THE RIGHT OF NON-DISCRIMINATION AND AFFIRMATIVE ACTION

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1. What is discrimination?

The term discrimination has Latin roots and its original meaning was "making distinction". But through the times, this word was not used as neutral word anymore and today when the term discrimination is used it is understood as "non-permitted distinction".

Despite of the fact that almost all constitutions and many international documents contain provisions, which forbid discrimination, there is no universally accepted definition of this term.

The 1965 International Convention of Elimination of All Forms of Racial Discrimination in Art. 1 defines the term discrimination as any distinction, exclusion, restriction or preference based on some enumerated non-permitted bases which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. This definition has often been the subject of discussion in jurisprudence.[1]

The discrimination encompasses two elements: the base of discrimination and the manner of distinction.

Usually, the discrimination is forbidden on the basis of characteristics obtained without the will of the human being (sex, race, nationality, origin, birth). Some other characteristics (as language and religion) are "inherited" by the parents.[2]

Political and other opinions (as well as property status) are characteristics, which are obtained i.e. they could be changed by the free will of the person (or he/she can make efforts to change the property status). These obtained differences are forbidden ground for discrimination because: they are result of the freedom of expression and because they often are base for discrimination.[3]

The other element of the discrimination is the manner of distinction. The law must not make irrelevant and subjective distinctions. In many legal systems some distinctions, which are not considered as discrimination, are allowed. This is in accordance with the formula: "all persons should be treated equally save when there are

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[1] At the occasion of the revision of the Constitution in 1983, Minister of Internal Affairs of Netherlands gave a definition of the notion of discrimination, the spirit of which has been followed in literature and jurisprudence: "Discrimination is one person treating another person in such a way that it has been made clear to this other person that the first person considers these elements of his being human as deficient." See: F Goudappel, *Race Equality - National Report*, paper for 1998 Conference of European Group of Public Law, p. 9.

[2] See V Dimitrijević, M Paunović u saradnji s V Đeričem, *Ljudska prava*, Beogradski centar za ljudska prava, Beograd: Dosije, 1997, p. 186.

[3] Ibid, p. 186.

reasons for treating them differently." The problem arises when the reasons for different treatment shall be justified.

The discrimination could be direct, when different groups are obviously treated in different manner and indirect when some law, which appears to have general application to all, in fact has different influence on different groups. It is problematic to determine to which degree the prohibition of discrimination should include also the indirect discrimination.

In the UK, existence of the indirect discrimination in the process of employment is tested through following questions: Is some request or condition required? Does small part of the protected group can fulfill this request or condition? Is the condition or request is demanded in order to disfavor the person who is complaining? Does the accused for discrimination can justify that condition or request?

So, for discrimination there must be request or condition which is absolute obstacle for some person to be employed or to keep the employment. But if the condition is just one of the several interconnected criteria (from which all others the individual could fulfill) indirect discrimination could not be proved. To prove indirect discrimination the person should prove that in that time (not in the past of future) very small part of the group he/she belongs could fulfill certain condition, compared with other groups. If the condition or request could be justified depends on whether there is reasonable balance between discriminatory effect of the condition and the reasonable reason of the person who poses the condition or the request. The request or condition should be justified regardless the color of the skin, race, ethnic or national origin etc.

The 1990 New Zealand Bill of Rights Act contains provision that measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of color, race, ethnic or national origin, sex, marital status, or religious or ethical belief do not constitute discrimination.

The European Commission and European Court of human rights have interpreted Article 14 from the European Convention of Human Rights which contain non-discrimination provisions. This article is not framed in general terms of equality before the law or equal protection of law, i.e. it does not guarantee the general right not to be discriminated against. It guarantees only non-discrimination in enjoyment of the rights set in the European Convention. Compared with other international documents, as are Universal Declaration on Human Rights and International Convention on Civil and Political Rights, Article 14 of the European Convention of Human Rights regulated equality and non-discrimination in a very restrictive manner. It does not create a separate "right to equality". Because of that the right of Article 14 is called "parasitic right". In the interpretation of the Commission and the Court the principle of non-discrimination could not be construed to operate independently but only in relation to the violation of one of other rights. But, they do not maintain this as consistent view.

Later, they recognized that the insistence upon the specific violation of another article before Article 14 could be invoked deprived the non-discrimination provision of practical value and they

held that there could be a violation of Article 14 in association with another Article of the Convention, even where the other Article had not itself been violated.[4]

Also, according to the interpretation of the Court and the Commission, this article does not impose absolute equality. Different treatment has been held to be acceptable when there is objective and reasonable justification. The Court has stated that prohibited discrimination has occurred when:

a) the facts found disclose a differential treatment;
b) the distinction does not have an aim, that is, it has no objective and reasonable justification having regard to the aim and effects of the measure under consideration; and
c) there is no reasonable proportionality between the means employed and the aim sought to be realized.[5]

But this does not mean the end of the problem. As, Jan-Erik Lane wrote: if as it is sometimes stated the reasons for different treatment have to be "morally acceptable or reasonable, then we are simply moving in a circle: just treatment requires a concept of equality which requires a theory about just reasons for unequal treatment."[6]

To prove that there is differential treatment means to prove that:

- the person is treated essentially different (worse) than the others
- the basis on differential treatment are personal characteristics or status
- the others with whom that person is compared are in analogous situation.

As justified reason for differential treatment, the Court accepted different arguments from the countries: maintaining the traditional family (Marcx v. Belgium, (1979) 2 EHRR 330); protection of the market of labor and public order (Abdulaziz, Cabales and Balkandali v. United Kingdom (1985) 2 EHRR 471).

Because of the restrictive approach of the Article 14 in regard of the prohibition of the discrimination (besides Article 14, part of this material was regulated also in Article 5 of the Protocol No.7 which regulates the equality of the spouses), the European Convention on Human Rights was criticized as outdated.[7] That led toward adoption of the Protocol 12 in 2000, which contains stronger anti-discrimination clause. This protocol in its Preamble addresses the principles of equality before the law and equal protection by the law, which (principles) are not contained in the Article 1 of the Protocol, neither in the Article 14 of the Convention. Anyway, the Court of Human

[4] More see in: R Beddard, *Human Rights and Europe*, Cambridge: Grotius Publications Limited, 1993, p. 4; D Gomien, D Harris & L Zwaan, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Strasbourg: Council of Europe Publishing, pp. 345-346.

[5] Belgian Linguistic judgment of 23 July 1968, Series A, No. 6, para. 10.

[6] J E Lane, *Constitutions and political theory*, Manchester and New York: Manchester University Press, 1996, p. 230.

[7] R Clayton, H Tomlinson, C George and V Shukla, *The Law on Human Rights*, Oxford University Press, 2000, p. 1205.

Rights in Strasbourg in its practice used the "principle of equal treatment"[8] or "equality of the sexes".[9] Even more, in the Preamble of the Protocol, the measures which the states can take in order to promote full and efficient equality are accented, but these provisions (in the Preamble) are programmatic in character and do not impose obligation for the state. Article 1 of the Protocol contains general prohibition of the discrimination by public authorities, their enjoyment of the rights which are guaranteed for the individuals in the national law. This article did not enhance the forbidden grounds for discrimination, because the list contained in the Article 15 is not complete, closed or restrictive and the Court in its practice has already accepted several "other statuses" as forbidden ground for discrimination, as are: sexual orientation (the Judgment of 21 December 1999 in the Salgueiro de Silva Mouta v. Portugal), marital status (Rasesmussen v. Denmark (1984), 7 EHRR 371, para 34; Abdulaziz, Cabalas and Balkandali v. United Kingdom (1985), 7 EHRP 471), membership in the trade union (National Union of Belgian Police v. Belgium (1975) 1 EHRP 578), membership of the army (Engel v. Netherlands (No.1), (1976) 1 EHPR 647), professional status (Van der Mussele v. Belgum (1983) 6 EHPR 163), imprisonment (RM v. United Kingdom (1994) 77-A DR 98), conscientious objection (X v Netherlands (1965) 8 YB 266) and similar personal characteristic or status.

But, still the question on the degree in which this Protocol protects from discrimination in the relation of private persons (so called "indirect horizontal effect") could be posed. There is debate whether ECHR imposes positive obligation on the state to take actions for prevention of the private acts of discrimination. Despite of the fact that neither Article 14 from the Convention, nor Article 1 of the Protocol has the aim to prevent every type of discrimination, including those between private parties, the state must not be left without any obligation in prevention of the discrimination to the degree that would not be violation of the right to privacy. So, it could be expected from the states with their legislation to prevent discrimination in the relation between private persons, which take place in public sphere which is usually regulated by law, as are for example: arbitrary restriction of the access to employment, access to the restaurants, access to the services given to the public by private persons, as are medical care, use of water, electricity etc.

2. The constitutional status of the right to non-discrimination

Modern constitutions usually contain the general principle of equality, prohibition of discrimination and the series of other specific rules of equality. But, there are different formulas for expressing the general principle of equality in the constitutions. Most of them proclaim the principle of "equality before the law" and some of them guarantee "equal protection of laws".

[8] The Court`s Judgment of 23 July 1968 in the "Belgian Linguistic case", Series A, No.6, para.10.

[9] The Judgment of 28 May 1985 in the Case of Abdulaziz, Cabales and Balkandali v. the United Kongdom, Series A, No. 94, para.78.

The Constitution of the Republic of Macedonia guarantees equality of the citizens in rights and freedoms regardless of the sex, race, color of the skin, national and social origin, political and religious belief, property and social status. That in the essence means prohibition of the discrimination. This right also is in the rights that are protected by the Constitutional court. Constitution of the Republic of Macedonia also proclaims equality of the citizens before the constitution and the law. The principle of "equality before the law" provides that rules of law shall be applied according to their terms regardless of the persons involved. It means that the laws should be enforced against all impartially and without distinction.

For a first time this principle was formulated in the 1789 French declaration of the rights of the man and citizen which provided that "the law is the same for all" (droit être la même pour tous, soit qu`elle protège, soit gu`elle punisse).

This principle in its *literal meaning* provides only legal, formal equality (equality in application of the law), but does not include any commitment to substantive equality i.e. it does not bind the legislator to respect the equality in creating the content of the law.

The principle of "equality before the law" provides only that nobody is above the law and exempt from its requirements. But it does not make this principle less important.

The significance of equality before the law, wrote Lloyd L. Weinreb, is manifested in the "public display of resentment when the principle is flouted and acknowledged rights or obligations are openly ignored and in the display of satisfaction when an important person is treated 'like anyone else'."[10]

This principle obliges all state bodies, which apply the law (executive power and judiciary) to do that in general manner.

The difference in proclamation of this principle in the constitutions is that some of them apply it only to citizens[11] and others to all persons[12]. The Constitution of the Republic of Macedonia fails in the first group of the constitutions in which equality of the citizens before the constitution and the law (Art.9 para.2).

The literal wording of the principle contained in these constitutions does not mean that they protect only legal equality. On the contrary in all of them equality before the law is not only protected aspect of equality, but they also contain provisions which express the concern about the content of the laws, i.e. which protect equality in law (as is the clause for prohibition of discrimination, which is contained in every constitution which guarantees "equality before the law").

Some constitutions have different formulation of the principle of the "equality before the law" trying to accent that equality should be guaranteed not only within the application of the law, but the content of the law should not violate the principle of equality. For example, the Fourteenth Amendment to the United States Constitution

[10] L L. Weinreb, *Natural Law and Justice*, Cambridge, London: Harvard University Press, p. 166.
[11] For example Bulgaria, Belgium, Portugal, Spain, Italy, Macedonia, Luxembourg, Austria, Greece.
[12] For example, Estonia, Lithuania, Slovenia, Germany, Albania, Finland, Brazil.

contains Equal Protection Clause, which guarantee to every person "equal protection of the laws". This principle guarantee the protection of equal laws, not merely the equal application of the laws, But this clause has been interpreted as it has also bound executive bodies to the principle of equality in application of the laws. Even through a statute satisfies the principle of equality protection on its face, "unjust and illegal discrimination between persons" in its application are forbidden: it is unconstitutional "if it is applied and administered by public authority with on evil eye and an unequal hand."[13]

The 1949 Constitution of India, which was influenced by the U.S. Constitution, also guarantee to every person "equal protection of the laws", but it also in Art. 14 includes the expression "equality before the law" with intention to spell out the guarantee of the equality more fully. 1995 Constitution of Armenia (Art. 16) and the1994 Constitution of Belarus (Art. 22) also do the same.

The broadest expression of the general principle of equality is that in the 1982 Canadian Charter of Rights and Freedoms. Section 15 (1) of the Canadian Charter guarantees that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law…" As it could be seen the general principle of equality includes four elements: equality before the law; equality under the law; equal protection; equal benefit of the law.

The guarantee of "equality under the law" was included as a response to the Justice Ritchie`s judgment in the Lavell case where in he implied a distinction between the "equality before the law" clause, and unequal treatment "under the law".[14]

Further, as Taranopolsky explains, because majorities on the Supreme Court of Canada have rejected any adoption of the "egalitarian conception set forth in the American Fourteenth Amendment the legislative draftsmen added a counterpart to the American "equal protection" clause."[15]

And third, because in a case (Bliss v. A.G. Canada [1979] 1 S.C.R. 183) dealing with unemployment insurance benefits, Mr. Justice Ritchie rejected a connection that distinction made with respect to pregnant women constituted discrimination on the basis of sex, on the ground that such distinctions 'involved a definition of that qualifications required for entitlements to *benefits*', Section 15(1) now also includes a clause providing for 'equal *benefit* of the law'.[16]

The constitutions also guarantee special aspects of the right to equality and non-discrimination. For example: equality of voting rights[17], equality of men and women, equality of spouses, equal rights between children born out of wedlock and children; equal access to

[13] Yich Wo v. Hopkins 118 US 356 (1886). See in T.R.S. Allan, *Law, Liberty and Justice - The Legal Foundations of British Constitutionalism*, Oxford: Clarendon Press, 1994, p. 164.

[14] A. G. Canada v. Love; et al., (1974) S.C.R. 1349, 1365-67 and 1372-73. Quoted in W S. Taranopolsky, 'The New Canadian Charter of Rights and Freedoms as Compared and Contrasted with the American Bill of Rights', *Human Rights Quarterly,* p. 247.

[15] Ibid*,* p. 247.

[16] Ibid*,* pp. 247-248.

[17] It is guaranteed in the Constitution of the Republic of Macedonia.

public office and employment;[18] equal status for all religions;[19] equal rights to all trade unions; equal protection to property rights; equal legal status to all parties (all entrepreneurs) on the market;[20] equal access to courts and equality of all parties before courts; equal treatment of conscientious objectors and persons performing military service; prohibition of discrimination in the restriction of the basic constitutional rights by laws;[21] equitable taxation.

But some constitutions also contain certain provisions which promote affirmative action. For example, in 2001, the new basic value was introduced in the Constitution of the Republic of Macedonia. It is just and equitable representation of the citizens who belong to all communities in the bodies of state power and other public institutions on all levels. It is the constitutional basis for taking some measures for affirmative action. The Constitution of the Republic of Macedonia also introduces the right and obligation for the ombudsman to take care for the protection of the principles of non-discrimination, just and equitable representations of the members of the communities in the state, public and local bodies.

3. Positive discrimination (affirmative action)

Whether the programs on "positive discrimination" in favor of certain groups which were in disadvantaged position is controversial question and raises many questions on equality and discrimination. The rigorous application of the principle of non-discrimination will mean forbiddance of such measures as discriminatory.

Affirmative action or positive discrimination means leading of the governmental policy in which directly or indirectly the members of certain usually racial or national groups are given preference in employment, enrollment in the universities or in distribution in certain social goods. At the beginning affirmative action was justified with the need to give to those groups compensation for the discrimination on which they were exposed in the past. Later affirmative action was justified with the social benefit of creation of integrated society, i.e. the need to find most rational method for distribution of the limited recourses in the community. Affirmative action is carried through the principle of proportional representation and introducing of the quota for certain groups.

In the USA, until the adoption of the Law on civil rights in 1964, which proclaimed national politics for equal opportunities for employment, there was presumption in the constitutional law that every racial classification is negative and undesirable. In order to overcome this presumption, the supporters of the affirmative action toward the Blacks, pointed out that with it the negative effects of the previous discrimination will be repaired and it is a legitimate social aim.

Such positive attitude toward the affirmative action is resumed in the case Bakke, in which the Judge Harry A. Blackmun

[18] It is guaranteed in the Constitution of the Republic of Macedonia.
[19] It is guaranteed in the Constitution of the Republic of Macedonia.
[20] It is guaranteed in the Constitution of the Republic of Macedonia.
[21] It is guaranteed in the Constitution of the Republic of Macedonia.

wrote: "In order to get beyond racism we must take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[22]

The supporters of the affirmative action thought that the differences between certain groups are consequence of the different historical and cultural conditions in which they lived. For example, blacks lived under different conditions compared with the white in the time of slavery and segregation. Because their life circumstances are different we cannot speak of existence of equal opportunities. "Unwilling or unable to reject the concept of equal opportunity, supporters of affirmative action insist that it can only be achieved by guaranteeing equal results for racial and ethnic groups. That is, proportional racial representation in the allocation of social goods, as the outcome of public policy, is taken as proof of the existence of equality of opportunity at the outset or throughout the social activity in question. Equal opportunity is thus transformed into equality of achievement."[23]

Equality in opportunity means that everyone competes under equal conditions on the basis of his individual capabilities. That is formal procedural equality. The essence of this concept is equal treatment and its primary concern is rules of the game. In itself it carries liberal understanding of the equality.

Equality of achievement (equality in result) demands direct intervention in the social practice in order to obtain fair distribution of the results. This concept starts from the point of view of the group and takes care for the result of the game. Usually it is connected with the quotas.

The critics of the affirmative action think that it reflects tribal concept of collective guilt of whole ethnic or racial groups (all blacks are considered as victims and have right to compensation and all whites had benefit from the injustice of the system of racial discrimination and because of that are guilty). For them such concept is contrary to the individual natural rights which are basis for modern democracies in the world. Or, as it is written by Douglas Rae, the idea of pursuing equality through inequality is fallacious as killing for peace or lying in the name of truth.[24]

Because giving preferential treatment to certain group (affirmative action) might be felt as discrimination by the other groups of people, it is necessary affirmative action to be implemented very carefully and only if it is obviously necessary.

The positive discrimination, i.e. promotion of the groups which were disadvantaged, through affirmative action is not in conflict with the Article 14 of the European Convention of Human Rights. The Court of Human Rights in Strasbourg pointed that not every different treatment is unacceptable having in mind that sometimes the legal inequality corrects factual inequality (Belgian Linguistic Case (no.2), 1968, 1 EHRP 252 para. 10). For example, tax relieves for married women, which fail under the right to free

[22] D J Bodenhamer and J W. Ely, Jr., *The Bill of Rights in Modern America*, Indiana University Press, 1993, p. 170.
[23] Ibid, p. 173.
[24] D Rae et al., "Inequalities", Cambridge, 1981, p. 56.

enjoinment of the property of Article 1 of the Protocol No.1 have objective and reasonable justification because by implementing positive discrimination, they encourages married women to go back to work (DC and DW Lindsay v. United Kingdom (1986) 49 DR 181, 190, 191, ECHR).

The Court of human rights considered that there is discrimination even when the states without objective and justified reasons do not treat differently the persons whose position is very much different.

4. Conclusion

The principle of non-discrimination and the affirmative action are not conflicting and irreconcilable principles. Both of them are part of the general notion of equality.

The notion of equality could be seen from different aspects. One is the idea of formal equality, which can be described with the formula "equal treatment for equal persons". Another aspect is the aspect of active equalization of unequal facts and circumstances, which attempts to attain a general level of living conditions by equalizing existing social and economic inequalities, or differences in the level of education.

The practice of the Court of human rights in Strasbourg is important in understanding and implementation of the principle of non-discrimination in the European countries. This court in its decisions supported affirmative action as non-conflicting with the principle of non-discrimination. It also expressed the attitude that there is discrimination even when the states without objective and justified reasons do not treat differently the persons whose position is very much different.

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