



Executive Summary

Country Report Macedonia (FYR) 2010 on measures to combat discrimination

By Biljana Kotevska

1. Introduction

Macedonia (FYR)¹ is a land-locked multi-ethnic country on the Balkan Peninsula. It became an independent republic in 1991 with the dissolution of Yugoslavia. It is a candidate for European Union membership since 2005, and holds a conditional invitation to join the North-Atlantic Treaty Organization since 2008. Membership in these two organizations, a foreign affairs priority for the country, also guides the domestic political discourse and actions, including tailoring of all reform undertakings. Domestic priorities, of relevance here, are implementation² of the Ohrid Framework Agreement (signed in view of ending the country's 2001 armed conflict, aiming to advance the position of minority communities in the country, and to preserve and reflect the multi-ethnic character of the country in public life, including through actions directed towards non-discrimination and equitable representation), lowering unemployment (32.1 per cent of the active population) and struggle with poverty (over 25 per cent live below the poverty line).

The country's population is a little over two million people. Ethnic affiliation plays a very important role, as some of the rights and positive actions foreseen in law for minorities are granted on the basis of percentage of total population which the ethnic community represents (i.e. over 20 per cent of the population). The ethnic composition is approximately 64 per cent ethnic Macedonians, 25 per cent ethnic Albanians, 4 per cent ethnic Turks, 3 per cent ethnic Roma, 2 per cent ethnic Serbs, 1 per cent ethnic Bosniacs, 0.5 per cent ethnic Vlachs and 1 per cent which fall under others.

¹ The constitutional name of the country is 'Republic of Macedonia'. However, pending settlement with Greece on the (on-going) name dispute, under a UN Resolution A/RES/47/225, the country was admitted as UN member under the temporary reference "the former Yugoslav Republic of Macedonia", which is the term used by the European Commission, thus also used for the purposes of this report.

² Although it is not OFA itself that is being implemented, but Constitutional, legal provisions and strategic documents that resulted from its signing, the expression "implementation of OFA" is used here to avoid long explication pretexts for the wave of reforms after 2001 resulting from it being signed.

Other numbers³ of importance for understanding the context in the country are mother tongue (approximately 67 per cent speak Macedonian, 25 per cent Albanian, 4 per cent Turkish, 2 per cent Roma, 1.5 per cent Serbian, 0.5 per cent Bosniac, 0.5 per cent Vlach and 1 per cent other language as a mother tongue), sex (50.2 per cent male and 49.7 per cent female), age (approximately 20 per cent are among zero and fourteen years of age, 70 per cent are among fifteen and sixty four years of age and 10 per cent are above sixty five years of age), religion (approximately 65 per cent Orthodox Christian, 33 per cent Muslim, 0.5 per cent Catholic, 0.1 per cent Protestant and 1.5 per cent other), and sexual orientation (official numbers do not exist, however estimations have been made by NGOs, claiming that over 5% are homosexuals).

The country has a low net migration rate (minus one migrant per 1000 population). It is a country of immigration rather than emigration, has a problem with brain-drain and has no brain-gain policy.

As a post-socialist country, its legal system underwent series of reforms. Changes in the political system were not accompanied by thorough changes in the legislative framework and reforms in the judicial and institutional framework. This resulted in a terminology that is not unified between various laws causing terminology confusion, and in substantial differences in the interpretation and the implementation of laws. Many of the reforms once commenced were abruptly stopped and new reform course was taken, while some are not yet completed. Such dispersed reforms targeting seems to have a negative long-term effect on the legal system. Resistance to reforms by the representatives of the judiciary is product of this reform patchwork operation.

Although the country is presented by the government as a country open to differences, through the actions on advancement of minority rights, it can hardly be said that this is really the case. Hate speech is widely tolerated, and seems to be omnipresent, especially in the past few years. Homophobic statements and hate speech directed towards homosexuals can be said to have dominated the public speech in 2010. Politicians, some of which members of parliament, have regressed the discourse for over forty years by publicly speaking about homosexuality as disease. The most staggering example of such a speech is one of an MP, a medical doctor by vocation who amidst the debate on the adoption of the Anti-discrimination law in one of the Parliament's working bodies stated that homosexuality is a disease. Similar is the situation with Roma people. Political participation of Roma⁴ does not have an equivalent in other rights, and certainly not in economic and social rights.

³ All numbers presented here are rounded percentages on the basis of the numbers from the Census of 2002. A new census is scheduled for 2011. All statistics gathered by the State Statistical Office can be found at: State Statistical Office. *State Statistical Office Website*. <<http://www.stat.gov.mk/>>. Last accessed: 13 March 2010.

⁴ This is the first country to have a Roma minister in the government, Roma municipality (Shuto Orizari), and it is on its way to *de facto* introducing Roma language as language in official use (in the Shuto Orizari municipality).

Instances of segregation in the educational system are still reported. Employment measures through equitable representation are still far from being reached when it comes to Roma. Many obstacles remain for integration and improvement of the rights of Roma in the country. Special programmes and strategies have been developed and supported by the government within the frame of the Decade for Roma Inclusion - a CEE and SEE government initiative for improving the situation of Roma in health, housing, education and employment. However, these seem to have had minimal or no results. No action is being undertaken to bring about crucial changes and an end to the cycle of poverty and unemployment of Roma people. Even more, no action is being taken to tackle stereotypes and prejudices against the Roma and make decisive steps against segregation.

A rise of traditional and religious values which lead to negative effects on gender equality and freedom of thought and conscience is noted in the past two years. Government funded anti-abortion campaign and a campaign calling for increase in the number of children, are just the most staggering examples.⁵

Official government policy for cooperation with NGOs in general and NGOs actual role in policy making processes is another point of importance. Example of relevance here is the adoption of the anti-discrimination legislation. It started as an NGO initiative, was transformed in inclusive consultation process for drafting of the anti-discrimination legislation, but ended up as a case of quest for legitimacy instead of case of participatory policy making process. At the beginning of the drafting of the Anti-discrimination law, a National Coordinative Body on Discrimination composed of representatives of Parliament, Government, NGOs and individual experts was established. The body was designed as a discussion forum and a link between NGOs and state decision-making bodies. In the course of 2008-2009 the NGO representatives that were part of this body actively participated in improving the drafting of the law by commenting on the versions of the law drafted by the government, as well as by putting forward publications and organizing events to assist the advancing of the debate on non-discrimination. However, in January 2010 the government announced on a press conference that a draft-law shall be proposed to the Parliament for adoption. This draft was (more or less) the very first 2008 draft version. During the second reading of the law, the government did consult the NGO coalition 'Macedonia without Discrimination' on possible amendments to the draft-law. The Government accepted and later on proposed in parliament few of the amendments (approximately twenty) proposed by the NGO coalition. However, these amendments did not present a substantial change on the text of the law.

⁵ Using the pro-choice position by accenting the slogan "You have a choice", the government actually pushed for a pro-life position, presenting a twisted picture of abortion and its health, socio-economic consequences, and showing only negative consequences from abortion, and indirectly advocating an anti-abortion campaign. In parallel, there was another campaign "Preservation of family values" filled with portraits of traditional families represented as the only picture of how a "normal" family should look like, and presenting horrifying pictures of life doomed to unhappiness if other family forms are sought, including if a couple decides to pursue a life of career rather than a family life. Examples of videos from these campaigns can be seen on these links:
<http://www.youtube.com/watch?v=CAF5Nlv1Z3U>;
<http://www.youtube.com/watch?v=TsrGVuGAguo&NR=1>.

Thus, this can again be seen as a mere step made to towards seeking legitimacy for the adoption of that version of the draft-law (i.e. as a text adopted in consultation with the NGOs), than willingness for genuine consultation and participation of NGOs in policy making processes.

2. Main legislation

The “Constitution of the Republic of Macedonia”⁶ is a written constitution and the country’s highest act. It accepts international law as part of domestic law, making international law higher than domestic laws and by laws. The Constitution enables three lines of protection against discrimination.

It firstly upholds equality of citizens before the Constitution and before law, stating that “citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of gender, race, colour, national and social origin, political and religious conviction, property and social status. Then, it foresees a protection mechanism for all who find their Human Rights and freedoms breached, in front of the Constitutional court. Finally, as the country has signed and ratified all relevant international law on non-discrimination (save the Convention on the Rights of Persons with Disabilities), these documents are also at disposal.

Until 2010 provision on anti-discrimination were scattered in various laws. In April 2010, the Anti-discrimination Law (first comprehensive legislation on anti-discrimination) was adopted in the process of approximation of the domestic legislation with the *acquis*. This law does not comply with the Directives regarding minimum protected grounds, definitions and forms of discrimination, victimisation, effective, proportionate and dissuasive sanctions, use of statistical data, dialogue with the NGO sector. The equality body established with the law cannot be seen as meeting the requirements of Directive 2000/43.

The Anti-discrimination law protects the following grounds: colour, gender, belonging to a marginalised group, ethnic affiliation, language, citizenship, social origin, education, political affiliation, personal or social status, family or marital status, property ownership, and health condition, any other ground foreseen by law or a ratified international treaty. As can be seen, it does not protect the minimum list of grounds prescribed with the Directives, as it includes a limited scope of belief, and no notion of sexual orientation. However, it contains an open-ended clause, and several other grounds not covered by the directives.

In practice, until now, there have been very few cases where people filed a case to court when they find themselves wronged by failure to apply to them the principle of equal treatment. Also, people seem to file very few cases in front of the Ombudsman and the Constitutional court, as two other instances.

⁶ Constitution of the Republic of Macedonia. Official Gazette of the Republic of Macedonia. *Official Gazette of the Republic of Macedonia Website*. <<http://www.slvesnik.com.mk/WBStorage/Files/USTAV-eng.pdf>>. Last accessed: 07 March 2011. Art.40.

The new equality body established under the Anti-discrimination Law starts functioning as of 2011, thus clearly no case law coming from this body exists yet.

Policies in favour of equality and non-discrimination have not been developed and no changes have been made in the overall approach toward discrimination.

The reasons for this would be general lack of understanding and knowledge on discrimination and equality (be it on non-discrimination and equality in general and their importance, shift of burden of proof, victimisation), lack of legal clarity (provisions on discrimination related to personal and material scope, forms of discrimination, body to address discrimination cases, burden of proof, as well as protected grounds), lack of skills and established mechanisms to encourage, receive and process discrimination cases (recognizing discrimination, and encouragement to file discrimination cases to competent institutions; general principles that could be applied uniformly in the context of wider national legislation).

3. Main principles and definitions

The Anti-discrimination Law contains definitions of direct and indirect discrimination; harassment, instructions to discriminate as well as victimisation. Definition of discrimination is unnecessarily more complicated than the one of the Directives. The definition of indirect discrimination is fully replicated from the Directives. It contains an article on harassment and on sexual harassment, as well as a separate article on discrimination of people with disability. Multiple discrimination is foreseen as a grave form of discrimination, together with a repeated and extended discrimination. The law also has a provision on inciting and encouraging discrimination, however no provision on discrimination by association exists.

The law defines a list of exceptions and exemptions. These are connected with the nature of particular occupational activities and/or special care for some groups of people (the elderly, youth, pregnant women, people with disabilities, and parents). Reasonable accommodation is included primarily in the Law on Employment of People with Disabilities. However, the list of exceptions is not very precise in the personal and material scope. This opens room for readings of the law which could narrow protection against discrimination.

Before the adoption of the Anti-discrimination Law, various laws incorporated definitions of discrimination. As the Anti-discrimination Law does not foresee a unification of provisions amongst various laws, one can expect that the institutions that are supposed to implement the law could face doubts on which legislation and/or provision to apply to a certain case, and which provisions should have the last word. Although *lex specialis derogat legi generali* and *lex posterior derogat legi priori* are by tradition part of the judicial work, court practice states that judges usually reach for existing provisions rather than general legal principles even in cases where seemingly contradictory provisions exist, as general legal principles are used primarily in case of existence of a legal loop.

Neither strategy nor plans of action have been adopted to assist the process of implementation of the legislation as a whole, thus no such documents exist to assist dealing with cases on specific forms of discrimination. In April 2010, a manual for protection from discrimination was developed by the Ministry of Labour and Social Politics that should help the administration to implement the anti-discrimination legislation.

Ministry of Education adopted a manual on tackling discrimination in education, with a special focus on discrimination against Roma. However, both manuals are more of an overview of provisions from international and domestic legislation rather than a tool to be used by practitioners.

4. Material scope

Anti-discrimination Law is applicable to both the private and public sector and applies to all fields.

The law notes that specific attention should be paid to the fields of employment and working relations; membership of and involvement in trade unions, political parties, NGOs, foundations, and other membership organisations; social security, including social protection, pensions and disability insurance; health insurance and healthcare; education; access to goods and services; and housing. Thus, this law goes well beyond the Directives.

Other laws also include discrimination provisions, defining the material scope. All of them relate it to both the public and private sector, save of the Law on Ombudsperson which enables protection from discrimination, however only in the public sphere.

In the field of employment, aside from the Anti-discrimination law, there is also a Law on Labour Relations which prohibits discrimination in all aspects listed in the Directives. Aside from the Anti-discrimination Law, in the field of employment the prohibition of discrimination applies to both the public and private sector.

5. Enforcing the law

Laws currently in force are not clear when it comes to addressing of complaints of discrimination. Various laws call for various types of proceedings in similar or equal cases. Proceedings vary from inspector control, misdemeanour procedure, litigation procedure, administrative procedure, to criminal procedure. In some laws the phrase "to the competent authority" is used, without further explanations. As no case on discrimination under the new law, nor under previous laws, has been brought to court as a case of discrimination, victims are not benefiting from effective protection.

According to the Constitution, citizens are entitled to bring a case for protection of fundamental rights and freedoms to regular courts in a prompt procedure.

However, in practice, although invocations of the procedures have been made, the Constitutional court has been very reluctant in acting upon cases in relation to discrimination i.e. to citizens' rights and freedoms cases in general. In fact, in 2010 the Constitutional Court had the first case where it established a breach of a right within this procedure.

Another procedure for protection of rights, including right to equality and protection against discrimination is a procedure that can be initiated in front of the Ombudsman. This is limited to the public sphere only.

The Ombudsman is vested with the competence to provide for protection of the principle of non-discrimination and equitable representation. The number of cases on discrimination is the lowest number according to the statistics of the institution. Only 0.40 per cent of the cases in 2010 are cases on discrimination. Moreover, the number of cases has dropped since 2009 (from 20 in 2009 to 16 cases in 2010).

Anti-discrimination Law envisages several options for procedural protection. These are: administrative, litigation and misdemeanour procedures.

Administrative procedures in front of the Commission for Protection against Discrimination (equality body established under this Law; this body is to start functioning in 2011). This procedure is free of charge, and may result in a Commission's opinion and recommendation. Duration of the procedure stretches to 90 days. If the recommendation is not acted upon, the Commission can initiate a procedure with a competent body (without further specifications).

Litigation procedure can also be raised in front of regular courts, based on the provisions of this law. The law does not resolve the priority of the procedures, in a case of simultaneous procedures. It does state that if a procedure is raised in front of a court, no procedure can be raised in front of the Commission. However, it does not say what one does if there is a procedure raised in front of the Commission, and after that (but before the procedure ends in front of the Commission) another procedure is started in front of a court. Also, this is not settled for the relations between the procedures in front of the Ombudsperson and the Commission.

In the Anti-discrimination Law the outcome of the procedure depends on the procedure which one chooses to pursue. The administrative procedure envisages a recommendation for rectifying the violation (i.e. the discrimination) within 30 days; litigation would lead to an award of regular compensation; while the misdemeanour procedure envisages fines in the range of 400 to 1000 euro in national currency. There are financial sanctions and other sanctions envisaged under the Criminal Code for discrimination. These provisions have not been applied thus far.

Neither under the Anti-discrimination Law, nor under previous laws have situation testing and statistical evidence been prescribed as admissible evidence and tools in procedures on discrimination cases. They have not been used in practice (with the exception of few efforts by NGOs).

Statistical evidence is not mentioned in domestic legislation. In fact, statistics are only mentioned in a context of competences of the equality body (i.e. collecting statistics).

NGOs support the complaints of victims and bring cases of discrimination to public attention. However media and public do not show a constructive interest in the cases nor in covering discrimination. The coverage and interest are more sensationalist, rather than genuine interest in non-equal treatment.

Shift of the burden of proof is foreseen in the Anti-discrimination Law.

However its definition is not in line with the standard prescribed with the Directives, as the law asks that the potential victim of discrimination provides for facts and proofs to justify their claim. This places unreasonable large portion of the burden on the side of the potential victim of discrimination. Shift of burden of proof does not apply for the criminal offences related to breach of equal treatment. Furthermore, it is also mentioned in several other laws. However, so far it is not used in practice. Courts and judges still ask from plaintiffs to submit hard evidence when filling their cases, and do not shift the burden of proof.

6. Equality bodies

Anti-Discrimination Law provided for the establishment of the first equality body in the country, a Commission on Protection against Discrimination. Under this law, the Commission members were elected in December 2010, and it should start functioning in beginning of 2011, with the start of the implementation of the law.

The Commission will be working on cases of discrimination covered by the Anti-discrimination law. These grounds are: sex, race, colour of skin, gender, belonging to a marginalised group, ethnicity, language, citizenship, social origin, religion or religious belief, other sorts of belief, education, political affiliation, personal or social status, mental or physical disability, age, family or marital status, property ownership, health condition, or any other ground stipulated in law or a ratified national treaty.

The Commission has an extensive mandate. It includes giving advice and recommendations on cases of discrimination; providing information and initiating procedures at relevant state bodies; reporting, education and training; initiating changes to legislation; cooperation with local government, NGOs, other equality bodies and international organisations; and collecting statistical data, establishment of databases and research.

Before the Anti-discrimination law no equality body existed at the national level. Some functions concerning discrimination fall within the mandate of the Ombudsman's office, which has a special department for protection from discrimination. The relations between the Ombudsman and the Commission were not regulated in the Anti-discrimination law.



According to the general mandate of the Ombudsman, it can accept individual claims, investigate, give recommendations and opinions, initiate procedures, monitor and research specific issues, focusing the protection on the grounds mentioned in the Constitution and covering violations made by public bodies.