

COMPARATOR AS THE ELEMENT OF DISCRIMINATION - IS THE THEORETICAL CONCEPT RECOGNIZED IN SERBIAN CASE LAW?

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Abstract

The legal definition of discrimination, stipulated by many national, regional and international documents, contains three elements: protected ground, less favorable treatment and a comparator. All three Serbian non-discrimination acts prescribe the special anti-discrimination civil procedure for protection against discrimination. To prove (the likelihood of) discrimination, by applying specific rules on burden of proof, one should point out that all three elements are present in a certain case. However, the case law of most relevant European courts points to certain cases of discrimination in which comparator is not necessary. By analyzing case law, the author examines whether Serbian courts understand and recognize the adequate comparator for (those) specific cases and anti-discrimination cases in general.

Keywords: *anti-discrimination law, a comparator, ECHR case law, CJEU case law.*

1. The legal framework of the anti-discrimination law

Legal framing of non-discrimination law has begun just after World War II. The United Nations adopted the Charter of the United Nations¹ in 1945. Three years later, the Universal declaration of human rights² was proclaimed by the United Nations General Assembly. Nowadays, it is considered to be the milestone document in the history of human rights. It is stipulated that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood (Art. 1). Furthermore, everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. No distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty (Art. 2). The International Convention on the elimination of all forms of racial discrimination³ was adopted in 1965 and opened for ratification. In 1966 two important documents were accepted: International Covenant on Civil and Political Rights⁴ and International Covenant on Economic, Social and Cultural Rights⁵. Both documents stress out that the rights enunciated in the covenants will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. One of the core documents in the field of anti-discrimination is surely the

¹ Charter of the United Nations, signed on 26 June 1945.

² Universal Declaration on Human Rights, proclaimed on 10 December 1948.

³ The International Convention on the elimination of all forms of racial discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965.

⁴ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

⁵ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

Convention on the elimination of all forms of discrimination against women, the so-called CEDAW Convention⁶. The CEDAW, among others, prohibits both direct and indirect discrimination, encourage formal as well as substantive discrimination and oblige state parties to embody the principles of equality and non-discrimination in their legislative. Convention of the rights of people with disabilities⁷ was passed by the General Assembly of the United Nations in 2006⁸.

Paralelly with the United Nations, the Council of Europe (CoE), most important european intergovernmental organization in the area of human rights and establishment of the rule of law, developed its own mechanisms for the protection of human rights. In 1950 CoE adopted the Convention for the Protection of Human Rights and Fundamental Freedoms⁹, still one of the most significant documents in this area. The prohibition of discrimination was established by Article 14: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. However, since 2000 the protection against discrimination has been even strengthened, by bringing the Protocol No. 12 following the European Convention. The Protocol expands the scope of the protection of the prohibition of discrimination to equal treatment in the enjoyment of any right, including rights under national law. There was no change in the list of non-discrimination grounds in Article 1 of the Protocol, in comparison with Article 14 of the Convention.¹⁰

At the national level, the protection against discrimination is stipulated by the Constitution¹¹. All are equal before the Constitution and law. Everyone shall have the right to equal legal protection, without discrimination. All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited (Art. 21). The first non-discrimination Act, Act on the prohibition of discrimination against people with disabilities¹² was brought in 2006. In 2009, two important acts were adopted. The first one, Act of gender equality¹³ prescribes the establishment of equal opportunities to accomplish rights and obligations, undertaking of special measures to prevent and eliminate gender-based discrimination and the procedure of legal protection of persons exposed to discrimination (Art. 1). The second one is the so-called umbrella act, Act on the prohibition of discrimination¹⁴ (hereafter: Anti-discrimination Act). Each of these acts has two parts - the first one, containing substantive law, and the second one contains the rules of procedure.

⁶ Convention on the elimination of all forms of discrimination against women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979.

⁷ Convention of the rights of people with disabilities adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007.

⁸ The listed documents (International convention on the elimination of all forms of racial discrimination, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the elimination of all forms of discrimination against women and Convention of the rights of people with disabilities, along with Convention against torture and other cruel, inhuman and degrading treatment or punishment, Convention on the rights of the child, International convention on the protection of the rights of all migrant workers and members of their families and International convention for the protection of all persons from enforced disappearance are considered to be core international human rights documents (<https://www.ohchr.org>, data accessed 8.6.2019).

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04/11/1950 - Treaty open for signature by the member States of the Council of Europe and for accession by the European Union.

¹⁰ „This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included“ (Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, p. 5), <https://rm.coe.int/16800cce48>, data accessed 20.6.2019.

¹¹ Constitution of Republic of Serbia, Official Gazette No. 98/2006.

¹² **Act on the prohibition of discrimination against people with disabilities, Official Gazzette No. 33/2006, 13/2016.**

¹³ Act on gender equality, Official Gazzette No. 104/2009.

¹⁴ Act on prohibition on discrimination, Official Gazzette No. 22/2009.

2. Types and elements of discrimination

Even though Anti-discrimination Act lists seven types¹⁵ of discrimination, it is stressed out that there are two main types - direct and indirect discrimination (Petrušić, Krstić, Marinković, 2014: 36).

According to Serbian Anti-discrimination Act, direct discrimination shall occur if an individual or a group of persons, on the grounds of his/her or their personal characteristics, in the same or a similar situation, are placed or have been placed or might be placed in a less favourable position through any act, action or omission (Art. 6). Indirect discrimination is defined by Art. 7: Indirect discrimination shall occur if an individual or a group of individuals, on account of his/her or their personal characteristics, is placed in a less favourable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary.

Though the legal definitions of discrimination are slightly different in different legal documents, there are three key elements essential to the term of discrimination: protected characteristic, less favorable treatment, and a comparator.

There are two ways commonly used to determine the scope of protected grounds. The first one uses the principle of *numerus clausus* - all of the enumerated grounds are listed and there is no space for stepping away even if the circumstances demand different¹⁶. The second way uses *exempli causa* principle - the listed grounds are given only for example¹⁷. If discrimination is based on some other ground, the court is obliged to protect the victim.

The interpretation of “protected ground” is broad. Sometimes, the victim itself is not a person with characteristics, but the one with presumed personal characteristics¹⁸ or the member of the family or the person close to one with characteristics.

Less favorable treatment can be explained as the treatment designed to make any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment). In the case of indirect discrimination, that is the equal treatment that leads to different consequences for people in different situation.

The comparator is the person in the same situation as the victim of discrimination. A comparator is a person in a materially similar situation, but with the main difference - protected ground (Handbook on European non-discrimination law, 2018: 44). Except for individuals, groups of people can also be compared. It is noted that two groups, adequate for comparison in one case, can be inadequate to compare in some other¹⁹. Still, there is a well-established case law of ECJ that where the detriment suffered by a woman is due to pregnancy, then it constitutes direct discrimination based on sex, there being no need for a comparator.

¹⁵ Direct discrimination, indirect discrimination, violation of the principle of equal rights and obligations, the prohibition of calling to account, Association for the purpose of exercising discrimination, hate speech, Harassment and humiliating treatment (Art. 6 - 12. Anti-discrimination Act).

¹⁶ This Act provides for the protection and promotion of equality as the highest value of the constitutional order of the Republic of Croatia, creates prerequisites for the realization of equal opportunities and regulates protection against discrimination on the grounds of race or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, disability, genetic heritage, native identity, expression or sexual orientation (Art. 1. Act on suppression of discrimination, Official Gazzette Croatia, No. 85/2008, 112/12).

¹⁷ The terms “discrimination” and “discriminatory treatment” shall be used to designate any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race, skin colour, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organisations and other real or presumed personal characteristics (Art. 1. par. 1. Act on the Prohibition of the discrimination Serbia).

¹⁸ For example, a waiter asks two girls holding hands to leave the coffee shop, assuming that they are lesbians, not just friends (Petrušić, Obradović, Raičević, Miladinović Stefanović, Tasić, 2017: 85).

¹⁹ While the Contracting States may be allowed a certain margin of appreciation to treat differently married and unmarried couples in the fields of, for instance, taxation, social security or social policy, it is not readily apparent why married and unmarried partners who have an established family life are to be given disparate treatment as regards the possibility to maintain contact by telephone while one of them is in custody (*Petrov v. Bulgaria*, No. 15197/02, 22 May 2008, para. 55).

The milestone case is *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* (C-177/88)²⁰. The same pattern is applied as for maternity leave²¹ and in vitro fertilization²². However, the new theoretical observations actually point out that sometimes there is no need for comparator – „the most traditional and widely used heuristic—comparators, who are similar to the complainant in all respects but for the protected characteristic—is barely functional in today’s economy and is largely unresponsive to updated understandings of discrimination“. It is proposed for a comparator to be treated as one of the several imperfect methodologies, rather than the key element of discrimination (Golberg, 2011: 731-812)²³.

3. The comparator in the cases for the protection of discrimination in Serbian case law

The Serbian Anti-discrimination Act stipulates special civil procedure against discrimination. There is no time limit for bringing the suit in front of the court. Four subjects are entitled to initiate the proceeding: victim of discrimination, Commissioner for equality, an organisation engaged in the protection of human rights or the rights of a certain group of people and a person who had deliberately exposed him/herself to discriminatory treatment intending to directly verify the application of the regulations pertaining to the prohibition of discrimination (Art. 46). They can demand: imposing a ban on an activity that poses the threat of discrimination, a ban on proceeding with a discriminatory activity, or a ban on repeating a discriminatory activity; that the court should establish that the defendant has treated the plaintiff or another party in a discriminatory manner; taking steps to redress the consequences of discriminatory treatment; compensation for material and non-material damage; that the decision passed on any of the lawsuits referred to in items 1-4 of this Article be published. The victim of discrimination can also demand compensation for pecuniary and non-pecuniary damage (Art. 43)²⁴. It should be emphasized that special rules concerning the burden of proof are applied in anti-discrimination proceedings²⁵.

3.1. The comparator in the case of pregnancy

The Commissioner for equality brought the claim against a bank²⁶. The victim of discrimination was a mother of three, who was the head of the branch before the maternity leave. After the return, she was offered annex to the contract²⁷ according to which she was transferred to the lower position. Her payment was decreased from around 80

²⁰ During pregnancy, Ms Dekker applied for a job. Even though considered to be the best candidate by the employer, she was rejected by selection committee due to pregnancy. „In the letter the VJV explained that the reason for the decision was that Mrs Dekker was already pregnant at the time of lodging her application and that, according to the information it had obtained, the consequence would be that, if the VJV were to employ her, its insurer, the Risicofonds Sociale Voorzieningen Bijzonder Onderwijs (Assurance Fund for the provision of social benefits in special education; hereinafter referred to as "the Risicofonds") would not reimburse the daily benefits that the VJV would be obliged to pay her during her maternity leave . As a result, the VJV would be financially unable to employ a replacement during Mrs Dekker' s absence and would thus be short-staffed“. The employer raised couple of questions in front of the court, and the most important answers are as following: „in that regard it should be observed that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave“. The fact that no man applied for the job does not alter the answer to the first question.

²¹ C-191/03, *North Western Health Board v. Margaret McKenna*, 8 September 2005. The case concerned a rule of a sick-leave scheme which provides for absences on grounds of illness to be offset against a maximum total number of days of paid sick leave to which a worker is entitled during a given period, irrespective of whether the illness is or is not pregnancy-related.

²² Ms Sabine Mayr was dismissed couple of days after the beginning of her IVF treatment. The court found that because IVF is a treatment that “directly affects only women”, “the dismissal of a female worker essentially because she is undergoing that important stage of IVF treatment constitutes direct discrimination on grounds of sex. C-506/06, *Sabine Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG* [GC].

²³ An example is also listed in the cited publication: discrimination, in the form of sexual harassment, could occur in a purely male work environment (*Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)).

²⁴ See more on anti-discrimination lawsuits: Tasić, 2016.

²⁵ See more: Tasić, 2018: 325-336.

²⁶ P 18254/12 (First Basic Court Belgrade), Gž 2746/14 (Apellate Court Belgrade).

²⁷ **According to Labor Act, if the worker refuses to sign the annex, he faces the cancellation of the labour contract (Labor Act, Official Gazette No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 - decision of Constitutional Court, 113/2017 and 95/2018 - authentic interpretation, Art. 179. Para. 5. p. 2).**

000 dinars to around 57 000 dinars. The mother of two adult children was appointed the head of the branch. The first instance court took as the evidence the statistic data regarding the position of the women who took maternity leave²⁸. The 14 out of 89 women were transferred to the lower position, 18 were already at the lowest position and 31 were at the maternity leave at the moment. However, the court found that there was no gender-based discrimination because one woman was replaced by another, and no discrimination based on family status because a mother was replaced by a mother. The second instance court confirmed the decision and explained that the change was motivated by the need of the working process. It was also said that not every change of the position after maternity leave means discrimination. The Supreme Court of Cassation turned the revision down and explained that it is the employer's right to choose the most competent person for the leading position. Neither did the Commissioner nor any of the courts pointed out to the famous decisions of the CJEU²⁹. On the contrary, the courts actually explained their decision by the lack of adequate comparator. They did not even take into consideration that in those type of cases the woman on maternity leave is a comparator to herself - whether the employer would transfer her to the lower position in case she was not pregnant. Unfortunately, the described case is an example of the misunderstanding of the specific position of the pregnant women, their position in the family and the society and the need for their protection, also stressed out by the Serbian Constitution³⁰.

3.2. The comparator in case of people with disabilities

Recent case law of the Supreme Court of Cassation³¹ also questions the understanding of the comparator among the members of Serbian judiciary.

The lawsuit was brought by a female worker, who claimed to be discriminated due to the health condition of a member of her family³². In the first place, she worked in one department of the company. By changing the internal Act of organization of the working process, the employer closed that department. Before transferring the employees in another department (so-called IMS department), the employer explained to them that the new department is founded and that workers with a health issue would be positioned there. It is expected that the working process would be easier for them in that case. Except for the claimant, in the same department were relocated workers with disabilities as well as workers who used sick leave more often. About two years later, a new Act of organization of the working process was entered into force. According to it, the IMS department was closed and the workers, including the claimant, lost their jobs.

The claimant stressed out that she is discriminated. However, the court pointed out that she was in the exact same situation as other workers in the same department. They were all fired. The fact that at the beginning she was not even a person with a disability, but the person who was absent from work due to her child's health issue was also pointed out. Her own disability was diagnosed later.

So, as the main argument, the court indicated that the claimant was in the same position as all the other people with disabilities. However, are they a good comparator? Are they comparator at all? Can the employer separate, or, even worse, segregate people with one personal characteristic into a divided group and then act towards them equally (inappropriate, unlawful)? Isn't it a good question whether the employer made the discrimination by separating people with disabilities in one department, even with the excuse that they would work easier type of jobs? If it is the affirmative measure, can it be defined so if, in the end, it leads to the worse position of the whole group? Even more, if it leads to the loss of one of the fundamental rights?

It can be compared with an interesting parallel - if the school principle segregates Roma children in one class and then give them a classroom in the schoolyard, away from the rest of the pupils, can he justify it by saying that he acts towards all Roma children in the same way? Can the previous behavior be overlooked?

²⁸ More on statistic data: Petrušić, 2014: 33-49.

²⁹ Even though Serbia is not the member of the EU, it was granted the status of an associated country to the European Union of by signing the The Stabilisation and Association Agreement (entered into force on 1 September 2013).

³⁰ Families, mothers, single parents and any child in the Republic of Serbia shall enjoy special protection in the Republic of Serbia in accordance with the law. Mothers shall be given special support and protection before and after childbirth (Art. 66. Par 1. and 2 of the Constitution).

³¹ Rev2 26/2017.

³² Case C-303/06, *Coleman v Attridge Law*, 2008 also deals with the discrimination based on disability of the member of the family.

4. Conclusion

Even though some new researches challenge that the comparator is one of the three essential components of discrimination, it is still considered being one of the key elements of discrimination. If the victim of discrimination wants to prove that he/she was treated less favorably, he/she must point to the person who presents a (good) comparator. There are, still, certain categories that do not need to point to the comparator. Those are, in the first place, pregnant women. However, the author analyzed the case from the Serbian case law that shows the lack of understanding of the issues related to the pregnancy. Insisting on the comparator in case of pregnancy is a clear sign that there is still place for further education of all members of the judiciary, especially in the field of the recent practice of ECHR and CJEU case law.

The second case analyzed in this paper indicates how the employer can "trick" the law and defend himself from allegation for discrimination. By creating the 'false' comparator, one can challenge basic postulates of anti-discrimination law. That is why the continuous analysis of the case law and pointing to both good and bad examples is crucial for the development of judiciary.

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