

The equality and nondiscrimination and the civil court procedure – The case of Macedonia

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Abstract

The civil court procedure for preventing and protecting against discrimination has its own characteristic features. The utilization of a comparison, the making of a prima facie discrimination case, justification and legitimate aim, and the burden of proof, are features of the civil court proceeding of a discrimination case. The judgment for protection against discrimination may also be a condemning (mandatory) one. In all cases in which the party files a compensation claim, the court shall render a condemning (mandatory) ruling. The court must provide institutional protection to the discrimination victim, by condemning the responding party and ordering such party to pay, do or suffer the consequences. The court proceeding of a discrimination case and the rendering of a court ruling is a procedural hindrance against the same proceeding before the Commission for Protection against Discrimination, because of the supremacy of the courts over the Commission in the field of providing institutional protection against discrimination.

Keywords: civil court, discrimination, protection, prevention.

1. Introduction review on the principles of equality and non-discrimination

The issue of protection from discrimination is a subject of scientific and theoretical treatments, analyzes and approaches from many segments and perspectives. This topic views are mainly focused on birth, development and protection from discrimination. The protection from discrimination influenced in creating a free, safe and legal area, on the basic principles of protection of citizens' fundamental rights and liberties. The dynamics that characterizes this theme is determined by the continuously growing theoretical thought and creature always oriented to the evolution suffering the positive legislation and court practice in the country. The argument on discrimination and institutional protection of this phenomenon in theoretical-doctrinaire view combined with cases from practice and definitions on positive regulations are the main basis of this analysis.

The discrimination theme is a relevant and very complicated object. The phenomenon of discrimination many times had reached a revival and a scientific research. Besides, the question of discrimination and protection against discrimination in Macedonia should be treated in terms of democratic consolidation and state's transition on its way of becoming a true legal state. Macedonia is a young country facing ethnic conflicts, inter-ethnic war conflict on the one hand and challenges in the path of transition to the rule of law, market economy, the establishment of democracy and providing human rights on the other. Macedonia has not yet implemented a successful transition and democratic consolidation. The respect of the democratic process which elects the government, the fact that the government comes to power in free and democratic elections, the division of government, its accomplishment and respected by the bodies and institutions of state's authority has not been achieved. It's a fact that the pro-democratic regime in Macedonia is on the path of consolidation with governmental and non-governmental forces, but still there are no conditions to resolve conflicts, especially ethnic ones legally, through activities and new democratic institutions. The consolidation of democracy in Macedonia is a key factor in the institutional protection from discrimination. Social relations in Macedonia are shaped by the trends of ethnic conflicts especially between the two largest communities Macedonians and Albanians. For many open questions odd decision are given.

2. Constitutional framework and the issue of discrimination

Citizens enjoy some freedom and rights that simultaneously present a legal ruling made by certain powers that serve the needs of personal and private and public every day. The rights of a citizen of others exist, which obligates others to respect and protect them, including the obligations of the bodies and institutions of the state system to ensure institutional protection in cases of human rights violations in question. Violation of these rights represent a violation of material legal norms. Right holder of violated rights has the right to seek institutional protection.

To maintain the principle of equality and anti discrimination there are a number of organs and institutions are state have subject matter jurisdiction to proceed, as the regular courts, the Constitutional Court, the Ombudsman, the Commission for protection against discrimination and other bodies at the national level and scale Local self government.

The Commission for Protection against Discrimination is the only state nationwide that has jurisdiction protection from discrimination in public and private sector in the country. However, analyzing the issue of discrimination and institutional protection from discrimination, we assess that the constitutional and legal

regulation of Republic of Macedonia devotes particular importance to the rights and liberties of man and citizen. The Constitution of Republic of Macedonia¹ devotes an important place to citizens' liberties and human rights. The individual as a human being is at the centre of legal and constitutional regulation and human rights and liberties have taken the dimension of a very significant institution. The Constitution of Republic of Macedonia is categorizing human rights and liberties to civil and political rights, economic, social and cultural rights.

The constitutional and legal regulations of Republic of Macedonia devote an important place to the regulation and protection of personal rights and liberties such as: the right to life, right on physical and moral integrity of the person, the right to liberty, the right of non-discrimination, law equality before the law, right to an appeal, the inviolability of residence, inviolability of secret documents, freedom of movement and residence, the right of opinion and conscience, freedom of religious affiliation, the right to citizenship. Regarding the right to life it should be noted that human life is inviolable.

Article 10 of the Macedonian Constitution stipulates that the death penalty cannot be determined in any case or circumstance. In the foreseen lawful conditions a life sentence for committing serious criminal actions may be imposed. Regarding the right on physical and moral integrity of the person, the Constitution of Republic of Macedonia prohibits acts of state authorities or other entities that violate the physical and moral integrity of man. In this direction the Constitution of Macedonia handles and indirectly protects the position of man in the civil legal relations, especially from intervention by state bodies or authorities. Civil legal relations are created on the base of people actually people themselves are the ones establishing these relations, without arbitrary state intervention. Only people have the characteristics of living beings, being aware and only they can enter into legal relations among themselves. Only people are bearers of rights and duties, actually legal entities, therefore the right exist only for people: *hominum causa omne jus constitutum est*. Regarding the right to liberty the Constitution of Republic of Macedonia guarantees the free movement of people, free activities and expressions within the legal norms. Detention and deprivation of freedom, presumption of innocence, right to compensation for damage caused by deprivation of liberty without legal grounds, closed or punished without legal basis in fact represent the rank of freedom of the person provided by the Constitution. Regarding the right of non-discrimination the Constitution of Republic of Macedonia in Article 9 guarantees civil and political freedoms and rights. According this constitutional provision, every citizen is equal in exercising the rights and freedoms guaranteed by the law and the Constitution, regardless of gender, nationality, social, political, religious affiliation, position in society, etc. With this preconditions for human rights and freedoms in each area are created. In the framework of this right we should mentioned the right to equality before the law of every person and citizen. Regulatory, constitutional, legal and normative aspects on each area should refer to all citizens regardless of race, sex, nationality, social, political, religious affiliation, social status etc. In this frame belongs the right to an appeal as a right to person's freedom.

The Constitution of the Macedonia guarantees the right to an appeal by any citizen under favorable legal norm.² From the corpus of personal rights and liberties, we'll separate the right on opinion and conscience and the freedom of religion determination. In the Constitution of Republic of Macedonia the rights to freedom of religion, conscience, opinion and public expression of opinion are guaranteed, while with amendment VII of the Constitution of Republic of Macedonia religion is defended by the state, because the Macedonian Christian Church, Islamic religious community, Evangelical Methodist Church, Jewish community, communities and religious groups are separated from the state and equal before the law.³ The legal and constitutional framework of Republic of Macedonia devotes a special place to the regulation and protection of political rights and freedoms such as freedom of speech, freedom of political union, the right to information, the right to peaceful assembly, right to vote, law complaints, the right to perform public functions, the right of foreigner etc. From the corpus of political rights and freedoms we'll separate in this case the right to complain to the organs of authority. According article 24 of the Constitution of Republic of Macedonia, the citizen has the right to register with different complaints on the work of public authorities or public undertakings and obtain response. For such a right the citizen cannot take the responsibility if from the content of the complaint or appeal he didn't perform a crime.

The constitutional and legal regulation of Republic of Macedonia gives an important place to the regulation and protection of economic and social freedoms and rights, such as the right to property, right to inheritance, labor rights, the right to join trade unions and the right to strike, right on social insurance, social assistance to the family, the right to freely decide on having children. The constitutional and legal regulation of Republic of Macedonia devotes an important place to the regulation and protection of cultural rights and freedoms, such as the right to education, freedom of scientific and artistic works and freedom of free expression of the determination of nationality. The values of this treatment, we believe that will be part of the legal culture and

¹ The constitution of Republic of Macedonia http://www.siofa.gov.mk/data/file/ustav_ustavni_amandmani_al.pdf

² Article 15 of the Constitution of Macedonia, http://www.siofa.gov.mk/data/file/ustav_ustavni_amandmani_al.pdf

³ Article 16 of the Constitution of Macedonia, http://www.siofa.gov.mk/data/file/ustav_ustavni_amandmani_al.pdf

will significantly affect the realization of the legal reliability, guaranteeing human rights and freedoms in the Republic of Macedonia. The affirmation in this regard is permanent, not only in the proper implementation of the law by adopting comply laws with international laws but also in creating a favorable environment for legal safety. Discrimination represents any form of distinction, exclusion or restriction on the enjoyment and exercise of fundamental rights and liberties of man and citizen. To consider the existence of discrimination there needs to be an action or activity of bodies, organizations or institution that are empowered to perform public functions on the basis of discrimination and the consequences of causing discrimination. Theoretical and practical treatments for discrimination made recognizable some forms of discrimination, such as discrimination based on skin color, family status, age, gender, nationality, ethnicity, political affiliation, social status, position in society, health etc.

3. The legal concept of the equality and non-discrimination

The issue of equality and non-discrimination are institutionalized concepts in national and international legal frameworks. These concepts represented in practice found satisfactory legal arrangement. Still the spirit of these concepts remained an important issue that obeys the theoretical treatments and solutions, administrative and court resolutions in the actions of prevention and protection against discrimination. To speak of the spirit of principles of equality and non-discrimination both the profile of equality: formal equality and substantive equality should be taken into account.¹ The Macedonian legislation in the concept of equality and non-discrimination "formal equality" is institutionalized. According "formal equality" any negative impact, difference, exclusion or restriction have or may have violation or restriction of equal knowledge and equal enjoyment of human rights and fundamental freedoms as consequence, as compared with the treatment that another person may have in the same or similar conditions represents discrimination (direct discrimination).

In the same context, it is certain that putting any person or group at a particular disadvantage compared with other persons, by adopting provisions, prominent natural criteria or by taking certain practices, unless these provisions, criteria or practices, are derived from a justified cause, but the means of achieving that cause are appropriate and necessary also represents discriminatory (indirect discrimination). The legislator is oriented in treating a person or group in similar situations and in different ways. Here the criterion of similarity of individuals has been taken into consideration not taking into account the wider context of the conducted treatment. The spirit of the concept of equality and non-discrimination is not satisfactory according the "formal equality". Because of that, the legislator on the issue of regulation of non-uniform action should include "substantive equality" in the Law on Prevention and Protection from discrimination. Persons should be treated differently in different situation. This view is supported in the "equality of results" and "equality of opportunity". "Substantive equality" depends on several factors in each case individually, for example nationality, nature of the profession or activity actually the conditions within the profession, providing resources, opportunities etc. Meaning that for each case there's a need of providing an objective and reasonable justification.

4. Burden of proof

The party which has filed a claim of equality and discrimination with the court is bound to present facts and propose concrete evidence to prove that equal treatment has been breached. In filing the claim suit, the claimant, in making a prima facie discrimination case, must submit facts and propose means of proving. That party has the burden of making the prima facie discrimination case. Therefore, the burden of proof is with the claimant. This is a procedural matter. Meanwhile, the respondent, the claimed discriminator, is burdened to prove that the prima facie discrimination case is ungrounded. Such party must repudiate the claims of the claimant, or otherwise bear the liability of discrimination. Facts and proof to be presented by the responding party must refer to the concept that the action taken is not discriminatory, and that there was a legitimate aim pursued. In no way should the responding party guide its defense in the existence of the aim for non-discrimination.² The existence or not of the aim of discrimination has no effect on the discrimination case. Therefore, the burden of proving that there was no discrimination lies with the responding party.³ If one considers the principle of review and principle of

¹ Fredman S (2002), *Discrimination Law*, Oxford, University press, pg. 7-11

² In the case of Koua Poirrez v. France (Application no. 40892/98), related to the right to social benefits between French citizens and citizens of a state signatory of a reciprocity agreement and other foreign citizens, and also referred to the matter of rejecting the citizenship for a person residing in France, The European Court of Human Rights at Strasbourg has reiterated that the reasonable time of procedure of obtaining French citizenship must be assessed under the light of the circumstances of the case and by referring to the criteria defined by national legislation, and specifically the complexity of the matter and the conduct of the applicant and relevant authorities. The Court reviewed the existence of a differential treatment related to the right to social benefits between French citizens and citizens of a state signatory of a reciprocity agreement and other foreign citizens, which was not based on any "objective and reasonable justification".

³ In this context, the Article 4 of the Directive 97/80 has defined that when the claimant provides facts from which it may be presumed that there was direct or indirect discrimination, the burden of proving there was no breach of principle of equality and non-discrimination pertains to the responding party.

adversariality in contested procedure, one may say that there is no division of burden of proof between the claimant and respondent. Each party must support their allegations in a civil court on facts. The claimant files facts and means of proof to prove its allegation. The responding party shall object the allegations of the claiming party by filing its own facts and proof. Therefore, each of the parties has a burden of proof for its own allegations. The court has interest to encourage statements of allegations by each party. The issue of dividing the burden of proof is not procedural but it is material. Filing facts and evidence is enabled by undertaking procedural actions, such as the claimant filing the claim suit, the respondent filing a reply to such claim, preparatory session, the main hearing session, the use of challenging remedies, etc. The content of a fact presented by any of the parties in a judicial procedure must be proven by such party itself. On the basis of free assessment and conviction of the court on the proof presented by parties or proof obtained by the court itself, the Court establishes the conviction of the instant dispute.

5. Formed conviction of the judge

The court shall review and rule on the existence of a discriminatory action by applying concrete legal norms and supporting the factual grounds, namely the decisive facts. The found factual situation must correspond to the reality. The activity of the court is aimed at finding the truth in terms of decisive fact. The truth is an essential condition in proceeding and ruling over the case. The results of proof heard are freely assessed. The factual situation must include all circumstances influencing the stance on alleged discrimination. The party, which has initiated the procedure of reviewing alleged discrimination, in the context of the factual situation, has an active role already with the submission of the discrimination claim. The party presents circumstances in its own knowledge on material facts. The court is bound to clarify the factual situation, by demanding a reply from the opposing party in relation to the allegations of discrimination, and statements by other persons. The truth is found by the court by means of proving. It must correspond with the conviction of the court on decisive facts and the objective situation.¹

6. Conclusions

The civil proceeding over a claim of equality and non-discrimination is aimed at resolving the dispute. The resolution of the dispute is achieved by rendering a ruling. The judgment on a discrimination case represents a legal act by which a dispute is resolved with a view of preventing and protecting against discrimination. By such an act, the court expresses its view on the contested object. According to the type of protection provided by the court, the ruling may be confirming (declaratory) and condemning (mandatory). The civil court procedure for preventing and protecting against discrimination has its own characteristic features. The utilization of a comparison, the making of a prima facie discrimination case, justification and legitimate aim, and the burden of proof, are features of the civil court proceeding of a discrimination case. In all cases when the claimant files with the court a claim of discriminatory action, the court shall render a confirming judgment. This ruling shall confirm the existence of a breach of the right to equal treatment. The judgment for protection against discrimination may also be a condemning (mandatory) one. In all cases in which the party files a compensation claim, the court shall render a condemning (mandatory) ruling. The court must provide institutional protection to the discrimination victim, by condemning the responding party and ordering such party to pay, do or suffer the consequences. The court proceeding of a discrimination case and the rendering of a court ruling is a procedural hindrance against the same proceeding before the Commission for Protection against Discrimination, because of the supremacy of the courts over the Commission in the field of providing institutional protection against discrimination.

Still can not talk about a judicial practice in Macedonia in relation to judicial protection from discrimination. What can be said at this stage and in this case is the existence of the establishment of residence to determine the active legitimacy to initiate the procedure for court protection from discrimination to include institutions and entities determined that the scope of their explicitly They have prevention and protection from discrimination both in the public and in the private sector on one side, and on the other to determine the damage figures may be caused by discriminatory action, which can sue for damages.

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¹ In the case of *Marschall v Land Nordrhein-Westfalen* (Application C-409/95 [1997]), the European Court of Human Rights at Strasbourg found that a national rule which institutionalized the position that in cases where there are fewer women in leadership positions in public sectors, an advantage shall be given to female candidates, if they enjoy similar qualifications in terms of suitability with the managing position, competency and professional performance. Such action is not discriminatory, namely there is no breach of equal treatment for women and men in the fields of labour, vocational training and promotion, etc. therefore, a national provision which gives priority to women against men, when women have equal qualifications and are under-represented, is for the court a non-discriminatory measure.

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