

Legal Provisions, Discrimination and Uncertainty on LGBT community in Albania

Laws on human rights vs exerted rights of LGBT persons

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Abstract

During the communist regime and until 1995 homosexual relations were sentenced by law in Albania as a criminal offense. Membership in the Council of Europe and the ratification of the European Convention on Human Rights brought as a result the improvement of the legal framework and the abolition of the condemnation of homosexual relations. The first attempts of activism were shown in the form of meetings on joint activities organized by the Gay community in public spaces or cruising areas. In 1994, an Albanian newspaper published the first interview of a gay community member. In the early 2000s, "Gish Albania" and "Alga" were the first organizations, which provided specifically in their statute the protection of LGBT rights and made serious efforts to the promote of their rights and the establishment of a small nucleus of people that would encourage the formation of a LGBT community. On March 13, 2010, the Anti-Discrimination Law, one of the essential legal instruments that protects human rights in Albania, and also includes the prohibition of discrimination on the basis of sexual orientation, came into force. Albania has already the Commissioner for Protection from Discrimination. Two LGBT organizations have already been established in Albania: the Alliance against Discrimination LGBT and LGBT Pro Albania. They aim to protect the rights of sexual minorities in Albania and promote a national movement of social mobilization to protect and promote the rights of this community in Albania

Keywords: LGBT; sexual orientation; commissioner for protection from discrimination; homophobia; or xenophobia.

Albanian legal system and its relationship with the LGBT community.

Before starting the treatment of Albanian legislation , laws and legal acts in the Albanian legal system, the first act, which is the foundation of the Albanian state and from which all laws and legal and sub legal acts are based, is the Constitution. This community the first protection to be equal before the law and before the state or non-state institutions is found precisely in Article 18 of the Constitution of the Republic of Albania expressly states that:

"Everyone is equal before the law. No one can be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or

philosophical beliefs, economic, educational, social or parental affiliation. No one shall be discriminated against for the reasons referred to in paragraph 2, unless there is reasonable and objective justification."

This constitutional provision, first of all, sanctions a negative obligation under which the state should not interfere, so that no one is unjustly discriminated against because of his "social status". In conceptual terms, "social status discrimination" means that individuals can be differentiated and treated unequally based on their social composition, which is irrelevant to their merits. It is true that in the way that this constitutional provision is written, the phrase "social status" as a reason for discrimination is manifested as a separate cause for the other causes that the constitution has explicitly defined (race, religion, gender, etc.).

The Constitutional Court has interpreted Article 18 of the Constitution through its jurisprudence, saying that "Equality in law and before the law does not mean that there are equal solutions for individuals or categories of persons who are objectively different conditions. Equality before the law and the law presupposes the equality of individuals who are on equal conditions "and" only in exceptional cases and for justifiable and objective reasons may justify the different treatment of certain categories benefiting from this right.

According to this spirit, the Constitutional Court has given us the right to abstracate why the LGBT community should not enjoy the same rights as normal people of this country, but should be discriminated against, treated unequally, hated from the majority of the population, even from the programmes that have been broadcasted, there has been a hateful spirit of public figures reacting in the worst possible form to this category. In Albania this category is denied a essential and fundamental right such as the right to family life, marriage and cohabitation. This is the situation and situation that is presented in Albania to the LGBT community.

Below we will address a number of laws that are in the interest of LGBT as well as some of the legal changes that this group is seeking to change in domestic law by extending the scope of their rights in comparison to the rest of the population that does not belong to the LGBT community:

Law on Protection from Discrimination.

"The Law on Protection from Discrimination" was approved by the Albanian Parliament on 04.02.2010 and entered into force on 13.03.2010. This law is a concrete step in the area of human rights protection in the spirit of international documents and at the same time a concrete step towards meeting EU membership standards. In order to ensure effective protection against discrimination and any form of conduct that incites discrimination, the law has established the institution of the Commissioner for Protection from Discrimination.

The mission of the Commissioner for Protection from Discrimination in these years has been to protect against discrimination through:

- providing assistance to victims of discrimination in prosecuting their complaints of discrimination; awareness raising through information on the right to protection from discrimination, the legal means available for this protection and the development of regular dialogue on discrimination issues with relevant social groups, including non-governmental organizations;
- publishing reports and making recommendations on any issue related to discrimination

After 7 years from the adoption of this law, the spirit that follows this law has also been applied in the courts. The number of court cases with discrimination claim in the courts has been growing particularly during 2014 and especially in the field of labor relations. The courts' awareness of the Commissioner's call for written opinions or the results of administrative procedures has also been increased in cases when the Commissioner has conducted an administrative investigation. Law enforcement indicates an increase in the level of awareness and information on legal ways to ensure protection against discrimination.

However, raising awareness of the implementation and respect of the principle of equality and informing on the legal ways of protection from discrimination continues to be a challenge for the institution of the Commissioner for Protection from Discrimination for the coming years.

During these years some of the recommendations given by the Commissioner for Protection from Discrimination regarding the LGBT community have been:

- Improve Albanian legislation to avoid discrimination based on sexual orientation and gender identity in accordance with international acts, European legislation and the Law "On Protection from Discrimination".
- It is important to research and collect data on discriminatory measures and practices, in particular when it comes to "hate crimes" and "hate-motivated incidents" due to sexual orientation or gender identity, taking into account the right to respect for private life. Reflection on crime police statistics due to sexual orientation.
- Awareness of society in general and special groups on LGBT community rights with a view to promoting a debate incompatible with the use of hate speech;
- Ensure that victims of discrimination are informed and can use effective legal remedies;
- Realization of surveys and monitoring on LGBT rights in different areas of education, employment and services. Inclusion in curricula / extra school

curricula and rights of the LGBT community as human rights; revision of textbooks with discriminatory content; monitoring and studies on issues of discrimination / bullying / violence including sexual orientation etc;

- Involvement of public figures (journalists, politicians, teachers ...) in protecting the rights of the LGBT community with the aim of promoting positive models;

But what is interesting is not taking into account at all this recommendation report for both, institutions and public figures, where they have reacted with great hatred to the community in various shows and giving various offensive statements to them. Although this community has different feelings, different tastes, other concepts for family and family life, this does not legitimize insult to them and a hate spirit, but the whole society should strive to integrate this community into society with the same rights and obligations as a whole Albanian society. This social response would be a plus not only for the Albanian society but also for Albania to make successful steps towards the European Union.

Labor Code

Following an intensive work by the Ministry of Social Welfare and Youth, the Ombudsman, the Commissioner for Protection from Discrimination and LGBT organizations in the country, the Albanian Parliament adopted amendments to the Labor Code by providing protection against discrimination in the workplace due to sexual orientation and genital identity. Specifically, in point 2 of Article 9 of Law 7961/1995 "Labor Code of the Republic of Albania" included as grounds for discrimination also "sexual orientation and gender identity". Specifically Article 9 of the Labor Code states:

In the exercising of the right to employment and occupation, any form of discrimination provided for in this Code and in the special legislation on protection against discrimination shall be prohibited. "Discrimination" means any distinction, exclusion, restriction or preference based on gender, race, color, ethnicity, language, gender identity, sexual orientation, political, religious or philosophical beliefs, economic, educational or social conditions, pregnancy, affiliation parental responsibility, parental responsibility, age, family or marital status, civil status, residence, health status, genetic predisposition, disability, living with HIV / AIDS, union or affiliation with trade union organizations, belonging to a particular group or any other cause, which has as its purpose or effect to hinder or render impossible the exercise of the right to employment and profession, in the same manner as others.

So we see a greater guarantee in the work relationships for this community because before gender identity and sexual orientation did not get involved in the discrimination provided for in Article 9 of the Labor Code.

Criminal Code

In 2013 Albania's Parliament made the first amendments to the Criminal Code since the adoption of the Law on Protection from Discrimination. Specifically, the first change involves the addition as an aggravating circumstance of a crime and motivation due to sexual orientation and gender identity, thus protecting the transgender community. This change is made in Article 50 of the Criminal Code, paragraph (j), which is amended as follows:

j) "when the offense is committed by motives relating to race, color, ethnicity, language, gender identity, sexual orientation, political, religious or philosophical beliefs, health status, genetic predisposition or disability".

So if a crime is motivated by one of the above characteristics then the circumstances are aggravating and the punishment is greater. Even in cases where a person convicted has mitigated circumstances, if the crime is committed for one or more of the above characteristics, then the person does not benefit from a reduction in punishment but an increase in punishment.

The second change deals to the inclusion in the Criminal Code of the concept of crimes against LGBTI persons through information technology. Article 119 /a provide a new crime in the list of criminal offenses.

"Offering in public or intentional public distribution, through information and communication technology systems, of racist, homophobic or xenophobic content constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment".

So as we see if a person who has reached the age of criminal responsibility and through acts like public offering, intentional dissolution of homophobic materials is punishable by a fine or up to two years of imprisonment. This means more guarantee for the LGBT community.

Despite the progress made by Albania in the legal protection and advancement of the rights of lesbian, gay, bisexual, transgender and intersex persons, articles of the Criminal Code of the Republic of Albania continue to contain certain articles that continue to affect the dignity and integrity of persons LGBTIs and discriminate citizens on a gender basis and sexual orientation.

In contravention of the Constitution of Albania, the Law on Protection against Discrimination and the International Conventions signed by Albania, these articles continue to condemn homosexuality and mark it as special in sexual crimes against minors and adults. Also, some of them discriminate on a gender basis and use contradictory punishment standards that protect one sex but not the other that put the accused's genus on one sex but not the other.

Specifically, articles 100, 101, 102, 102 / a, 103, 104, 105, 106 and 107 of the Criminal Code are prejudicial and discriminatory to LGBTI persons because they emphasize sexual orientation, although crime for obvious reasons is the same punishable regardless of the orientation or gender of the perpetrator. Sexual violence against minors, women, people who are unmanageable to protect, threaten with weapons, abuse of office, guardians and in public places is and should be equally punishable regardless of whether it is homosexual or heterosexual , directed towards a male or female, by a male or female.

In fact articles 102 and 102/a of the Criminal Code are discriminatory because of sexual and gender orientation at the same time. Specifically, Article 102 punishes “violence sexual intercourse with adult women”. So it assumes that only adult women can be victims of sexual violence and that their perpetrators can only be husbands. Meanwhile, Article 102/a punishes “homosexual violence intercourse with adult “ by presuming that sexual crimes between same-sex persons are always committed by a male against another man.

The concept of gender and sexual orientation in the above articles is prejudicial, discriminatory and inconsistent with today’s worldview on sexual violence, national and international law and non-discrimination principles. Sexual violence remains sexual violence and it does not know orientation or gender.

Family Code

The right to marry is ranked among the fundamental human rights. This right belong to the category of social rights. As such, it is disciplined by the same general principles underlying this category of rights. Everyone has the right to marry and have a family. The use of the pronoun “*anyone*” means that there is no discrimination about it. The right to marry and to create a family is provided by Article 12 of the ECHR, which is closely linked to Article 8 of this Convention, which provides the right to private and family life. According to Article 12 of the ECHR “starting from the age allowed for marriage, the husband and wife have the right to marry and to create families under national laws governing the exercise of this right”.

The ECHR leaves the Member States the discretion to determine the age allowed for marriage. The ECtHR has an elaborated jurisprudence regarding the right to marriage. Albanian constitution delegates this to the specific law: “Marriage and marriage settlement is regulated by law”. So is the law, in our case, the Family Code, which will regulate in detail the right to marriage. The essence of the right to marriage is the formation of mandatory legal relationships between a man and a woman.

What is noticed is that the Family Code does not recognize the LGBT community the right to marriage and cohabitation. To this point , they are denied the right to have a

legal marriage and a legal cohabitation because of the way the Family Code describes marriage, it excludes members of this community to enter into a legal marriage and legal consequences for them.

From the formulation of the Family Code by marriage we will understand a voluntary union between a man and a woman, which means a heterosexual union and not a homosexual union. This formulation excludes members of this community to marry and enjoy family life as heterosexual couples. Further, the Family Code does not even know cohabitation as an alternative to marriage between these LGBT community. This has led the Ombudsman and the Commissioner for Protection from Discrimination to make recommendations for changes to the Family Code that would allow same-sex couples to legally coexist. Some of these changes consist exactly of Articles 163 and 164 of the Family Code which are proposed to be amended as follows:

Article 163 to be formulated:

“Cohabitation is a union of fact between two people living in a couple characterized by a common life that represents a character of stability and sustainability.” Through this change, legal recognition of cohabitation between same-sex couples becomes possible, because with this change coexistence will make up a union between the two persons and not a union between a man and a woman.

Article 164 to be formulated:

“The conditions and procedures of registration, the consequences of registration, the ways of completing coexistence and the personal and property relations between the co-habitants are regulated by a special law”.

The amendment to Article 164 concerns the possibility of providing for regulation by a special law of aspects regarding the conditions, the procedure, the registration and the personal and property consequences of coexistence. So far these two proposals are in the Ministry of Justice and there is no date when these proposals will be considered by the Albanian Parliament. The purpose of the proposed changes is to respond to the standards of freedom, equality and non-discrimination in matters relating to the enjoyment of family life. Also the purpose of these changes is to guarantee the albanian constitutional principle provided for in Article 53/1 that “everyone has the right to marry and have a family” and Article 52/2 that “marriage and family is specially protected from the state”.

Legal recognition of gender

Legal Recognition of Gender is the official recognition of a person’s gender identity, including gender and name or names in official records and important personal and public documents. The European Court of Human Rights has often taken decisions and

has expressed positively about the legal recognition of gender in order to protect and empower the rights of trans persons.

Transsexual persons have a gender identity that does not match the sex assigned to them at birth. This includes persons who intend to perform, are performing or have performed the physical change of gender as well as those who prefer to appear differently from the expectations that are born of the sex that is assigned at birth.

Albania has not had and does not have any specific laws pertaining to the legal status of the sexes. In practical terms this means that transgender people can not live in a way that fits in with the gender in which they want to live and belong to them. For example, a trans person who is a female but born as a male and who is registered as a "male" child can not have an identity card or passport that corresponds to the female gender or the name of a female. Also this person can not change the driving licence, school diploma or university degree. These are all legal, administrative and procedural barriers that adversely affect the life of a trans person.

Meanwhile, European legislation over the years has resulted in many problems because it is considered discriminatory and negative in practice. In many European countries, the legal change of gender may have one or more preconditions that are discriminatory or detrimental to a person's emotional and physical well-being, such as:

- Diagnosis of mental disorder;
- Medical treatments and surgical interventions;
- proof that has lived sufficiently in the requested sex;
- Being single
- Request for sterilization, etc.

Such requests violate the dignity of a person, physical integrity, the right to create a family, and to be free from any form of degrading and inhuman treatment. Due to the long advocacy efforts of trans and LGBT organizations in recognizing these issues, many countries have already introduced new laws on gender legal recognition that have eliminated these discriminatory practices or have made amendments to existing laws on the legal recognition of gender.

The Council of Europe Office in Albania, the Ombudsman and LGBT organizations have worked together with some of the best experts in drafting a bill that fits best practices that are non-discriminatory, fast and respectful dignity and human integrity. Currently this draft law has not been considered by the respective Ministries.

Cases of discrimination of the LGBT community in Albania

The first case occurred in 2011 and was about a gay couple in Tirana who were raped and discriminated by police and relatives. The event was reported at the PINK

Embassy after this couple had a family incident related to the fact that they were gay and cohabiting. One of the brothers of this couple had threatened to kill them and the couple had gone to the police station to report them. At the police station, they explained that they were laughing and ridiculed and that they were held for hours, blaming them for the incident. In this case, they had gone for reportation and not only did not hear their reportation about the threat of life but were also discriminated against by those who were there to defend them, thus double discrimination and psychological violence.

Imagine someone being threatened despite the fact that he is heterosexual, homosexual, etc. and when he goes to the police station that need to be serious and treat the case with the greatest seriousness and there to be discriminated against and mocked for the second time? We need to understand that law enforcement institutions are not at the right level to treat and non-discriminate members of this community. After the PINK Embassy received the announcement from the couple about the incident, she immediately informed the Commissioner for Protection from Discrimination through a letter of complaint and assisted the couple by offering free help through a legal aid in Tirana.

The second case belong to the “Perla” case in 2012 which was psychologically and physically abused, and was permanently isolated for five months by her 40-year-old brother. Perla was part of the transgender community and when her brother had learned he had shot her with the palm and pulled her out of the house by throwing her clothes in the yard. She showed that she had had no support from family members on that day and had left home by sleeping in a friend’s home. She had contacted the PINK Embassy and was assisted by this embassy. This case shows that the LGBT community still lives under constant pressure and physical and emotional violence not only from the society but also from the family and its members for denying or hiding the gender identity.

The third case belongs to the “Spahia” case. This case relates to the “Debate on Channel One” programme on 21.03.2013 where the topic was “Pedophilia in Albania”. This issue discussed about sexual abuse of children, a debate that took place in the event that occurred in the city of Tirana where a child was missing and another was sexually abused. Also invited to this show was Mr. Ekrem Spahia, who talked about the causes that led to these events. From his analysis, he found that the non-governmental organizations were guilty of this because they stimulated more homosexuals than children and imposing values that ruin the Albanian family.

He said that this category is the most worthless thing in human society and tries to impose it on Albanian society. After this broadcast, the Commissioner for Protection from Discrimination based on Article 32/1 / c of Law no. 10 221, dated 04.02.2010 “On Protection from Discrimination”, where it is sanctioned that the Commissioner has the

authority: “To carry out administrative inquiries after obtaining reliable information for violation of this law”, Article 46 of the Code of Administrative Procedures, according to whom: “The administrative proceeding may be initiated by the administration or at the request of the interested parties, the Commissioner with order no. 37, dated 05.04.2013, initiated the administrative proceeding against Mr. Ekrem Spahia, guest on this show.

After the proceeding, the Commissioner ruled that Mr. Ekrem Spahia’s statements were direct discrimination as they prejudiced dignity and undermined the right to security and protection from the violence of persons due to sexual orientation. Also, the Commissioner imposed the obligation of Mr. Ekrem Spahia, to publicly apologize within 15 days of getting to know this decision and to avoid in the future the use of language that produces the effect of promoting, distributing or promoting hate or other forms of discrimination against persons because of sexual orientation .

Recommendations and Conclusions

Based on the assessment of the current situation of LGBT people in Albania, a dynamic change model should be followed, which includes measures for legislation, social policy, public administration and services, in order to create a culture of inclusion and openness to diversity and strengthening the LGBT community. In this regard I suggest that the lawmaker should engage in some priority areas by making a series of related changes which aim to guarantee greater respect for the rights of LGBT people in Albania, non-discrimination and equality in all aspects of daily life. Some of these recommendations we provide are:

- Identify gaps in legislation to ensure non-discrimination and the rights of LGBTI persons. This requires a complex assessment of existing legislation and a set of recommendations regarding the gaps in the legal framework in the area of protection of rights and non-discrimination. Significant changes need to be made in specific codes and laws to guarantee more rights for LGBT persons such as the Family Code by recognizing them the right to coexistence, specifically Article 163. New legal prohibited measures should be initiated against discrimination due to sexual orientation .
- Establish a system of statistical data and easily accessible reporting on discrimination cases in relevant fields. This is related to the creation of new formats for the recording and reporting of incidents of discrimination at work, the provision of services and goods as well as statistical data. Also, new formats should be opened for health centers for the registration of persons seeking recognition and treatment gender identity and statistical data. Finally, the opening of formats for recording and reporting cases of homeless persons due to sexual orientation and gender identity.

- Ensure security and dignity in institutions through employee qualification and drafting non-discriminatory working protocols.
- Improve the employment situation for LGBTI people through information and awareness raising of employers and the provision of employment facilitation programs.
- Improve LGBTI access to community sports facilities by reducing discrimination.
- Improve legislation and inclusive policies for LGBTI persons. The change should be reflected in recognition of the right to asylum because of sexual orientation and gender identity.

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