

**Network for Protection against Discrimination**

**REVERSING THE BURDEN OF PROOF IN COURT  
PROCEEDINGS FOR PROTECTION AGAINST  
DISCRIMINATION**

**Analysis and recommendations for promoting the effectiveness of court protection  
against discrimination**

*– public policy paper –*

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## Executive Resume

Effective court protection against discrimination in contemporary legal systems cannot be conceived without regulations on reversing the burden of proof from the person claiming to be the victim of discrimination to the person claimed to be discriminating. European standards on reversing the burden of proof are established with the case-law of the Court of Justice of the European Union (CJEU) and to a lesser degree of the European Court on Human Rights (ECHR), codified in several directives as general legal acts. For the purpose of harmonizing domestic legislation with these standards, in 2019 the new Law on Prevention and Protection against Discrimination (LPPD) was adopted, which introduced, among several other changes, an amendment to the provision on regulating the burden of proof in proceedings for court protection against discrimination.

The document contributed towards the promotion of the effectiveness of court protection against discrimination through a critical analysis of the legal framework prescribed with the new LPPD, which regulates proof in proceedings for protection against discrimination, and an analysis of past case-law, with a focus on the burden of proof. The document is based on research on the burden of proof in proceedings for court protection against discrimination.

According to the conclusions reached in the research, the provision from Article 37 of the 2019 LPPD regulating the reversal of the burden of proof is completely harmonized with the European Law prescribed with EU directives on protection against discrimination, and is more favourable for the plaintiff. However, the wording of the provision differs from the wording of existing provisions regulating the reversal of the burden of proof in discrimination cases in the Law on Labour Relations and the Law on Equal Opportunities for Women and Men, a potential problem in practice. With respect to the past application of the rule on reversing the burden of proof, in practice we have noticed differences in court approaches. In more than half of the analysed court decisions, the courts never stated their opinion on the burden of proof, failing to apply this rule, which significantly complicates access to effective proceedings for protection against discrimination. The reasons for such actions might be identified in the insufficient training, as well as the poor activity of higher courts in reaching harmonized application of the laws.

Surpassing the identified problems could be managed with legal measures, training and harmonization of court practice. It is necessary to initiate amendments to the Law on Labour Relations and the Law on Equal Opportunities for Women and Men towards harmonizing the provisions on the burden of proof in these laws with the provision from Article 37, paragraph 1 of the LPPD. Additionally, the Program for Initial and Continuous Training at the Academy for Judges and Public Prosecutors needs to be amended with the case-law of the CJEU on the burden of proof in proceedings on protection against discrimination. Furthermore, the Supreme Court of the Republic of North Macedonia, within its competences pursuant to the Law on Courts, needs to undertake proper measures for harmonized application of the rule on reversing the burden of proof in proceedings for protection against discrimination.

## Introductory notes

Discrimination is never manifested in an open and easily perceivable manner. Cases of people openly confessing to treating certain groups of individuals differently due to certain protection grounds are not common. The motive behind the different treatment often exists only in one's consciousness, i.e. the mind of the perpetrator, and can be the result of a subconsciously embed prejudice, or in some cases intention might be completely lacking. This leads to difficulty in proving discrimination cases, which is partly why the rule on reversing the burden of proof in such cases was introduced. However, the application of the rule faces significant challenges even among EU member states that have been applying it for a long period.<sup>1</sup> The challenges mostly arise since the rule itself is a deviation, an exception from the common, generally accepted and developed rule in civil procedures according to which each party in the proceedings is obliged to prove the facts on the grounds of which they are basing their claim. Reversing the burden of proof is relatively new, usually regulated with one provision incapable of answering all potential dilemmas in the practical application of the principle, such as: When is the burden of proof reversed? What is a *prima facie* case? Is any evidence required, and what kind, to reverse the burden of proof?

In the Republic of North Macedonia (RNM), after the numerous remarks on the wording and application<sup>2</sup> of the Law on Prevention and Protection against Discrimination adopted in 2010,<sup>3</sup> in May 2019, the Assembly adopted a new Law on Prevention and Protection against Discrimination (LPPD).<sup>4</sup> The new LPPD introduced several novelties<sup>5</sup>, including on the burden of proof, the focus of this text. Namely, the provision regulating the burden of proof, assessed by many experts as particularly rigid and prescribing the burden of proof “greatly to the plaintiff”, was amended.<sup>6</sup>

This document aims to contribute towards promoting the effectiveness of court protection against discrimination through a critical analysis of the legal framework and past case-law, with a focus on the burden of proof. It would allow us to determine whether the introduction of the novelty to the new LPPD on the burden of proof requires harmonization with provisions from the Law on Litigation Procedure (LPP) as a general law regulating civil procedures, as well as other laws. By offering an overview, analysis and comparison with European and domestic law and practice, the research assess past application of the rule, identifies the problems and challenges related to the correct application and interpretation, and offers recommendations on how to address these correctly. All of this is presented in the document in that order.

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<sup>1</sup> Lilla Farkas and Orlagh O'Farrell. *Reversing the burden of proof: Practical dilemmas at the European and national level*. European Network of Legal Experts in the Non-discrimination field. European Commission - Directorate-General for Justice and Consumers. 2014. стр. 73–78.

<sup>2</sup> See, for instance: Јадровски И., Јовановска К. Ј, Гелевска М., [Извештај за имплементација на Законот за спречување и заштита од дискриминација 2011 – 2018](#). Мрежа за заштита од дискриминација. Скопје, 2018 (Јадровски И., Јовановска К.Ј., Gelevska M., *Report on the Implementation of the Law on Prevention and Protection against Discrimination*); Цаца Н. М., Коцо В., Филипов С., [Анализа на недостатоците во Законот за спречување и заштита од дискриминација](#). Институт за човекови права. Скопје, 2014 (Саца Н. М., Косо В., Filipov S., *Analysis of the Weakness of the Law on Prevention and Protection against Discrimination*).

<sup>3</sup> Law on Prevention and Protection against Discrimination, “Official Gazette of RM”, no. 50/10, 44/2014, 150/2015, 31/2016, 21/2018, С. court no. 82/2010.

<sup>4</sup> Law on Prevention and Protection against Discrimination, “Official Gazette of RNM”, no. 101/2019 (hereinafter: LPPD). **Note: The Constitutional Court of RNM, with Decision no. C. no. 115/2019 from 28.01.2020 initiated a procedure for assessing the constitutionality of the Law on Prevention and Protection against Discrimination).**

<sup>5</sup> See explanation to [Draft-Law on Prevention and Protection against Discrimination](#).

<sup>6</sup> Supra note 1. p. 60.

# 1. European law and court practice on the burden of proof in court proceedings on protection against discrimination

Reversing the burden of proof as a rule in discrimination procedures was developed due to the need to achieve the principle of “*effectiveness of EU law*”<sup>7</sup>, and prevent and regulate the inability for practicing the rights prescribed with EU law and their protection.<sup>8</sup> It was established through the case-law of the Court of Justice of EU (CJEU)<sup>9</sup> in the cases *Enderby*<sup>10</sup> and *Danfoss*,<sup>11</sup> two cases related to discrimination on the basis of sex in relation to equal pay for equal work. If the law establishes the entire burden of proving discrimination on the plaintiff, “all the respondent needs to do in practice is to produce a colourable story, which casts doubt on the plaintiff’s version of events”<sup>12</sup> and thus win the lawsuit. In the case *Enderby*, the CJEU found that:

*Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory.*<sup>13</sup>

Later, this case-law was transferred into a legal act with the adoption of Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex (December 15, 1997). The rule on reversing the burden of proof from the Directive was reproduced in three of the key EU directives on discrimination – the Equal Treatment Directive,<sup>14</sup> The Race Equality Directive<sup>15</sup> and the Equality Framework Directive.<sup>16</sup>

The provision establishing the obligation for EU member states to provide reversal of the burden of proof in discrimination cases is identical in all three directives, stating the following:

*Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, **before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.***<sup>17</sup>

In addition to court proceedings, the provision also refers to other competent authorities. Furthermore, the Directives leave a possibility for the states to be able to establish more favourable rules on proof for the plaintiff. Reversing the burden of proof does not refer to criminal cases in which the state is prosecuting the perpetrator for a hate crime. The type and admissibility of the evidence before national court bodies remains in the competence of states, and provisions regulating these can be stricter than the rules applied by the CJEU and ECHR.<sup>18</sup> It is particularly important to stress

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<sup>7</sup> Paul Craig, Grainne de Burca. *EU Law – Text, Cases and Materials*. 6<sup>th</sup> edition. Oxford University Press. p. 959.

<sup>8</sup> Supra note 5. p. 14.

<sup>9</sup> This rule is simultaneously accepted by the European Court of Human Rights (ECHR).

<sup>10</sup> Case C-127/92 *Enderby v Frenchay Health Authority* 1993 ECR I-05535.

<sup>11</sup> Case C-109/88 *Danfoss* [1989] ECR I-3199.

<sup>12</sup> Ellis, E. and Watson, P. (2012). *EU Anti-Discrimination Law*. Oxford: Oxford University Press, p.157.

<sup>13</sup> Supra note 8. Paragraph. 18.

<sup>14</sup> Directive 2006/54/EC of the European Parliament and the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (last consolidated version) (5 July, 2006) – Article 19 (1).

<sup>15</sup> Directive 2000/43/EC of the Council on the implementation of the principle of equal treatment between persons irrespective of racial and ethnic origin (29 June, 2000) – Article 8.

<sup>16</sup> Directive 2000/78/EC of the Council establishing the general framework for equal treatment in employment and occupation (27 November, 2000) – Article 10 (1).

<sup>17</sup> Article 19, paragraph 1 of the Equal Treatment Directive.

<sup>18</sup> *Handbook on European Non-discrimination Law*. EU Agency for Fundamental Rights, 2010. p. 138.

paragraph 3 of the provision, according to which member states can choose not to apply the rule on reversing the burden of proof in proceedings in which the facts of the case need to be investigated by the court or another competent body in a procedure based on the inquisitorial principle.

Regardless of the fact that the aforementioned Directives have been fully transposed by all EU member states, there remain certain challenges referring to the reversal of the burden of proof, which creates problems in its application by national courts. Towards harmonized application and interpretation, the Court of Justice of EU developed a certain court practice regarding the rule's application presented further in the text and divided according to whether the cases involved direct or indirect discrimination.

### ***Direct Discrimination***

Direct discrimination, according to EU Directives, exists where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.<sup>19</sup> The key issue regarding the reversal of the burden of proof is what exactly is implied with the term “*facts from which it may be presumed*” that the person suffered direct discrimination. The court practice of CJEU offers a certain range of circumstances for establishing a *prima facie* case. According to Beale<sup>20</sup>, key circumstances on which CJEU has developed court practice refer to the facts capable of reversing the burden of proof and the standards of proof.

#### *Overview of key CJEU decisions referring to the burden of proof according to Beale<sup>21</sup>*

##### **a. Which facts are capable of reversing the burden of proof to the respondent?**

It is important to mention that in themselves none of these facts can reverse the burden of proof in advance, but rather a complete analysis of the case would be required. The CJEU identifies the following types of factors as capable of reversing the burden of proof:

- Giving discriminatory statements and comments in public (*Feryn*<sup>22</sup>, *ACCEPT*<sup>23</sup> *CHEZ – Nikolova*<sup>24</sup>);
- Different treatment is not sufficient to reverse the burden of proof (*CHEZ – Nikolova*);
- Facts referring to an actual or hypothetical comparator (*Brunnhofers*<sup>25</sup>, *Meister*<sup>26</sup>);
- A failure to disclose relevant documents and evidence upon the plaintiff's request, as well as lack of a reasonable explanation (*Meister*, *CHEZ – Nikolova*).

##### **b. What is the standard of proof required to reverse the burden of proof to the respondent?**

The wording of the Directives requires the plaintiff to prove facts from which “it may be presumed” that there has been discrimination, and imposes the question – what is the standard of proof required? The current position of CJEU was established in the case *Belov*<sup>27</sup> at the request of national courts on an opinion regarding whether the established facts have to indicate to a **conclusion** that there has been discrimination, or a simple **presumption** would suffice. In her opinion, AG Kokot concluded that for a reversal of the burden of proof only a “presumption” of discrimination is sufficient. Any

<sup>19</sup> Article 2 of the Equal Treatment Directive.

<sup>20</sup> Anna Beale. *Proving Discrimination: The Shift of the Burden of Proof and Access to Evidence*. 2018.

<sup>21</sup> *Ibid*.

<sup>22</sup> Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*.

<sup>23</sup> Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*.

<sup>24</sup> C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*.

<sup>25</sup> C-381/99 *Brunnhofers v Bank der osterreichischen Postsparkasse AG* [2001] ECR I-4961.

<sup>26</sup> C-415/10 *Meister v Speech Design Carrier Systems GmbH*.

<sup>27</sup> C-394/11 *Belov v CHEZ Elektro Balgaria AG* [2013] 2 CMLR 29; the CJEU later decided the case was inadmissible, so made no ruling.

stricter interpretation of the wording would jeopardize its practical effectiveness and mean that the rule on reversing the burden of proof would be practically redundant.

### ***Indirect Discrimination***

Indirect discrimination occurs when an apparently neutral provision, criterion or practice (PCP) could place a person from a certain sex at a particular disadvantage in comparison to a person from a different sex, unless this provision, criterion or practice is objectively based on a legitimate aim and the means of achieving that aim are appropriate and necessary.<sup>28</sup> The plaintiff needs to establish the factors from which it can be presumed that an apparently neutral PCP place at a particular disadvantage on discriminatory basis certain people or other people in comparison to other people. A particular challenge is the establishment of a presumption of a **disadvantage. Factors capable to contribute to this** are statistical data indicating to a disadvantage (Bilka-Kaufhaus<sup>29</sup>, Seymour Smith<sup>30</sup>).

### **Factors irrelevant for establishing discrimination**

Throughout its court practice, the CJEU established several factual questions which could accompany discrimination cases, which are irrelevant in determining whether the legal criteria for discrimination were met. Claims unnecessary to prove are:

- The motives and prejudices of the perpetrator. The law cannot regulate individual's attitudes, regardless whether these are "racist" or "sexist", but it can certainly regulate and sanction actions through which such attitudes are manifested.<sup>31</sup>
- The intention of the disputed rule or practice. It is not necessary to prove that a certain rule or practice have been established in order to produce different treatment. Even when the goals are altruistic, if the practice is oppressive to a certain group, then it qualifies as discrimination.<sup>32</sup>
- It is not necessary to prove the existence of an easily identifiable victim.<sup>33</sup>

## **2. Burden of proof in domestic law**

### **2.1. Burden of proof according to the 2019 LPPD**

One of the essential novelties introduced with the LPPP towards strengthening the efficiency of court practice against discrimination is the revision of the provision regulating the burden of proof in such proceedings.

*Table no. 1: Parallel presentation of the provision on the burden of proof in the LPPD from 2010 and 2019*

<b>Article 38 from the 2010 LPPD</b>	<b>Article 37 from the 2019 LPPD</b>
<b>Burden of proof</b>	<b>Burden of proof</b>

<sup>28</sup> Article 2 of the so-called Recast Directive.

<sup>29</sup> C-170/84 Bilka-Kaufhaus GmbH v Weber von Hartz [1986] ECR 1607.

<sup>30</sup> C-167/97 R v Secretary of State for Employment ex parte Seymour Smith and Perez [1999] ECR I-623

<sup>35</sup> Judgment, paragraph 60.

<sup>31</sup> C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV [2008] ECR I-5187.

<sup>32</sup> D.H. and Others v. the Czech Republic [Grand Chamber] (no. 57325/00).

<sup>33</sup> C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV [2008] ECR I-5187.



<p>(1) If a party in a court proceeding shall claim that in accordance with the provisions of this Law, his/her right to equal treatment has been violated, he/she is obliged to state all the facts and evidence justifying his/her claim. Proving evidence that there has been no discrimination is on the burden of the opposite party.</p> <p>(2) The provision from paragraph (1) of this Article shall not be applied in misdemeanour and criminal procedure.</p>	<p>(1) If a plaintiff shall claim that in accordance with the provisions of this Law discrimination has occurred, then this party is obliged to state all facts making the claim probable in which case the burden of proof that discrimination did not occur shall shift to the defendant.</p> <p>(2) The provision from paragraph (1) of this Article shall not be applied in a misdemeanour and criminal procedure.</p>
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An interpretation of the provision reveals several crucial elements which require separate analysis and clarification. These are: the plaintiff, the plaintiff's obligation to state facts, the moment when the burden of proof shifts and the defendant's obligation.

**a. The plaintiff**

With regards to the plaintiff, the provision is regulated in a manner as to clearly prescribe that the obligation for reversing the burden of proof refers not only to cases when the plaintiff is a person who believes to have been a victim of discrimination, but rather in lawsuits for protection of the public interest (*actio popularis*),<sup>34</sup> where the plaintiff can be an organization, foundation, etc. Using the wording “*if a plaintiff shall claim that in accordance with the provisions of this Law discrimination has occurred*” instead of the previous solution “*if a party in a court proceeding shall claim that in accordance with the provisions of this Law, his/her right to equal treatment has been violated*” clearly reveals the legislator's intention to relieve the burden of proof in all procedures for protection against discrimination, not only those directly initiated by the victims.

**b. Stating of facts**

According to the provision, the plaintiff's obligation is to “*state all facts making the claim probable*”. In comparison to the previous solution where the party “*is obliged to state all the facts and evidence justifying his/her claim,*” the more favourable approach for the plaintiff in the new solution is clear. According to the 2010 LPPD, the party had the obligation (burden) to state all facts and evidence justifying her claim, which, in fact, requires the party to prove that discrimination had occurred, while on the other hand, the 2019 LPPD requires only stating facts.

However, although more liberal, correct interpretation can be challenging in practical application. The plaintiff has the obligation “*to state all facts*” which “*make the claim probable*”. Stating facts is a process action carried out in the lawsuit with a submission or at a hearing no later than the pre-trial hearing or hearing for the main contention in disputes with small value. This includes stating and description of the events or actions that has led the plaintiff to believe there has been discrimination. The facts can refer to: protected characteristic (discriminatory ground), the action (or failure to act) which led to the discrimination, as well as the consequences suffered, which can take the form of a disadvantageous treatment, limitation of access to rights, damages and many other forms.

The dilemma in practice is whether the stating of the facts, without proof, is sufficient, or whether it is necessary for the plaintiff to offer certain proof. According to the case-law of the ECHR, “if the facts, as presented by the claimant appear credible and consistent with the available evidence, the ECHR

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<sup>34</sup> Prescribed with Article 35 of LPPD.

will accept them as proven, unless the State is able to offer a convincing alternative explanation.”<sup>35</sup> The ECHR shall accept as facts the assertions that are:

*supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions ... Proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact... Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the [ECHR] right at stake.*<sup>36</sup>

### **c. Facts making the claim that there has been discrimination probable**

The facts stated have to be in a form and scope making the claim there has been discrimination probable. In absence of an established standard of proof, and due to the abstract nature of the norm, certain challenges are to be expected during its application in practice. However, with the previously described practice of the CJEU, “facts making the claim probable” indicated to the conclusion that only a **presumption** there has been discrimination is necessary and not a clear **conclusion**. The stated facts, independently and together as a whole, have to cause doubt, presumption that discrimination has occurred in the relevant case. By reaching that, the burden of proof is shifted to the defendant.

### **d. The defendant’s obligation to prove there hasn’t been discrimination**

By shifting the burden of proof, the defendant is obliged to offer facts supported by evidence that would rebut the presumption for discrimination. If the defendant fails to do so, i.e. fails to prove there hasn’t been discrimination, the court will accept the plaintiff’s claim and determine discrimination. The defendant is able to rebut the presumption in two manners. By proving that the plaintiff factually is not in a similar or comparable situation with the comparator, or that the different treatment is not founded on a discriminatory ground but rather other objective differences in cases of direct discrimination. If the defendant fails to rebut the presumption, the other option is to present the circumstances which allow different treatment and prove that the measures were objectively justified and proportionate.<sup>37</sup> In cases of indirect discrimination, the defendant can claim and prove that the provision, practice or politics in question does not exist, that it wasn’t applied to the person claiming to be discriminated.

## **2.2. The LPPD as special vis a vis LLP as a general law**

Court protection against discrimination is conducted pursuant to the general rules of the litigation procedure, unless otherwise regulated with the LPPD.<sup>38</sup> In other words, the LLP provides the framework for protection, while the LPPD prescribes certain specific rules that digress from the regular procedure due to the specific subject of protection. The burden of proof is one of the elements differently regulated with the LPPD. The reversal of the burden of proof is a digression from the generally accepted principle that every party needs to prove the facts on the grounds of which they base their claim. This principle is contained in Article 205 of the LLP, according to which the burden of proof falls to each party who are obliged to state the facts and propose evidence on the grounds of which they are basing

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<sup>35</sup> *Handbook on European Non-discrimination Law*. EU Agency for Fundamental Rights, 2010. p. 137.

<sup>36</sup> ECHR, *Nachova and Others v. Bulgaria* [Grand Chamber] (no. 43577/98 and 43579/98), 6 July, 2005, paragraph 147. The same was confirmed with the case: ECHR, *Timishev v. Russia* (no. 55762/00 and 55974/00), 13 December 2005., paragraph 39, and ECHR, *D.H. and Others v. the Czech Republic* [Grand Chamber] (no. 57325/00), 13 November 2007, paragraph. 178.

<sup>37</sup> *Handbook on European Non-discrimination Law*. EU Agency for Fundamental Rights, 2010. p. 138.

<sup>38</sup> Article 32, paragraph 2 of LPPD.

their claims and thus rebut the findings and evidence of the opposite party.<sup>39</sup> The first issue that arises here is how applicable the LPPD is in litigation procedures, considering that it regulates the burden of proof differently.

The LPPD is a special law in comparison to the LLP, establishing specific court proceedings for protection against discrimination. As such, and pursuant to the principle *lex specialis derogat legi generalis*, the rules on reversing the burden of proof are part of the corpus of rules courts are obliged to apply in their decision-making. On the other hand, the LPPD is a law adopted with a simple majority vote, while the LLP as a systematic law is adopted with a two-third majority vote. Considering the principle *lex superior derogat legi inferior*, such a solution can (but doesn't have to) cause problems in practice, particularly in responses to lawsuits and defendants' objections, as well as by inertia considering that the majority of the cases examined in litigation procedures are decided upon according to the general rules of the LLP.

An additional argument for the dominant nature of the principle *lex specialis derogat legi generalis*, according to which the LPPD as a special law has an advantage before the relevant norm from the LLP, is the analogy with the procedures regulated with the Law on Family.<sup>40</sup> In the provisions from Article 222 to Article 279, the Law prescribes specific rules on procedures in the field of family law, establishing four separate, which due to the nature of the matter, visibly digress from the rules in the regular litigation procedure. The Law on Family is a law adopted with a simple majority, hence the unobjectionable application of the Law's process provisions in the past fails to offer any arguments against the application of the provision on reversing the burden of proof prescribed with the LPPD.

Reversing the burden of proof is not a novelty initiated with the LPPD. It exists in the Law on Labour Relations,<sup>41</sup> as well as the Law on Equal Opportunities for Women and Men.<sup>42</sup> It should be noted that the wording of the provision on reversing the burden of proof is different in all three laws, which can lead to different application and dilemma as to the moment in which the burden of proof reverses from the party claiming to be discriminated against to the person, subject claimed to have discriminated during the procedure.

### 3. Burden of proof in domestic court practice

#### a. Do courts invoke the provision from Article 38 of the LPPD?

In 48 (60%) of the verdicts, courts invoked Article 38 of the 2010 LPPD, while in the other 28 (34.5%) the provision was never quoted at all. In two verdicts, the court invoked Article 11 of the LLR. In the remaining decisions, the lawsuit was rejected or considered as withdrawn. **Accordingly, in 1/3 of court decisions, the court did not invoke the key provision referring to proof in procedures for protection against discrimination.** Consequently, the court failed to respect in full the obligation regulated with Article 327, paragraph 4 of the LLP, according to which the verdict shall contain in the explanation "*the regulations on which the court found its decision.*" The failure to quote the provision was analysed in the context of the whole explanation, from which it can be determined that the burden

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<sup>39</sup> Чавдар К., Чавдар К. *Коментар на Законот за парничната постапка*. Академик, Скопје 2016 (Chavdar K., Chavdar K. *Comments on the Law on Litigation Procedure*).

<sup>40</sup> Law on Family, Official Gazette or RM, no. 80/1992.

<sup>41</sup> Article 11 of LLR.

<sup>42</sup> Article 36 of LEOWM.

of proof was not formally reversed in all verdicts in which the provision was missing, with the exception of one verdict, where despite the failure to quote it, the explanation clearly states that the burden of proof was reversed.<sup>43</sup>

#### **b. Is the provision regulated with Article 38 argued in verdicts' explanations?**

Quoting the provision is not sufficient to conclude that it was applied in practice. The next element leading to the conclusion that the burden of proof was reversed is whether the court explicitly applied the provision in the explanation of the specific case by invoking it and whether it stated that the defendant failed to prove, or proved there has not been discrimination. **Such argumentation was identified in only 34 (42%) of the verdicts analysed, while in the remaining verdicts the court failed to state its opinion on the burden of proof.** The smaller number of verdicts arguing the burden of proof than the verdicts in which the provision is only inferred indicates to a certain formality in the stating of the regulations, without going too much in details on the fundamental application of reversing the burden of proof. The scope of the explanation is limited to stating that the defendant has proved, i.e. failed to prove discrimination did not occur, with a more detailed argumentation being an exception.

#### **c. Did the court apply the rule on reversing the burden of proof during its decision-making?**

An analysis of the verdicts' explanations leads to the conclusion **that in only 36 verdicts, less than half, the burden of proof was reversed, and the court clearly stated in its argumentation that the defendant proved, i.e. failed to prove discrimination did not occur.** This indicates to a low awareness of the obligation for reversing the burden of proof. It is apparent that the failure to apply the imperative process provision in more than half of the analysed verdicts is troubling, pointing to a necessity for advocating for proper and correct application. The fact that in some verdicts the courts based their decision explicitly and clearly by applying the rules on the burden of proof is good practice. Consequently, Primary Court Berovo in a 2017 verdict found that:

*[...] pursuant to the above-quoted Article 38, paragraph 1 of LPPD, it is indisputable that the burden of proof that discrimination against the plaintiffs did not occur falls on the defendant. The defendant did not act pursuant to these provisions, since during the procedure the defendant failed to offer any proof, confirmation, minutes or similar documents to confirm the fact that the plaintiff and his family were returned only because they did not possess the necessary documentation. Furthermore, the defendant failed to deliver the written evidence mentioned by the witness with initials T.S., employed at MOI-PS for GK. T that first, on 13.10.2010 a document was produced – minutes that the plaintiffs were at the border crossing T. without all necessary documents, and that also according to the written order they had – a telegram and other directions for acting in such cases, which telegram was not presented to the court as evidence by the defendant, while it is indisputable that he did not allow the plaintiffs to cross the border, but rather they were ordered to get off the bus which was filled with passengers.<sup>44</sup>*

By applying the provision from Article 38, paragraph 1 in this manner, the court mitigated its restrictiveness, mentioned previously. Consequently, the Primary Court in Bitola, in a 2019 verdict offers an explanation on the reasons for reversing the burden of proof to the defendant.

*Considering the quoted provisions, particularly the provision from Article 38, paragraph 1 of the Law on Prevention and Protection against Discrimination, which prescribes that the burden of proof that discrimination did not occur falls to the defendant, it is the Court's opinion that the plaintiffs delivered evidence to make it probable that they suffered discrimination when they were refused to exit the country, while the defendant failed to prove that discrimination did not occur, i.e. the actions taken by the police officers were no*

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<sup>43</sup> Primary Court Skopje 2, P4-1091/17 from 02.09.2018.

<sup>44</sup> Primary Court Berovo P4 no. 2/2016 from 27.09.2017.

*different than actions taken with all other citizens. The plaintiffs were not allowed to leave RM by the officers employed by the defendant at the border crossing without any reason, which led them to an unequal position compared to other citizens of RM. The defendant failed to prove justified, regulated reason not to allow the plaintiffs leave the country and that discrimination did not occur in this case.*<sup>45</sup>

The rules on reversing the burden of proof is applied by primary courts when acting pursuant to the directions of the Court of Appeals. The Primary Citizen's Court in Skopje in a retrial found that:

*Regarding the indication by the Court of Appeals that it is not clear as to how the conclusion that the defendant was going to continue the employment of the plaintiff if she hadn't been pregnant was reached, and considering that her employment contract was temporary, pursuant to Article 38, paragraph 1 of the Law on Prevention and Protection against Discrimination, proving that discrimination did not occur falls on the burden of the opposite party. In the specific case, the defendant failed to prove to the Court that the plaintiff wouldn't have remained employed with him even had she not been pregnant, moreover, when the plaintiff received a document for termination of employment six other workers were employed, and the defendant failed to deliver proof that the reason to terminate the plaintiff's employment is not her pregnancy.*<sup>46</sup>

Verdicts reached by the Court of Appeals, unfortunately, apart from occasionally invoking the provision from Article 38 of the LPPD, do not offer detailed explanation and examination of the elements that might contribute to a more developed court practice on this issue. There is an impression that higher court practice in the interpretation of such provisions is lacking, which at this stage can be the result of the relatively small number of cases, or that this issue was not disputed by the parties, which, on the other hand, cannot be concluded simply from analysing the verdict without an insight in the cases.

## 4. Conclusions

- The new LPPD adopted in 2019 is a significant step forward towards the promotion of the legal framework regulating protection against discrimination in the country. Having specified the wording of the provision regulating the burden of proof in the interest of the plaintiff, prescribing new evidence (statistical data and examining the situation) and prescribing a lawsuit for protection against discrimination in the public interest (*actio popularis*), establishes a legal framework which should promote the efficiency of court protection against discrimination.
- Article 37 of the LPPD regulating the reversal of the burden of proof is completely harmonized with European directives on protection against discrimination. However, the wording of the provision differs in the existing provisions regulating the reversal of the burden of proof in discrimination cases in the Law on Labour Relations and the Law on Equal Rights and Equal Opportunities. The different wording could possibly cause problems in practice, particularly considering that discrimination is a common occurrence in labour relations.
- The Law on Litigation Procedure does not prevent uninterrupted application of the rule on reversing the burden of proof. The LPPD is a special law, hence pursuant to the principle *lex specialis derogat legi generalis*, the provision from Article 37 of the LPPD has precedence and should be applied. The analysis of past case-law conducted for the purposes of this research does not indicate to a broad practice of disputing the applicability of the LPPD regarding the burden of proof. Furthermore, the already established practice of regulating special procedures decided upon in litigation proceedings with special laws (for instance the Law on Family)

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<sup>45</sup> Primary Court Bitola P4 no. 123/17 from 30.3.2018.

<sup>46</sup> Primary Court Skopje 2 PO-980/17 from 06.07.2017.

reveals that the current litigation procedure can be considered as a sufficient frame for the application of the provision from Article 37 of the LPPD.

- The application of the rule on reversing the burden of proof in practice remains not harmonized, despite the instances of good practice. In 2/3 of the verdicts, the courts state the provision from Article 38 of the 2010 LPPD, while in 1/3, the provision is never mentioned, which indicates that in 1/3 of the procedures, the courts never considered it as relevant to their decision-making process in the proceeding for protection against discrimination. In more than half of the proceedings, the court never stated its opinion on the burden of proof, which significantly obstructs access to efficient court proceedings for protection against discrimination.
- The role of higher courts in the harmonization of the application of the rule on reversing the burden of proof is insufficient. Verdicts reached by higher courts, with certain exceptions, fail to offer clear directions regarding the application of this rule in individual proceedings.
- The manner of keeping court statistics and data processing fails to provide access to complete data on the initiated court proceedings for protection against discrimination and their outcomes, which prevents monitoring and analysis of court practice *inter alia* and on the reversal of the burden of proof.

## 5. Recommendations

### To the Ministry of Labour and Social Policy

- During amendments to the Law on Labour Relations and the Law on Equal Opportunities for Women and Men harmonize the provisions contained in these laws referring to the burden of proof with the provision from Article 37, paragraph 1 of the LPPD, bearing in mind the provision from Article 51 from the LPPD.

### To the Ministry of Justice

- Two options are proposed regarding the LLP:
  - Option 1: No interventions to the provisions from the LLP referring to the burden of proof. Conclusions from the conducted analysis show that the existing legal framework on litigation procedure does not prevent the application of the rule on reversing the burden of proof due to the application of the principle *lex specialis derogat generalis*.
  - Option 2: Due to the normative harmonization of the regulations, Article 205 of the LLP can be amended with a guiding provision according to which the provisions from the LPPD shall be applied in proceedings for protection against discrimination.
- Adopt amendments to the Court Rules of Procedure in the part referring to keeping court statistics, which would allow monitoring the number and status of court cases initiated for protection against discrimination.

### To the Academy for Judges and Public Prosecutors

- Amendments to the Program for Initial and Continuous Training with the court practice of the CJEU, ECHR, as well as EU law on the burden of proof in proceedings for protection against discrimination.

**To the Supreme Court of RNM**

- Undertake proper measures within its competences pursuant to the Law on Courts for harmonized application of the rule on reversing the burden of proof in court proceedings for protection against discrimination.

**To civil society organizations and professional associations**

- Organize training for legal practitioners on the case-law of the CJEU and ECHR, as well as EU law on the burden of proof in proceedings for protection against discrimination.

## Annex no. 1: Research methods

During the development of this document, we conducted a research on the burden of proof in proceedings for court protection against discrimination. More precisely, the legal framework regulating the burden of proof on the one hand, and its application in practice, on the other. The research aimed to find answers to the two following research questions:

1. Do, to what extent and in which manner the provisions from the LLP as a systematic law on litigation procedure, provide direct application of the provision from Article 37, paragraph 1 of the 2019 LPPD that regulates the burden of proof in proceedings for protection against discrimination pursuant to EU standards in this field?
2. Was, to what extent and in which manner the rule on reversing the burden of proof prescribed with the 2010 LPPD applied in past case-law related to proceedings for protection against discrimination? Which provisions do courts invoke, and with what kind of explanation, when assessing the stated evidence and establishing the factual situation?

The relevant regulations, on national and EU level, as well as the available and relevant literature on this issue as the subject of our research, were gathered with an office research.<sup>47</sup> Collection of the primary data was conducted by submitting requests for free access to public information to all courts. The requests asked for statistical data on the number of initiated proceedings on the basis of *discrimination/unequal treatment/violation of the right to equality*, and a sample of the verdicts reached between 2011 and 2019.

However, due to the manner of keeping and managing court statistics, access to complete data was limited. In order to complete and verify the data, we searched for the keyword “discrimination” on the web portal [www.sud.mk](http://www.sud.mk), on which verdicts are published.

According to the data received, 156 court proceedings were initiated in total during the research period, 81 of which first-instance and 61 second-instance verdicts. Data on the outcome from the proceedings in a statistically-processable form were not delivered. According to the data collected, most of the proceedings (92) were initiated before the Primary Civil Court Skopje, followed by the court in Bitola with 48 proceedings, Berovo with 5, Shtip with 4, Resen with 2 and Struga, Radovish and Kratovo each with 1 proceeding. Out of the 81 analysed first-instance verdicts, most refer to discrimination on the basis of ethnicity (51), followed by health condition (4), sex (4), personal or social status (4), disability (3), and one on the basis of age and political affiliation. Discriminatory basis was not stated in 7 of the proceedings. Most of the analysed verdicts refer to racial profiling of Roma on border crossings by MOI. The subject in 22 of the verdicts was employment disputes, while the other verdicts were reached in regular litigation procedures.

In 4 of the verdicts reached the lawsuit was granted, in 24 rejected, while in the other cases the lawsuit was declined or withdrawn. It should be noted that plaintiffs often claim discrimination in proceedings on employment disputes without stating a discriminatory ground. The proceedings are mostly the result of disputes related to exercising employment rights and often mobbing, the subject of other rights violations but not the right to equality.

The received data revealed a serious problem in the documenting and keeping of records since most of the courts informed us that they have never acted in proceedings of this type, although an insight

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<sup>47</sup> Bibliography listed in the annex to the document.



in the web portal [www.sud.mk](http://www.sud.mk) indisputably proved the contrary. This fact, as a result, imposed as a limitation to the research methodology.

The data analysis was conducted through an examination of EU literature and regulations on European standards, while with domestic regulations we applied the descriptive and comparative method. Court verdicts were analysed by employing a framework consisting of the following indicators:

- Basic classification indicators:
  - o Discriminatory grounds;
  - o Brief description of the facts in the case;
  - o Verdict reached.
- Indicators on the burden of proof:
  - o Does the court in the explanation of the verdict invoke Article 38 of the LPPD (or Article 11 of the LLR in cases of employment discrimination) with respect to Article 327, paragraph 4 of the LLP, according to which the court must state the regulations on the grounds of which the verdict is based?
  - o Does the court offer explanation and interpretation, and in what manner, of Article 38 of the LPPD (or Article 11 of the LLR in cases of employment discrimination)?
  - o Can it be concluded, on the basis of the comprehensive evidence and allegations contained in the explanation of the verdicts that the court reversed the burden of proof? In cases when the court did not reverse the burden of proof did it offer any explanation as to why it choose to do so, and if an explanation was offered, how did the court justify such an action?

## Annex no. 2: List of analysed domestic court verdicts

Primary Court	No. of decision	Date of decision	Primary Court	No. of decision	Date of decision
Berovo	P4 no. 26/2015	17.09.2015	Bitola	P4 35/18	02.10.2018
Berovo	P4 2/16	27.9.2017	Bitola	P4 45/18	14.09.2018
Berovo	P 4 14/16	02.11.2016	Bitola	P4 50/18	11.06.2018
Bitola	P 4 202/16	25.04.2017	Bitola	P4 51/18	11.06.2018
Bitola	P 4 35/17	10.10.2017	Bitola	P4 67/18	15.03.2019
Bitola	P 4 46/17	14.09.2017	Bitola	P4 76/18	26.11.2018
Bitola	P 4 50/17	14.07.2017	Bitola	P4 82/18	16.10.2018
Bitola	P 4-58/17	30.03.2018	Bitola	P4 97/18	16.11.2018
Bitola	P4-64/17	19.12.2017	Bitola	P4 16/19	11.07.2019
Bitola	P 4 66/17	01.12.2017	Debar	RO 23/13	13.05.2014
Bitola	P 4 82/17	20.10.2017	Debar	RO 1/15	20.02.2015
Bitola	P 4 87/17	07.02.2017	Kratovo	P4-13/15	11.02.2016
Bitola	P 4 97/17	30.03.2018	Radovish	RO 51/18	30.10.2019
Bitola	P 4 107/17	26.10.2017	Resen	P4 29/17	17.11.2017
Bitola	P 4 110/17	26.10.2017	Resen	P4 7/18	09.05.2018
Bitola	P 4 113/17	22.11.2017	Shtip	Ro.449/13	17.02.2014
Bitola	P4 114/17	05.02.2018	Shtip	Ro. 410/18	23.11.2018
Bitola	P4 121/17	29.10.2017	Skopje	11 P4 1046/15	30.05.2017
Bitola	P4 122/17	22.11.2017	Skopje	P4 641/17	01.11.2017
Bitola	P4 123/17	30.03.2018	Skopje	RO-974/14	02.07.2015
Bitola	P4 130/17	07.09.2018	Skopje	RO-980/17	06.07.2017
Bitola	P4 159/17	09.02.2018	Skopje	RO-956/17	13.02.2018
Bitola	P4 187/17	22.03.2018	Skopje	P4-453/17	17.07.2017
Bitola	P4 205/17	30.01.2019	Skopje	P4-1424/15	25.04.2016
Bitola	P4 1/18	16.05.2018	Skopje	RO-472/15	03.07.2015
Bitola	P4 2/18	09.07.2018	Skopje	RO.6p.143/14	19.03.2014
Bitola	P4 3/18	10.04.2018	Skopje	RO-469/14	30.09.2014

Bitola	P4 9/18	07.05.2018	Skopje	RO-1076/14	06.05.2015
Skopje	P4.no.730/15	10.11.2016	Skopje	P4-709/15	28.10.2018
Skopje	RO-531/13	12.02.2014	Skopje	RO-1121/16	26.04.2017
Skopje	P4.no.64/17	21.11.2018	Skopje	P4-171/15	17.03.2016
Skopje	RO-178/17	03.05.2017	Skopje	P4-171-15	05.01.2017
Skopje	P4-1277/14	24.12.2014	Skopje	P4-1228/13	4/11/2014
Skopje	PO-1305/14	01.07.2017	Skopje	P4.no.625/17	4/19/2018
Skopje	P4.no.625/17	19.04.2018	Skopje	RO-971/14	6/16/2016
Skopje	RO-1969/17	05.03.2018	Skopje	P4-1318/15	5/9/2016
Skopje	RO-618/15	03.03.2016	Skopje	P4-932/17	3/28/2018
Skopje	RO-904/15	18.12.2015	Skopje	P4-1091/17	2/9/2018
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