Rights decided that the given Covenant also covers positive steps by states, i.e. the obligations to ensure reasonable accommodations.

[29]Even though Article 14 of the Convention does not directly state the concept of reasonable accommodation, in the ECHR case of *Glor v. Switzerland* (#13444/04, 30/04/2009) the court recognized the presence of that principle in Article 14.

[30]See, for example *Sonia Chacón Navas v. Eurest Colectividades SA*, case #C-13/05, 11/07/2006, where the court decided that an employee cannot be dismissed for the failure to conduct his/her main professional duties, if the employer is not able to ensure reasonable accommodation.

## Conclusion

**The principle of 'reasonable accommodation' is absent from the legislation of the Republic of Armenia, but several regulatory norms vagely refer to it in Article 141[31] of the Labor Code (Arm.) and in a number of articles in the RA Law on Social Protection of Persons with Disabilities (Arm.).[32] However, these provisions are rather vague, and it is not clear whether they regulate only national authorities and local self-government, or include the private sector as well. Most importantly, they do not directly state the requirement to make accommodations at workplaces.**

For example, section 1 of Article 19 of the aforementioned law on 'Social Protection of Persons with Disabilities' contains the following uncertain statement: *'all employers shall ensure the establishment of working conditions, in accordance with individual rehabilitation programs for the employed persons with disabilities'.* It is not clear whether this specific provision can serve a substantive ground for 'reasonable accommodation'. This situation affirms the absence of a legislative definition of 'reasonable accommodation', which means that an employee has no ground to demand from the employer reasonable accommodations in his/her workplace.

For example, if the employee is in a wheelchair and needs to adjust the height of his/her working table to the height and form of the wheelchair in order to be able to perform his/her professional duties, and there would be no unreasonable efforts or financial means required from the employer to ensure such adjustments, then such employees will not enjoy under any law, including the Labor Code, rights to demand adjustments from the employer; and the employers, in their turn, will be under no obligations to ensure those adjustments, as there is no corresponding substantive ground (for reasonable accommodation) in the law.

This is the reason that the European Committee on Social Rights, which monitors the performance of the revised European Social Charter (hereinafter: the Charter) by the EU Member States, mentioned in its Report of 12/07/2012[33] that the situation in the Republic of Armenia, particularly related to the absence of the concept of 'reasonable accommodation' in the legislation, constitutes incompliance with the requirements of Section 2 of Article 15 of the Charter[34], because persons with disabilities cannot enjoy effective protection from discriminatory conduct in the workplaces. This conclusion of the Committee rather precisely reflects the state of affairs in the sector now.

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[31]According to which, following the request of the person with disability and based upon the medical examination report, the employer shall define a part-time working day or week.

[32]For example, section 2 of Article 17 prohibits not signing a contract or refraining from promotion in professional hierarchy, dismissal from work or transfer to another work solely for the reason of disability of a given employee. Or section 2 of Article 20, which obliges the national authorities or local self-government to establish favorable conditions for promoting entrepreneurship (including home employment) among persons with disabilities.

[33]See the report at the website of the Committee, http://www.hudoc.esc.coe.int/esc2008/query.asp

[34]Obliging accommodation of working conditions to the needs of persons with disabilities, or if that is not possible, establishing or ensuring safe working conditions.

## 5. INHERENT REQUIREMENTS

If a distinctive approach, expressed under one of the prohibited grounds, emanates from requirements inherent to a specific work, then it cannot constitute discrimination. Hence, this is another instance of exceptions to the non-discrimination rule, or positive discrimination, as mentioned above. A good example is the following announcement: *'Seeking a black actor for the role of Martin Luther King'*, which does not constitute discrimination on the grounds of race or skin color, as the color of the skin is an inherent requirement to perform the job. If the administration of a college requires a professor of theology to be Christian, there is no discrimination considered at stake, as such a requirement is genuinely specific to the job. Meanwhile, as mentioned above, quite popular job announcements in the Armenian labor market, like: *'Seeking attractive girls of 25-35, for the positions of waitresses'* will constitute indirect discrimination on the grounds of age and sex, if such employers fail to justify that the announced sex and age are properties emanating genuinely from the circumstances in which that work can be carried out.

'Inherent requirements for work' largely persist as an integral legal category (i.e. an independent substantive ground) in the EU legal framework. According to Point 1 of Article 4 of Framework Directive 2000/78/EC, a difference of treatment under one of the prohibited grounds (e.g. sex, age, religion or creed) is not discriminatory where the distinctive characteristics (nature and context) reflected in the essence or the circumstances of the professional activity concerned were merely **genuine and determining** occupational requirements, provided that the requirements were **proportionate**, and their objectives **legitimate**.[35] This formulation coincides with or emanates from the definition of discrimination in the ECHR Case Law, according to which discrimination is the different treatment of persons in relevantly similar situations, with no objective reasons and no proportionate means. In the context of professional relations, one of the prohibited grounds can be considered an inherent requirement, and respectively serve as a ground to legitimize a difference of treatment.

For example, the European Court of Justice has considered sex as an inherent requirement for military affairs[36]. Point 2 of Article 4 of Framework Directive 2000/78/EC states that religious institutions can consider religious belonging and creed as genuine work requirements.

The concept of 'Inherent Requirements' is also present in the national legislations of a number of states.[37]

[35]See also: Point 1 of Article 14 of the Gender Equality Directive (Recast), and Article 4 of the EU Racial Equality Directive.
[36]See: *Sirdar v. Army Board,* case #C-273/97, [1999 ] ECR I 7403
[37]For instance, the 'Equality Act 2010' of England, Schedule 9 of which defines a detailed list of inherent requirements; or US Civil Rights Act of 1964, Title VII, section 2000e-3 of which defines the concept of 'bona fide occupational qualification for employment'. Anti-Discrimination Law of Moldova, point 5 of Article 7 of which defines the same principle and in the same formulation as in Point 1 of Article 4 of EU Framework Directive 2000/78/EC.

Conclusion

**An 'inherent requirement' is not defined in the national legislation as positive discrimination or as an exception to the non-discrimination rule. Nonetheless, it is clearly set out in the draft Anti-Discrimination Law of Armenia, section 2 of Article 10 of which reads as follows: *'Different treatment based on certain characteristics is not discrimination, where, by reason of the nature of the particular occupational activity concerned or of the context in which it is carried out, the characteristics of an individual or a group of individuals constitute genuine and determining occupational requirements, with their objectives being legitimate and the requirements proportionate'.***

The last statement in Point 3 of Section 1 of Article 3 of the RA Labor Code (i.e. *'…other factors unrelated to the employee's professional qualities'*) deviously refers to the aforementioned concepts, but is not specific enough to be regarded as a full-fledged substitute of the 'inherent requirement' principle. That statement does not include a number of significant and necessary elements, e.g. the concepts of 'inherent' or 'determining', 'nature' or 'context' of occupational activity, which together come from international law.[38]

Summarizing the above, it follows that a person who believes that his/her failure to get enrolled in an organization was not the objective lack of professional capacity, but the subjective reasoning of the employer or certain stereotypes emanating from one of the 'prohibited grounds', e.g. age, sex, marital status, property, etc., will not be able to effectively challenge such perpetrations through any legal proceeding, because there is no substantive ground defined in the law. Making a reference to non-discrimination provisions of a rather general character (e.g. the aforementioned provision of the Labor Code) will not ensure effective remedies, as a substantial number of legal formulations, criteria, standards and principles, necessary for effective remedies, are missing from the provisions in the legislation. Hence, the citizens are deprived of effective means of legal protection.

## 6. AVAILABILITY OF PUBLIC GOODS AND SERVICES

According to this concept, public goods and services must be available for all groups of people, without discrimination. Sectors eligible under this concept are, inter alia, health, education, grants, funding projects, entertainment programs, shelter provision, transport, travel; the availability of any profession or craft and of public authorities is also included, together with such situations as the ability to enter stores, bars, clubs, service the visitors inside, get welfare, pension or loans, get sheltered accommodation, admittance to academic educational institutions and restrictions on use of services thereof, limitations on membership in certain professional unions or organizations, etc.

[38]See: EU Directive 2000/78/EC, above.

This principle is widely applied in the EU legal system,[39] UN Conventions,[40] CoE system[41], particularly in the case law of the European Court of Human Rights.[42]

This principle is mentioned in the RA Legislation, in the Law 'On Social Protection of Persons with Disabilities',[43], as well as in several provisions of the RA Law 'On Procurement'[44] and in the RA Law 'On Protection of Economic Competition'.[45]

## Conclusion

**Violations of this principle are quite frequent, sometimes becoming common practice, as the examples of job announcements mentioned above, which discriminate against many different groups of people, by defining non-inherent requirements for the work to be carried out and restricting professional development opportunities and other specific services for a number of individuals.**

There are many cases where no reasonable explanation or objective necessity has ever been demonstrated for a different treatment against a particular person or a group in using a specific service. For example, a quite controversial case was that of Artak Beglaryan, related to availability of professional development. His application for enrollment in the Diplomatic School of the RA Ministry of Foreign Affairs was denied solely because he was blind.[46]

There was a wider public response to the case of Gevorg Sloyan, who was denied admission to the School of Barristers because he had no basic legal education, but had graduated from the Masters Program of the Faculty of Comparative Legal Studies at the American University of Armenia. Gevorg Sloyan won the case at the Constitutional Court.[47]

In corollary to the aforementioned, it is worth discussing the conclusion of the European Committee of Social Rights[48] on incompliance of RA internal practices with Section 3 of Article 15

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[39]See: EU Directive on *'Gender Discrimination in Goods and Services'* 2004/113/EC or the EU Directive 2000/43/EC on *'Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin'.*

[40]For example, 'International Convention on the Elimination of All Forms of Racial Discrimination (bullets (iv), (v) and 'vi' of Article 5), or Convention on the Elimination of All Forms of Discrimination Against Women (e.g. Article 11(c), a number of points in Article 14), Convention on the Rights of Persons with Disabilities (Article 9),

[41]For example, Council of Europe Committee of Ministers Recommendation Rec(2006) on 'Health Services in a Multicultural Society', Article 1, or Article 15 of European Social Charter (revised).

[42]*Ponomaryovi v. Bulgaria* (5335/05, 21/06/2011) on school fees; the summary of the court decision is also available in Armenian. *Bah v. United Kingdom* (56328/07, 27/12/2011), on providing shelter; the summary of the court decision is also available in Armenian.

[43]See: Article 16

[44]For example, point 1 of Section 2 of Article 3.

[45]Point 'a' of Section 2 of Article 7, which prohibits discriminatory pricing in the context of monopolies or abuse of market domination position

[46]See: Court Case VD/0912/05/11 at www.datalex.am information system.

[47] Constitutional Court decision 1148

[48]See the report at the following webpage of the Committee: http://www.hudoc.esc.coe.int/esc2008/query.asp

of the European Social Charter (revised)[49], particularly as regards the absence of legislative regulations ensuring effective protection of persons with disabilities from discrimination on shelter, transport, telecommunication, culture and leisure. The Committee refers to the low quantity of television programs with sign language translation, absence of teletypes or videophones, lack of appropriate accommodation for persons with disabilities in public transportation, in the sector of shelter: lack of ramps to ensure the access of persons with disabilities to polling stations or other voting areas, in the sector of culture and leisure: lack of accommodations (e.g. ramps) for persons with disabilities mostly in schools and their lavatories, as the examples to the aforementioned incompliance.

It is worth mentioning that the Law 'On Social Protection of Persons with Disabilities' guarantees the enforcement of the mentioned principle only under one of the prohibited grounds (health), and as regards the Law 'On Procurement', the relevant provisions are so vague and uncertain that they hardly substitute the principle of 'availability of public goods and services' in practice.

In conclusion, both the legislation and the practices do not contain sufficient guarantees for protection from discrimination when buying public goods and services, because there is no integral substantive basis.

## 7. EVIDENTIARY DIFFICULTIES IN CASES INVOLVING DISCRIMINATION

The most problematic phase in combating discrimination is proving discriminatory conduct in the fact of the different treatment to which the plaintiffs and/or victims had been subjected. Compared to direct discrimination, proving indirect discrimination is a consummately complicated task. The difficulty in proving indirect discrimination and some other types of discrimination was one of the decisive reasons to adopt stand-alone non-discrimination laws. These laws have not only added substantive grounds for several new rights, but have also delivered new court/procedural norms/rules (e.g. in England, Moldova, Ireland and Georgia).

There are significantly more indirect discrimination cases than direct discrimination cases and the reason is that authorities generally refrain from committing direct discrimination. Even though, as mentioned in detail in section 3.1 of the Report, the Armenian legislation does not have a definition of indirect discrimination, discrimination in general is prohibited by Article 14.1 of the Constitution, which bounds the whole public administration system and even individuals, given that the provision is partially enshrined in a number of laws.

[49] Article 15 is related to the rights of persons with disabilities to independence, social integration and participation in the community life. Section 3 of the article defines the obligation of the Government to ensure *'full social integration and participation in community life by such means and technical support which are aimed at overcoming the difficulties in communication and mobility, and granting access to transport, residence, cultural activity and leisure.*

In order to describe this situation with an example, we should recall the fact that an educational institution can refuse to extend a work contract with a professor/lecturer without any explanation (merely by making reference to the employer's legal rights ), even though the real reason for dismissing that employee was his/her political views, which were, naturally, never mentioned by the employer in any official document and the employer had thoroughly denied any such allegations in court. Given this situation , the plaintiff or the victim of violations (here: the person filing a discrimination complaint is considered the plaintiff) has the arduous – one could say impossible – task to comply with the evidential requirements of the national court: if the filing submitted to the civil procedure court undergoes due process within the rules of burden of proof, then the party filing allegations bears the responsibility to prove them (Civil Procedure Code, Article 48, Section 1).

## 7.1. GENERAL RULES OF DISTRIBUTION OF BURDEN OF PROOF IN DISCRIMINATION CASES, IN NATIONAL LEGISLATIONS AND INTERNATIONAL LAW

In most of the countries that have proven effective in their combat against discrimination (e.g. United Kingdom, Ireland), the procedure on proving the presence or absence of circumstances in cases with alleged violations of non-discrimination rule cases is divided into two parts:

1) The first part of establishing proof is the responsibility of the alleged victim/plaintiff, where he/she has to prove the *prima facie* presence of unfavorable treatment under one of the prohibited grounds.

2) If the plaintiff succeeds in the aforementioned obligation this gives rise to the presumption of discriminatory conduct, and creates the obligation for the alleged perpetrator/defendant to refute such charges. The party responsible for denying the allegation of discriminatory conduct has to prove that: (**1**) the demonstrated different or unfavorable treatment pursued legitimate objectives, and (**2**) that legitimate objective was directly related to the different treatment which resulted in negative consequences, and (**3**) the selected means for reaching the mentioned legitimate objective were proportionate and by all means necessary.

This model of distribution of the burden of proof is also well recognized in regional and international systems of protection of rights, i.e. the UN Human Rights Committee[50], European Court of Human Rights[51], Inter-American Court of Human Rights[52] and the African Commission on

[50]See: *Bhinder Singh v. Canada*, communication No. 208/1986, ICCPR

[51]See: *D.H. and Others v. Czech Republic*, No. 57325/00, 13 November 2007, paras. 82-84

[52]See: *Velásquez-Rodríguezv. Honduras*, Merits, Judgment of July 29, 1988. Regarding the burden of proof, see the same discussion in Research on ECHR references to the decisions of the Inter-American Court
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Human and Peoples' Rights[53]. It has also been adopted by the national legislations of a number of developing democracies of our region.[54] The national legislation of the Republic of Armenia does not define the aforementioned principles and norms of burden of proof; and that substantially reduces the efficiency of legal protection from discrimination.

The next component of primary importance, among issues to be proven by the plaintiff, is identification of a comparator, or proving that another person has been subjected to more favorable treatment than him/her despite being in a relevantly similar situation. There can be no allegation of discriminatory conduct without proof of this component. The most common problems with choosing a 'comparator' in the national legal proceedings or within the international dimension are related to the scope and the level of difference in treatment. In this respect, neither the Armenian legislation nor national judicial practices have any specific approach, which is a problem that can be attributed either to the legislation, or to the enforcement in practice.

## 7.2. ABSENCE OF PREMEDITATION OR MOTIVES IN DISCRIMINATORY CONDUCT CANNOT BE DETERMINING IN REFUTING THE PRESENCE OF DISCRIMINATION

It is worth mentioning also that absence of premeditation, in cases of alleged discriminatory conduct on the part of the defendant, can be of no protection for the latter, and moreover, in no case can it indicate that a different treatment is not discrimination. This approach is much more conspicuous in cases with indirect discrimination, when a different treatment against the plaintiff can be an objective consequence of public policy (conducted by the government of the country), as the ECHR revealed in *D.H. v. Czech Republic*.[55] Even though the Czech Government had no intention to discriminate against gipsy children in its educational programs, the ECHR stressed the reality, as evidenced by statistical reports, which showed that children from that group of the population had been subjected to substantially different and unfavorable treatment by public authorities in the educational system and bore, as a result, the negative consequences of that treatment.

Absence of conclusiveness in non-intentional or motiveless discriminatory conduct has been reflected in international law, in international and regional machinery for human rights' protection, particularly in the decisions of the UN HRC, in rulings of the ECHR and the Inter-American Court of Human Rights.

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[53]See: *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*, communication No. 323/06, 16 December 2011, para. 138. The principle of *onus probandi* finds wide and particularly strict application in such cases of discrimination.

[54]See: for example, Point 2 of Article 8 of the Georgian Law 'On the Elimination of All Forms of Discrimination', according to which facts and evidence supporting the suspicions of the plaintiff are sufficient to have the burden of proof automatically shifted to the defendant. See also Point 1 of Article 15 of the Anti-discrimination Law of Moldova, according to which the burden of proof of discriminatory treatment lies upon the party alleged to be the one practicing such treatment.

[55]See: *D.H. and Others v. Czech Republic*, No. 57325/00, 13 November 2007

This principle is absent from the legislation of the RA, which noticeably weakens the protection from discriminatory conduct. One of the examples is the decision (in Armenian) of the Commission on Ethics of the 5th Convocation National Assembly of the Republic of Armenia, related to the public statement (in Armenian) of Armenian National Assembly Deputy (MP), Mr. Manvel Badeyan, in which the Commission decided to terminate the disciplinary proceeding on the ground of 'absence of intention to insult'.[56]

Meanwhile, it might be mentioned that stating or proving presence of intention, in its turn, can in some cases facilitate the satisfaction of a claim of discrimination.

## 7.3. STANDARD OF PROOF

The standard of proof in discrimination cases is viewed in conjunction to effectiveness in combating discrimination, as the higher that standard is, the harder it will be to prove discrimination, which will naturally result in a strengthening the defense against such claims and weaker protection of the rights of victims in practice.

'Beyond reasonable doubt'[57] is the standard prevailing in international and regional machinery on protection of human rights. Doubtlessly, this principle requires a much stricter standard of proof than 'balance of probabilities'[58], which, as a rule, is applied in civil cases in countries with adversarial proceedings. Nevertheless, despite the fact that 'beyond reasonable doubt' has been accepted by the international and regional systems on protection of human rights as an applicable standard of proof in discrimination cases, it is applied with a reservation that it is not equivalent to the weighting (strictness) communicated to it in the criminal justice systems of common law states. At the same time, in a number of cases the ECHR has even further specified this approach, asserting that in discrimination cases the standard of 'beyond reasonable doubt' shall not be interpreted as a standard 'demanding such high probability, as in criminal cases'[59], but shall be perceived as a threshold somewhere between 'beyond reasonable doubt' and 'balance of probabilities'.[60]

[56]See: bullet 28.

[57]This principle requires a stricter standard of proof, which is applied in common law countries to justify such criminal offences, which can result in much heavier punishments. This standard of proof is based on the idea that the one making a decision should not have a single doubt about the culpability of the suspect. This approach is mostly applied in the criminal justice sector of the USA, UK, New Zealand, Japan, Canada and Australia.

[58]This standard is the standard of proof applied in countries with adversarial proceedings and based on the idea that the satisfied standard of proof for the deciding party is sufficient to infer that the allegations raised by the party bearing the burden of proof are more sustainable than the arguments in favour of their rebuttal. As a rule, this standard is applied in civil cases.

[59]*Nachova v. Bulgaria*, app. No. 43577/98, 6 July 2005, GB, para. 147

[60]See further details on ECHR case of *Anguelova v. Bulgaria* in 'Partially dissenting opinion of Judge Bonello', which later became the official standing of the ECHR in adopting standards for discrimination cases

### 7.4. INFERENCES THROUGH COMPARATIVE ANALYSIS OF ARMENIAN LAW

The specifics of discrimination cases mentioned above are not reflected in Armenian legislation. Moreover, they are not reflected in any sphere of law enforcement. Evidentiary peculiarities of discrimination cases mentioned above should be examined in detail by the legislator when discussing adoption of non-discrimination laws; and afterwards the practical application thereof should evolve in the hands of the Supreme Court (Court of Cassation) and the Constitutional Court of Armenia through (if necessary) interpretation of corresponding court decisions and through effective implementation of the principles asserted by the public authorities, in accordance with guiding and explanatory documents adopted by the Equality Body, if the latter is established.

However, when considering the close appurtenance of evidentiary matters to court proceedings, their implementation through changes in existing laws would require the presence of procedural rules not in the non-discrimination laws but, first of all, in the Civil Procedure Code and their further evolution in the interpretation of high courts (Court of Cassation, Constitutional Court). At the same time, these evidentiary rules could apply to administrative procedures, where interpretations of non-discrimination law by the Equality Body would serve as a good basis for that.

In conclusion, we would like to mention that the draft (in Armenian) non-discrimination law, elaborated by the Human Rights Defender's office creates a basis or guidelines for development of the future law.

## 8. RESPONSIBILITY AND REMEDIES IN CASES INVOLVING DISCRIMINATION

The strictest form of responsibility for violation of non-discrimination rules is criminal responsibility. It is mentioned in the legislation of CoE member states and, as a rule, is preconditioned by the level of priority given to it in national programs on eradication of various forms of discrimination or by the level of severity of a specific form of discrimination for that society. Prohibition of discrimination in the criminal legislation of Armenia is mainly related to instigation or inducement to discrimination (see: Point 3.4 of the Report) or partially to harassment (see: Point 3.3 of the Report).[61]

Even though these articles of the Criminal Code of the Republic of Armenia were not drafted as mere measures for combating discrimination, they nevertheless embrace various phrases that include elements of discrimination. However, we might note that interpretations of these concepts of criminal justice, obtained through academic research and law enforcement practice, do not fully cover the whole constitutional dimension of prohibition of discrimination, and also need some further specification and precision.

[61]See RA Criminal Code, Article 226

Despite its severity, criminal responsibility is not always the most effective remedy against violations of non-discrimination rules. Being the heaviest form of intervention, criminal responsibility does not envisage any reparations for the victim. Analogous forms of responsibility, as well as those not envisaging criminal liability (e.g. administrative) cannot be considered satisfactory, if they do not ensure (pecuniary or non-pecuniary) restitution for the victim of the committed crime.[62]

In this respect, adoption of the Law will definitely require changes in civil legislation on discrimination, in conjunction with provision for reparations arising from violations of both criminal and administrative legislation.

## II. SPECIALIZED NON-DISCRIMINATION LAW ENFORCEMENT INSTITUTIONS (OPTIONS)

*The need to establish a body to enforce discrimination prohibitions in the law and in regulations (hereinafter named as the Equality Body)*

The experience of elaboration and partial implementation of policies of enforcement of non-discrimination laws by means of equality bodies is widely recognized in all CoE member states that have recorded noticeable progress in their fight against discrimination over the last 2 decades.

Within the framework of this concluding section of the study, the importance of analyzing other countries' experience of Equality Bodies is not simply to repeat the (mostly successful) solutions that they have found, but to identify why it was necessary to establish Equality Bodies and the underlying reasons for doing so, in the context of the political, legal and cultural agendas of the societies which created such bodies and granted them the necessary authorities.

Here we do not only mean the creation of a new Equality Body; the countries with unified non-discrimination legislation have adopted two different approaches in 'establishment' of their Equality Bodies. Either they established the body by law[63] or a law granted the corresponding authorities of an Equality Body to an existing entity, which would ensure substantial compliance[64] to the 'Paris

[62]See: *UN Human Rights Committee General Comment 31*, point 16, according to which where violation of any provision of the International Covenant on Civil and Political Rights takes place, the member states shall be obliged to provide restitution or other means of reparations: '*Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3 is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that* ***the Covenant generally entails appropriate compensation****. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.*'

[63]For example, in Moldova, where the functions of the Equality Body are carried out by a collective entity, a council, comprised of members assigned by the Parliament

[64]For example, in Georgia, where the Human Rights Defendant's Office (the Ombudsman) exercises the authorities of the Equality Body

Principles'[65], which are the basic principles applicable to national human rights institutions: independence (functional and financial), competence to deal with individual complaints and results of monitoring the human rights situation and, possibly, pluralistic composition of the national HR institution. In any case, we must take into account that compliance to the standards of 'Paris Principles' is a precondition of effectiveness of the operation of an Equality Body and plays a guiding role in establishment of such a body or when granting related authorities to an analogous entity.

In this respect, the draft (in Armenian) non-discrimination law, circulated by the HRD, proposed the model with implementation of Equality Body's functions to be undertaken by the HRD itself. This approach is in accordance with restrictions enshrined in Section 2 of Article 2 of the Constitution. by means of (**1**) vesting the authorities of the body responsible for Equality into a public entity of human rights' protection, which is (at least within the constitutional and legislative regulatory dimensions) considered the most independent and the one established and operating within 'Paris Principles'. Both of these approaches are imperative and shall be considered in any solution implied.

In this respect, the establishment and exercise of power by an independent commission or another collective entity, would be controversial in the light of constitutionality, in the sense that exercising power by an entity not mentioned in the Constitution would result in violation of Section 2 of Article 2 thereof (exercise of power only by national public and local self-government bodies and public officials).

Given the advantages in establishment  a collective entity, we argue that it can be formed as a commission under the HRD, and the decisions made by that commission shall be enforced through the powers given to the HRD by the law. This provisionally created hybrid model avails of the advantages of collective management for the Equality Body, the most important of which would be the presence of stakeholders from different layers of the society in it.

As regards the implementation of functional authorities, it should also be noted that the Equality Bodies operating in the CoE member states are divided into so-called 'Tribunal-type Equality Bodies'[66] and 'Promotion-type Equality Bodies'[67]. The main difference between the tribunal-type bodies and promotion-type bodies is that the tribunal-type bodies have the power to make binding decisions upon individuals, whereas the promotion-type bodies do not  enjoy such authorities.

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[65]See: Resolution A/RES/48/134, adopted by 85th General Assembly of the United Nations, in 1993, 'On National Institutions for the Promotion and Protection of Human Rights'. http://www.un.org/documents/ga/res/48/a48r134.htm

[66]See: for example, the Equal Treatment Commission of the Netherlands (http://www.mensenrechten.nl), Equality Court of Ireland (http://www.justice.ie/en/JELR/Pages/Equality_FAQ), National Discrimination Court of Finland (http://www.syrjintalautakunta.fi), Cyprus Ombudsman (http://www.ombudsman.gov.cy), etc.

[67]UK Commission on Equality and Human Rights (http://www.equalityhumanrights.com), Swedish Equality and Anti-Discrimination Ombudsman (http://www.do.se/en/), Equal Treatment Ombudsman of Austria (http://www.gleichbehandlungsanwaltschaft.at/), French Commission of Equal Opportunities and Anti-Discrimination, HALDE, German Federal Agency on Anti-Discrimination (http://www.antidiskriminierungsstelle.de), Anti-Discrimination Body of Ireland (http://www.equality.ie), and others.

In this respect, we must take into account that the issue of establishing a tribunal-type equality body will permanently face the invincible barrier of Article 2 of the Constitution, thereby excluding the possibility of creating a power not envisaged by the Constitution. If therefore it was decided to establish a tribunal-type equality body or to strengthen an existing body with corresponding authorities, the **Human Rights Defender's Office would be beyond any competition.**

However, if it is decided to establish a promotion-type Equality Body, then the situation changes. In such a case, the creation of a new body is possible, provided that it will not have any capacity to exercise power; hence the main issue of discussion would be the selection between the collective or individual format of such a body. Both aforementioned models are quite common in CoE member states. The classical examples of individual Equality Bodies in a number of countries are Ombudsmen[68]; collective representation is expressed in commissions.[69]

Apart from the functions mentioned above, we can find the following authorities given both to tribunal-type and promotion-type bodies of a number of CoE member states:

1. submission of recommendations to public agencies,
2. demanding information from public agencies on cases involving discrimination or discriminatory situations,
3. submission of *Amicus Curiae* to courts (including the instances of constitutional justice),
4. development of guiding documents in combatting discrimination,
5. assistance to victims of discrimination,
6. public awareness-raising on issues related to discrimination,
7. implementation of actions aimed at ensuring non-formal reconciliation between the parties in disputes involving discrimination,
8. initiation of *Actio Popularis* cases in the courts.

As regards the possibility of selecting the HRD as the preferable type and model of the Equality Body, then there will be no need to delegate any additional authorities to the latter, apart from those envisaged by the Law on HRD, because the overall scope of legally envisaged powers for the HRD will be fully sufficient to have a body operating in full compliance with the 'Paris Principles'.

Establishment of a collective entity in the role of the Equality Body will ensure more extensive participation of social groups. The presence of a collective entity in the functions of promotion-type Equality Body would be preferable in Armenia, given the advantages described in this paragraph.

[68]See: for example, Georgian Ombudsman (http://www.ombudsman.ge), Latvian Ombudsman (http://www.tiesibsargs.lv), Czech Ombudsman (http://www.ochrance.cz), etc.

[69]See: for example, the French HALDE, Danish Institute of Human Rights (http://www.humanrights.dk), Moldovian Equality Council (www.egalitate.md), National Anti-Discrimination Council of Romania (http://www.cncd.org.ro), etc.

As regards the authorities of the Equality Body, which must be envisaged by law, we should strictly follow the powers given to national institutions described in the section on 'Authorities and Responsibilities' in the annex of the 'Paris Principles'.[70]

The necessary criteria, which must be communicated to the candidates for composing the membership of the Equality Body, must cover appropriate knowledge and experience, as well as earned reputation of high moral standing of the candidate. Participation of the Legislative Power, as a representative forum of different groups of Armenian society, is also important when establishing the Equality Body, and the election or assignation of the Equality Body must be subject to the same qualified majority voting rules as in case of the HRD.

The law should define administrative responsibilities and regulate the formation of an independent budget to serve the routine operations of the Equality Body, which will decide upon such matters itself, in accordance with the 'Paris Principles'.[71]

## Conclusion

**The absence of a separate and stand-alone law on prohibition of discrimination results in a lack of effective remedies for citizens. The existing legal provisions, dispersed throughout the whole legal system, are unable to provide effective means for legal protection. These provisions, as a rule, vaguely refer to the most prominent and widely accepted substantive grounds of non-discrimination theory (sex, age, race, views, etc.), but fail to describe the mechanisms for implementing those. Consequently, the mentioned norms remain declarative in character. Meanwhile, relations between public bodies and citizens are developing, which require practical measures to protect citizens from discriminatory treatment. It is necessary to consider international experience and develop new approaches, while paying attention to the peculiarities of discrimination. For instance, the laws mostly regulate direct discrimination, whereas indirect, associative and instigated discrimination, harassment, victimization and others are absent from Armenian legislation.**

The procedural elements of prohibition of discrimination are not less important, but they too are not regulated by law. Discriminatory treatment is mostly concealed, hence the traditional procedural forms of receiving and assessing evidence will not be able to detect discriminatory conduct and substantiate liability for the latter. For example, according to RA procedural norms, statistical data, inferences (assumptions) derived from facts and information, including information derived from situation testing conducted by a party of the proceedings cannot serve as proof and determine the ruling of the court, whereas the above can serve as evidence under international law and national legislation of a number of states. .

[70]See: Resolution A/RES/48/134, adopted by 85th General Assembly of the United Nations, in 1993, 'On National Institutions for the Promotion and Protection of Human Rights' http://www.un.org/documents/ga/res/48/a48r134.htm
[71]Ibid

Absence of a regulator is one of the gravest consequences of absence of a law. Experience shows that Equality Bodies play a more important role in elaboration of a general policy on eradication of discrimination than sundry public agencies and even the courts. The same refers to protection of rights of individuals, where Equality Bodies are more accessible and less costly, where the case initiation is faster and court proceedings simplified.

The situation described above touches upon the violation of the fundamental principle of legal certainty. Any legal relation must be scrupulously and predictably regulated, which will protect the citizens from arbitrary interventions and thus create sufficient and effective guarantees of protection from violations. The current legal regulations do not provide certainty or predictability.

The situation described above can be regarded as a violation of Article 18 of the RA Constitution, meaning that the legal framework is not an effective means for protecting the rights and freedoms of citizens.

## RECOMMENDATIONS

1. Effective implementation of the constitutional right of prohibition of discrimination in the Republic of Armenia implies mechanisms for enforcement of such a right, adoption of one comprehensive legal act that embraces explanation of concepts and definitions thereof (provisionally called the Law on Equality). This does not mean at all that the Law on Equality must include all legal regulation mechanisms related to the sector; the adoption of a Law on Equality is necessary, but it cannot replace changes and amendments in a number of sector laws, which are also a must, to ensure effective protection of the constitutional right to prohibition of discrimination (e.g. the Code on Administrative Violations, Civil Procedure Code, etc.).
2. It is worth noting that combating discrimination by means of amending the existing legislation will give rise to technical difficulties, as sector tailored legislation was adopted, has been interpreted, reviewed and applied in consideration of the main priorities pertaining to the sector at stake, meanwhile, the purpose of provisions regarding protection of a specific right (here: the prohibition of discrimination) may not always coincide with the aforementioned priorities. Each of the sectoral laws is designed to cover and regulate a certain group of relations. However, in Armenian law, none of the legislative acts has comprehensively and compactly put forward the purpose of protection of equality, including the mechanisms that would insure the positive obligations of the state to reach the aim declared. Therefore, if reform is carried out via legislative ammendments of different laws and other legals acts, all those ammendments would be suited firstly and primarily to the purposes of the amended laws, in order to comply with the requirements of legislative technique and logic.

3. Therefore, it is highly advisable to base reformof the sector on an integrated draft lw, notwithstanding also the necessity of certain amendments in other related laws and other legal acts.

4. Primary importance of the Equality Law rests, inter alia, in definitions to the following concepts:

- Indirect discrimination
- Associative discrimination
- Harassment
- Instigation or inducement to discrimination
- Victimization

As mentioned above, absence of definitions of these concepts in the legislation causes ineffectiveness of remedies against discrimination, as the definition of discrimination is the milestone upon which legal protection is based.

5. The Law on Equality must cover all prohibited grounds, as described in this legal research.

6. The Law should also oblige the Government:

- To implement constructive actions, with a list of measures envisaged;
- To ensure reasonable accomodation, which can be binding upon non-state parties, in accordance with and in sectors and situations marked by the Law;
- To urge employers to develop work inherent requirements and rules on identifying the scope of application thereof;
- To define standards for public goods and services, applied upon local manufacturers and importers, with the purpose of ensuring substantial equality.

7. The Law on Equality must also envisage the establishment of an Equality Body, or grant the authorities of such a body to the HRD. The study of best practices and experience concludes that it is preferable to have a separate Equality Body, which shall be vested with credibility and authority in the eyes of the public, given the high moral stanading of specialists enrolled therein. As regards the *modus operandi,* functions and structure of the Equality Body, the scholars refer to 'Paris Principles'. Based on the provisions of Section 2 of Article 2 of the Constitution, a new body can be created only if it is a promotion-type model, to which the functions and authorities of an Equality Body, described in the corresponding part of this legal research, should be instrinsic.

8. It is also necessary to bring more certainty to the concepts of 'evidence', distribution of the burden of proof and standard of proof. In this context, corresponding changes must be made in the Code on Civil Procedure and Code on Administrative Procedure. These procedural changes must consider the peculiarities of distribution of the burden of proof and standard of proof in cases involving discrimination, as described in this legal research.

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