

"Ignorantia Legis Neminem Excusat" In the Area of Equality and Non-Discrimination - The Case of Macedonia

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Abstract

Discrimination (Indirect discrimination) represents placing any person or group in unfavorable position in comparison with other persons, by adopting the provisions, prominent natural criteria or by taking certain practices, unless in a case when these provisions, criteria or practices result from legitimate objective and the means for the achievement of that objective are appropriate and necessary. The legislator is oriented in treating the person or group in similar conditions and various ways. Here the criterion of similarity of individuals is taken into consideration disregarding the broader context of the conducted treatment.

The spirit of the concept of equality and non-discrimination is not satisfactory according to the "formal equality" therefore "substantive equality" should also be conceived. People in different situations should be treated differently. This point of view is supported in the "equality of results" and "equality of opportunity". "Substantive equality" depends on several factors in each case separately, for example nationality, nature of occupation or activity or the conditions in which that profession is performed, providing resources, opportunities etc. Therefore in each case an objective and reasonable justification should be provided

Keywords: discrimination (indirect discrimination), formal equality, substantive equality, law

1. The legal framework of Republic of Macedonia

Anti-discrimination provisions of Republic of Macedonia prescribe general prohibition of discrimination in all areas of social life. Discrimination is prohibited by the Constitution. In Article 9, the Constitution provides that "the citizens of Republic of Macedonia are equal in their freedoms and rights regardless of sex, race, color, national and social origin, political and religious beliefs, property and social status"

According article 4 of the Law on Prevention and Protection against Discrimination, all state bodies, local government bodies, legal persons with public authorities and legal persons and individuals from all areas are required to prevent and protect citizens from discrimination on all grounds. In article 6 of the Law the types of discrimination are defined. Direct discrimination encompasses any unfavourable treatment, distinction, exclusion or limitation which results or may result in deprivation, disruption or limit the equal recognition or enjoyment of human rights and fundamental freedoms, compared with the treatment that the person has or another person could have in the same or similar conditions.

Indirect discrimination on discriminatory grounds means placing a person or group in a particular unfavourable position compared to other persons by adopting apparently neutral provision, criteria or by undertaking certain practices, unless such provisions, criteria or practices are derived from a legitimate objective and the means for the achievement of that objective are appropriate and necessary¹.

The legal principles "Ignorantia legis neminem excusat" (law ignorance is not justified) resulted with the fact that the man who is conscious and responsible in front of the law can't escape from the responsibility of breaking the law just because he / she was not aware of its contents.

The essential public character of the law requires the legal solutions to be applied to anyone. Nobody can justify

¹ Even If in article 3 of the Law on Prevention and Protection from Discrimination the sexual orientation is not exhaustively listed numerically as discrimination ground, still that provision contains an open list of discrimination grounds. The Commission for Protection against Discrimination (CPD) acted upon complaints for protection against discrimination based on sexual orientation, taking into consideration the mentioned fact, the legal strength of internationally ratified acts and the application of practice by the European Court of Human Rights (ECHR).

their behaviour on the grounds that he/she was not aware of the legal decision¹.

Among other things, for this complex issue in Macedonian circumstances, the Commission for Protection against Discrimination of Republic of Macedonia identifies the two main reasons for the invisibility of the issue of sexual orientation as a ground for discrimination². First of reasons is legal regulation. In the Criminal Code of Republic of Macedonia sexual orientation is not foreseen as discriminatory ground³ and the Law on Audio and Audiovisual Media Services does not include sexual orientation as a ground of discrimination in an exhaustive way and determines respect of the law of the European Court of Human Rights (hereinafter ECHR)⁴.

Article 20: "The person who on the grounds of sex, race, colour, gender, belonging to a marginalized group, ethnicity, language, nationality, social background, religion or religious belief, other beliefs, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property status, health status or any other grounds provided by law or ratified international treaty deprives or limits human and civil rights established by Constitution, law or ratified international treaty, or based on all these differences favours citizens contrary to the Constitution, law or ratified international agreement, shall be punished with imprisonment of three months to three years.

Article 21: "The person who will threaten to commit a crime which is punishable with imprisonment of five years or more against a person through an information system because of their belonging to a particular sex, race, color, gender, belonging to a marginalized group, ethnicity, language, nationality, social background, religion or belief, other beliefs, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property status, health condition, or any other grounds provided by law or ratified international agreement, shall be punished with imprisonment of one to five years. "

Article 74:

(1) The person who by force, mistreatment, endangering security, ridicule of national, ethnic, religious and other symbols, burning, destroying or otherwise damaging the flag of Republic of Macedonia or flags of other countries, damaging objects, desecrating monuments, graves or on other discriminatory way, directly or indirectly, causes or incites hatred, discord or intolerance based on race, color, gender, belonging to a marginalized group, ethnicity, language, nationality, social background, religion or belief, other beliefs, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property status, health status, or any other grounds provided by law or ratified international agreement, shall be punished with imprisonment of one to five years.

(2) A person who commits the crime under paragraph (1) of this Article by abusing his position or authority, or if these crimes caused riots and violence against people or property damage of a large scale, shall be punished with imprisonment of one up to ten years. "

¹ Regarding the mission on prevention and protection against discrimination, the CPD as a jurisdiction object has the conduction of campaigns for raising public awareness among particular population groups. The adoption of opinions and recommendations by the CPD can be treated with two functions: acting on specified complaint / existing indications and education, raising awareness among citizens about the principles of equality and non-discrimination. The CPD has taken into consideration the difficulty citizens to be informed about the legislation, court practice and scientific views, regarding the average citizen's way of life. The quality of knowing these sources of law has an influence in the behavior, actions or acts of individuals / legal entities.

² Subject no.07/374/1 of the Coalition of sexual and health rights of marginalized communities vs A.S., www.kzd.mk

³ (Official Gazette of R. Macedonia, no.27 / 2014). In all the changes of the Criminal Code the sexual orientation is not foreseen as a reason or ground for discrimination, even though the implementation of international agreements is mentioned.

⁴ ("Official Gazette" of Republic of Macedonia no. 184/2013, 13/2014, 44/2014, 101/2014 and 132/2014) article 48 contains:., The audio and audiovisual media services must not contain programs endangering national security, incite violent overthrow of the constitutional order of Republic of Macedonia, call for military aggression or armed conflict, encourage or spread discrimination, hostility or hatred based on race, sex, religion or nationality. The specific prohibitions on this Article should be in consonance with the practice of the ECHR

Article 79: "The person who through a computer system in the public spreads racist and xenophobic written material, pictures or other representation of an idea or theory that helps, promotes or incites hatred, discrimination or violence against any person or group on the basis of gender, race, color, gender, belonging to a marginalized group, ethnicity, language, nationality, social background, religion or belief, other beliefs, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property status, health status, or any other grounds provided by law or ratified international agreement, shall be punished with imprisonment of one to five years. "

Article 84: "The person who based on the differences of sex, race, color, gender, belonging to a marginalized group, ethnicity, language, nationality, social background, religion or religious belief, other beliefs, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property status,

The second reason is the medical character. The persons with a different sexual orientation are treated as sick people or people who are suffering from a disease. But the World Health Organization since 1990 removed homosexuality from the International Statistic Classification of diseases and health problems.

2. Language of hatred

The Commission for Protection against Discrimination raises the fact that the expressions "homosexuality is a disease" and "homosexuals need professional medical help instead of legal assistance" are unfounded, misinforming the public.

The recommendation CM / Rec (2010) 5 of the Committee of Ministers of the Council of Europe "Measures to fight discrimination based on sexual orientation and gender identity" adopted in March 31, 2010, is taken into consideration by the Commission in this explanation. This recommendation was brought taking into account the case law of the ECHR. The Committee of Ministers recommends States to take measures to protect the right to life, security and defense from violence on the person because of their sexual orientation and gender identity. Under the guarantee of this right, it is recommended that "Member States should take the necessary measures to fight all forms of expression, including the media and the Internet, which can be taken in a reasonable manner as probable in causing the effect of encouraging or spreading hatred or other forms of discrimination against gay persons, lesbians, bisexuals and transsexuals. One such "language of hatred" is prohibited and we should publicly face the challenge when that will happen. All measures should be respected, the fundamental right to freedom of expression in accordance with Article 10 of the European Convention on Human Rights and the jurisprudence of the ECHR.

So we see that the "language of hatred" against the persons that are gay, lesbian, bisexual and transsexual (LGBT) applies to all forms of expression, widespread through the media and over the Internet, which incite, promote or justify hatred, discrimination or hostility towards the LGBT.

The Commission considers that the assessment whether certain expressions or statements will be regarded as "hate speech" should be conducted in accordance with the freedom of expression guaranteed in Article 10 of the Convention¹.

3. Using comparison

Under the principle of equality and non-discrimination the concept of using a comparison plays an important role. During the creation of the case prima facie, the person seeking protection against discrimination will have to use a comparison. He should make a comparison with another person or another group in the same condition where in a same situation there's a different treatment, exceptional or differentiated. The treatment of discrimination is determined using a comparison. In the procedure of protection against discrimination, the party that raises a

¹ ECHR treats sexuality as a matter of privacy, protected privacy. Verbal attacks or attacks through media material in a form of painting, cartoon, or other means of expression, against the members of sexual minorities are not considered as protected under Article 10. However, the ECHR in such cases usually invokes upon Article 14 of the Convention.

This position is established taking into consideration the case *Vejdeland and others versus Sweden*, the case no.1813/07. In that case the ECHR establishes the principle that homophobic statements and media materials do not fall into a legitimate exercise of freedom of expression protected by the Convention.

pretense of equality and non-discrimination should find an appropriate comparison. Such thing is not easy. There are situations when it's not possible to find a suitable comparison for the creation a case prima facie. In cases where it's not possible to find comparator, the Complaint for protection from discrimination should not be refused by the Commission, if the complainant, raised the prima facie case comparing his treatment within the essential standards which are referred to equality and non-discrimination, personal political, economic, social and cultural rights provided by the Constitution, international laws and the laws in force.

For this reason, in the analysis of the words "homosexuals need professional and medical help instead of legal assistance" which are used by the journalist and allowed by the editor, the Commission intended to review that expression in terms of overcoming the sanctioned freedom of expression. Commission refers to the limits provided in Article 10 of the Convention on freedom of expression and the points of view of the ECHR.

The implementation of freedom of expression contains duties and responsibilities. Under the second paragraph of Article 10 of the Convention, the exercise of this freedom can not violate the dignity and rights of others.

The expressions "homosexuals need professional medical help instead of legal assistance", used to address the LGBT in the journalist's article can create a perception that they are not good people, a sense of misunderstanding, refusal and even hatred¹.

According to the points of view of the ECHR, discrimination on the grounds of sexual orientation is as serious as discrimination based on "race, origin or color"².

In the reported case, the Commission takes into consideration another important fact - the position of the journalist and the editor in chief as a public relations person, or a TV media with credibility and popularity. The freedom of speech in the sphere of media is very essential.

But the freedom of speech can't be absolute. The importance of freedom of speech for one person - a journalist in a particular medium, contains a greater responsibility to show more attention and to avoid language that encourages intolerance and discrimination in public³.

The Commission considers that in this specific case, the expressions "homosexuals need professional medical help instead of legal assistance" used to address the LGBT in the journalist's article are so flagrant following an unjustified hatred speech which even in the absence of identification of a certain individual as a victim of discrimination. The institutional non-reaction on discriminatory behavior in such an open extent will seriously undermine the cause of the existence of the very legislation and institutional bodies.

The irresponsibility of freedom of speech which is used in the broadcasted journalist's article causes prejudice and undermines the dignity of the persons on the grounds of sexual orientation.

4. Conclusion

Taking the responsibility each actor in the area of media to have reserved views on unjustified differences or unequal treatment (exclusion, restriction or preference) in respect of a person or group of people based on

¹ In the case Fere against Belgium no. 15615/07, the ECHR has made important interpretations. The ECHR considered that "... such lecture will inevitably be created in the public - especially among those members of the public who are not well-informed causing a sense of misunderstanding, rejection, even hatred towards foreigners" and "... promoting hatred does not necessarily means a call for committing acts of violence or any other illegal acts. Attacks on a certain group of the population, conducted by insult, ridicule or defamation may be enough for the government to justify the immediate and effective treatment against racist expressions opposite the freedom of expression, conducted in an irresponsible manner.

² This point of view of the ECHR was institutionalized in the case Vejdeland and other verses Sweden, [http://hudoc.echr.coe.int/eng?i=001-109046#{"itemid":\["001-109046"\]}](http://hudoc.echr.coe.int/eng?i=001-109046#{).

³ This logic is compared with the point of view of the ECHR in the case Erbakan verses Turkey, <https://wcd.coe.int/ViewDoc.jsp?id=1017509&Site=COE>.

personal status is part of the national and European legislation. If the implementation of a retroactive action on this commitment is possible, then it should only be implemented in the future.

Debates, discussions and even comment on daily newspapers and other forms of media on issues on the rights and freedoms of persons with different sexual orientations are needed in those circumstances when the discussions on those issues were considered a taboo.

But the ignorance in a certain manner on these issues allows the public to have wrong reactions. Such discussions based on non-based information, often lead to the creation of false prejudices and stereotypes on the grounds of sexual orientation¹.

The Ignorance on these issues and the wrong attitude, occur because these issues have been invisible or forbidden for a long time.

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¹ The ECHR mentions this fact in the same context in the case Feryn verses Belgium, <http://merlin.obs.coe.int/iris/2009/8/article1.en.html> .