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ЗАГАЛЬНА ТЕОРІЯ ДЕРЖАВИ І ПРАВА

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PROHIBITION OF DISCRIMINATION IN UKRAINE: THE LEGAL FRAMEWORK AND APPLICATION

V. Honcharov

Ivan Franko National University of Lviv,
Universytetska Str. 1, Lviv, Ukraine, 79000,
e-mail: gonchar.lawyer@gmail.com

The article highlights the theoretical and practical aspects of non-discrimination under the national legislation of Ukraine. Despite the fact that the Law of Ukraine «On Principles of Preventing and Combating Discrimination in Ukraine» meets modern requirements for such laws, the legislative structure of discrimination and its forms are not without a number of shortcomings. The first is the use in the definition of ancillary features that do not identify, but only help to establish discrimination. Such features include, in particular, a comparator, the need to establish which is not always the case. The law also does not provide for the division of responsibilities for proving discrimination, so it is up to the person who alleges a violation of his or her rights to prove both positive and negative signs. Disadvantages of the application of the prohibition of discrimination include such phenomena as inflation of the concept of discrimination (blurring of its boundaries), accumulation of violations of the fundamental right to discrimination in the exercise of such a right, as well as insufficient proof of negative signs of discrimination.

Not every violation of equality in the exercise of rights is discriminatory, as discrimination occurs only on the basis of a protected feature, as emphasized in paragraph 2 of part 1 of Article 1 of the Law on Discrimination. Law enforcement officers and judges are obviously puzzled by the fact that the «any other feature» can be recognized as a protected one. However, it does not follow in any way that such a feature does not need to be established at all as the opposite contradicts the requirement of paragraph 2 of part 1 of Article 1 of the Law.

Keywords: discrimination, direct discrimination, indirect discrimination, protected feature, comparator, cross discrimination, restriction of rights.

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Introduction. The prohibition of discrimination as a component of the rule of law and the general principle of the enjoyment of human rights is of considerable interest to both jurisprudence and practice.

Citizens of Ukraine have access to a number of normative means for protection against discrimination: Constitution of Ukraine, international treaties and a number of laws and bylaws. However, the question of how to properly use and apply the anti-discrimination law remains open in many respects.

The case law of the European Court of Human Rights (ECtHR) remains a guide for national case law on the application of the prohibition of discrimination. The rare case of discrimination is decided now without reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), as well as the practice of the ECtHR, i.a, its decisions in Willis v. The United Kingdom, Van Raalte v. The Netherlands and Pichkur v. Ukraine.

The article aims to describe some of the legal issues of the application of anti-discrimination law. In this way, we want to address this important topic, initiated by our fellow researchers I. Kresina [2], O. Pankevych [4], S. Pohrebniak [5], S. Rabinovych [10], O. Uvarova, M. Yasenovska [14] and others [3; 11–13].

And we will start with a theoretical analysis of Ukraine's anti-discrimination law in terms of provisions that, in our opinion, carry potential risks of incorrect or at least heterogeneous application. We then turn to some problematic aspects of the application of the anti-discrimination law in the practice of the Supreme Court.

The construction of discrimination under national legislation. The Law «On the Principles of Preventing from and Resisting to Discrimination in Ukraine» (hereinafter – the Law), which entered into force on October 4, 2012, is quite a modern instrument to tackle the issues of the sphere. The Law's adoption was dictated mainly by the interests of law enforcement, for which, of course, it is more convenient to apply the Law than to the intricacies of the ECtHR case law. But as the domestic case law shows, the Law, Article 14 of the Convention, Protocol XII and the case law of the ECtHR are applied together, in which we do not see anything wrong.

Legislator resorted to a very detailed and quite an academic definition of discrimination. According to paragraph 2 of the first part of Article 1 of the Law «discrimination is a situation in which a person and / or group of persons on the grounds of race, color of skin, political, religious and other beliefs, sex, age, disability, ethnic and social origin, citizenship, marital and property status, residence, linguistic or other features that were, are and may be valid or presumed (hereinafter – certain features), is subject to restrictions on the recognition, exercise or use of rights and freedoms in any form established by the Law, except in cases when such restriction has a legitimate, objectively justified purpose, the ways of achieving which are appropriate and necessary. In contrast, international treaties to which Ukraine is a party do not generally define discrimination, but instead formulate a rather concise form that the enjoyment of rights and freedoms must be ensured without discrimination (Article 26 of the International Covenant on Civil and Political Rights, Article 2, paragraph 2). International Covenant on Economic, Social and Cultural Rights, Article 14 of the Convention and Protocol XII), which is fully in line with tradition not to bind the courts by legal definitions without direct necessity.

Our first question concerns language – why the «situation»? From a practical point of view it would be enough to define discrimination as restriction on the exercise of rights on the grounds established by law. However, this small shortcoming does not seem to have had harmful projections to judicial practice.

The next issue concerns the definition of forms of discrimination under the Law. According to Article 5 of the Law, the forms of discrimination are direct discrimination, indirect discrimination, incitement to discrimination, aiding and abetting discrimination. Of these, the first two can be considered primary, and the last three derivatives. According to paragraph 1 of the first part of Article 1, «direct discrimination is a situation in which a person and / or group of persons on their certain grounds are treated less favorably than another person and / or group of persons in a similar situation, except when such treatment has a legitimate, objectively justified goal, the ways to achieve which are appropriate and necessary». And according to paragraph 3 «indirect discrimination is a situation in which the implementation or application of formally neutral provisions, evaluation criteria, rules, requirements or practices puts a a person and / or group of persons on their certain grounds in less favorable conditions or situations compared to others, except in cases when their implementation or application has a legitimate, objectively justified purpose, the ways to achieving which are appropriate and necessary».

The disadvantage of these definitions is that the concepts of direct and indirect discrimination are revealed through the way they are proved. Yes, a reference to a comparator may not always be necessary to prove discrimination. These are primarily cases where discrimination is obvious (like the lack of a barrier-free architecture in public authorities), as well as the establishment of cross-discrimination, i.e. one that occurs as a result of the intersection of multiple protected features.

The problem with such cases is that the need to present a comparator often leads the applicant to a dead end. Thus, Ms. Uchellari brings forward an example where the UK Court of Appeal had to assess the allegations of an applicant who had complained of discrimination on the grounds that she was Asian (an Asian woman). However, it was no way to prove discrimination due to the fact that the court decided to investigate discrimination against each feature separately, and comparators for individual features were absent [15, p. 13]. That is, in the case of cross-discrimination, the comparator is all those who are not carriers of intersecting features, which, accordingly, may be an obstacle to the enforcement of anti-discrimination law.

Another issue with the Law seems to be the fact that it does not establish a division of burden for proving discrimination. All signs of discrimination can be divided into positive and negative. Positive grounds of direct discrimination include a less favorable attitude, a model for comparison, and a protected feature. In the case of indirect discrimination, this is a neutral rule, less favorable conditions or situation and, again, a protected feature.

It seems pretty natural that the establishment of negative grounds, which justify the difference in attitude, should rely on the defendant. But since the Law conceals this issue, there are no reasons to depart from the general rule of adversarial proceedings, according to which a party must prove the grounds of its claims and objections (para 3 Art. 12 of the Civil Procedure Code of Ukraine, para 1 of Art. 77 of the Code of Administrative Procedure of Ukraine, para 3 of Art. 13 of the Commercial Procedural Code of Ukraine).

Another general issue of the Law is that, unlike the Convention, the *prohibition of discrimination has no autonomous application.* According to the Law, discrimination is a restriction on the exercise of certain *rights and freedoms*, respectively, is established in conjunction with a violation of a substantial right or freedom.

The ECtHR has established that the discrimination prohibition under the Convention has an autonomous applicability, and therefore does not necessarily presuppose the violation of a substantive right. Instead, it is sufficient to establish that the discriminatory action falls within the ambit of a substantive right, protected by the Convention.

Thus, in its case against Lithuania, the ECtHR found a violation of Article 14 of the Convention in conjunction with Article 8, given that the applicant had been restricted in his employment in the private sector [18]. The applicant was a former KGB officer and was subject to a law restricting the employment of persons in the public and private sectors to which the applicant fell. Although the Convention does not enshrine social rights, the ECtHR found discrimination in the actions of the state. The Court held that the right to privacy enshrined the possibility of establishing relations with the outside world: although the applicant had not been restricted in his enjoyment of a substantive right under the Convention, was discriminated against in an area protected by the Convention.

In light of this, the legislator seems to have unreasonably narrowed the notion of discrimination in the Law to restrictions on the exercise of only rights and freedoms, without including the *legally protected interest*, which would significantly expand the scope of the prohibition of discrimination.

Let us turn to the characteristics of some problems in the application of the prohibition of discrimination in judicial practice.

I. Inflation of the prohibition. « When I make a word do a lot of work like that, I always pay it extra!», said Humpty Dumpty. Putting the excessive burden on the word in judicial practice, we should have done the same.

National courts mostly tend to take discrimination too broadly, as an unjustified violation of equality in the exercise of rights. Moreover, the question of which feature was the substantial ground for different attitudes is almost never paid attention. An indicator of discrimination is only the presence of a person or group of persons who, under similar conditions, do not experience the same restrictions.

Thus, *any inequality in the exercise of rights is considered discriminatory.* This is a kind of scarce (compared to the one enshrined in the Law) formula of discrimination, the application of which causes «swelling» or «inflation» of the very notion. In fact any violation of the law, any arbitrary behavior of state bodies in relation to person can be considered as a violation of equality in the exercise of rights, i.e. discrimination.

However, not every breach of equality in the exercise of rights is discriminatory, as discrimination *occurs only on the basis of a protected feature, as emphasized in para 2 of part 1 of Article 1 of the Law.* Law enforcement officers are obviously puzzled by the fact that any other feature, ie not mentioned in the Law, can be established as a protected feature. *However, it does not follow in any way that such a feature does not need to be established at all (the opposite will directly contradict the requirement of paragraph 2 of part 1 of Article 1 of the Law).*

In addition, not every single violation of legal equality may constitute discrimination. Refusal of employment for arbitrary personal reasons constitutes a violation of the right to work, but does not constitute discrimination in the exercise of this right, as there is no protected feature that causes a difference in attitude. Similarly, when the Supreme Court of Ukraine adopted contrary rulings in two very similar cases on value added tax, the ECtHR found a violation of legal equality and legal certainty as components of the rule of law in protecting property rights under Article 1 of Protocol No. 1 [17, para. 42–44], but not discrimination.

Thus, in its decision of 5.12.2019, the Grand Chamber of the Supreme Court considered the appeal against the decision of the High Council of Justice (hereinafter – HCJ). The case originated in the GRP's refusal to submit a petition to the President of Ukraine on the appointment of the plaintiff to the position of a judge of the Donetsk District Administrative Court. In 2010 the latter and two other judges held an infamous decision to abolish the Decree of the President of Ukraine «On conferring the title of Hero of Ukraine on S. Bandera.» Considering this decision to be politically motivated, HCJ refused to submit a plaintiff's petition to the President of Ukraine. However, this did not prevent HCJ from making similar submissions to other judges.

Disagreeing with the decision of HCJ, the judge appealed it to the Cassation Administrative Court.

The HCJ explained the difference in the approach to the plaintiff by the fact that information on candidates for the position of judge, as well as their assessment of HCJ, are by nature unique and are not the matter of the case.

Administrative Cassation Court, with which the Grand Chamber agreed, ruled that the HCJ's actions against the plaintiff discriminated him against the other two judges. *However, neither Cassation Court nor the Grand Chamber, contrary to the requirements of Article 1 of the Law, made any findings on the protected feature.*

II. Confusing violation of the substantial right with discrimination in the exercise of thesubstantial right. As mentioned above, the need to apply the prohibition of discrimination does not always arise. The application must be provided in cases where an action transcends the violation of substantive right or freedom. In other words, it is inadmissible that court finds applicable both substantive rights and the prohibition of discrimination.

Thus, considering the case № 367/2728/16-ts, Civil Cassation Court in its Resolution of September 19, 2019 agreed with the conclusions of the courts of first and second instance on the actions of violation of Articles 147–149 of the Labor Code of Ukraine regarding the imposition of disciplinary sanctions on the plaintiff, the district physician of a clinic [9]. The court found two separate violations, of the plaintiff's substantive labor rights, at one hand, and violation of the prohibition of discrimination with regard to enjoyment of this rights. The issue is that violations of Articles 147–149 of the Code and violation of the prohibition of discrimination in the application of these articles are alternative types of offenses, and the establishment of the former precludes the establishment of the latter and vice versa.

III. Negative features of direct discrimination should be payed more attention. The Grand Chamber of the Supreme Court in its Decision of December 3, 2019 in case № 910/6471/18 resolved a number of issues related to adopting service payments to condominium association.

The plaintiff referred to the fact that the latter established different fees for owners of residential and non-residential premises, which violates plaintiff's rights as owner of non-residential premises with a total area of 704.53 square meters. The plaintiff argued that the contested decision is discriminatory for his share in total payments to condominium association should be equal to the shares of owners of residential premises.

The Grand Chamber of the Supreme Court proceeded from the fact that when making a controversial decision on the distribution of costs for the management of the house and the division of contributions depending on the type of real estate owned by co-owners (residential or non-residential), the budget took into account different modes of operation of such premises (residential and non-residential). Therefore, the higher rates of fees for the owners of non-residential premises is justified by the fact that the latter require more operating costs, as there is arguably different number of visitors, amounts of waste, parking space etc.) [6]. The Supreme Court sided with the general meeting of condominiums, finding that they have the right to set higher fees for owners of non-residential premises.

Significantly, the Court found, on the one hand, that the plaintiff suffered less favorable treatment because of the protected features (ownership of non-residential premises), and on the other that this attitude was justified by various «load» of 1 sq. m. for residential and non-residential premises.

The failure is that in order to exclude the plaintiff's claim on discrimination, it is necessary to prove the substantial reasons for the difference in attitude. Meanwhile, the Court's decision does not provide any evidence to confirm the economic feasibility of such a tariff, as well as what confirms the alleged increased load per 1 sq. m. of non-residential premises.

In other words, negative features of discrimination that justify restrictions on the exercise of rights cannot be mere declarations and must be substantiated.

Conclusive remarks. In our view, the shortcomings of the domestic anti-disrimination legislation and case law are natural for a system that has relatively recently begun the process of implementing European and global anti-discrimination standards.

Therefore, without excessive optimism, we can hope for their future correction. However, we believe that it is important to counter the introduction of a broad interpretation of discrimination that distorts the original idea, which lies at the bottom of the prohibition of discrimination – tackling social stigma and obstruction of people out of intolerance and hatred.

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ЗАБОРОНА ДИСКРИМІНАЦІЇ В УКРАЇНІ: ЗАКОНОДАВЧЕ ЗАКРІПЛЕННЯ ТА ЗАСТОСУВАННЯ

В. Гончаров

Львівський національний університет імені Івана Франка,
вул. Університетська 1, Львів, Україна, 79000,
e-mail: gonchar.lawyer@gmail.com

Висвітлено теоретичні та практичні аспекти заборони дискримінації за національним законодавством України. Попри те, що Закон України «Про засади запобігання і протидії дискримінації в Україні» відповідає сучасним вимогам до подібних законів, законодавча конструкції дискримінації та її форм в ньому не позбавлена низки вад. Першою з них є використання у визначенні допоміжних ознак, які не визначають, а лише допомагають встановленню дискримінації. До таких ознак належить, зокрема, компаратор, необхідність у встановленні якого трапляється не завжди. Закон також не передбачає розподілу обов'язків з доказування дискримінації, у зв'язку з чим доведення і позитивних, і негативних ознак покладено на особу, яка заявляє про порушення її прав.

Проаналізовано вади застосування заборони дискримінації, до яких віднесено такі явища, як інфляція поняття дискримінації (розмивання його меж), нагромадження на порушення основного права дискримінації у здійсненні такого права, а також недостатнє доведення негативних ознак дискримінації.

Доведено, що не будь-яке порушення рівності в користуванні правами є дискримінаційним. Національні суди здебільшого схильні розуміти дискримінацію надто широко – як невиправдане порушення рівності в користуванні правами. При чому питанню, яка саме ознака послугувала підставою неоднакового ставлення, майже ніколи не приділяють уваги. Індикатором дискримінації стає лише наявність особи або групи осіб, які за аналогічних умов не зазнають таких самих утисків чи обмежень. Дискримінаційною визнано будь-яка нерівність у користуванні правами. Це така собі «усічена» формула дискримінації, застосування якої спричиняє «розбухання» чи «інфляцію» її поняття, адже фактично будь-яке порушення права, будь-яку свавільну поведінку органів держави стосовно людини можна розглядати як порушення рівності в користуванні правами, тобто як дискримінацію.

Звернуто увагу на те, що підхід, відповідно до якого дискримінація охоплює будь-яке порушення юридичної рівності, не відповідає практиці Європейського суду з прав людини. А тому важливо протидіяти укоріненню широкого тлумачення дискримінації, що спотворює оригінальну ідею, яка є стержнем заборони дискримінації – протидіяти соціальному тавруванню та обструкції людей через свавілля та нетерпимість до їхніх особливостей.

Автор переконаний у тому, що наявні вади судової практики є закономірними для системи, що відносно недавно розпочала процес імплементації європейських та всесвітніх стандартів боротьби з дискримінацією. Водночас без надмірного оптимізму сподівається на майбутнє їх виправлення.

Ключові слова: дискримінація, пряма дискримінація, непряма дискримінація, захищена ознака, компаратор, перехресна дискримінація, обмеження права.

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