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TOLERANCE**

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CONTENT

1. SEVERAL ASPECTS OF TOLERANCE, RELIGIOUS ASPECTS AND OTHER <i>Prof. Ferid Muhic, Faculty of Philosophy, Ss. Cyril and Methodius University, Skopje</i>	5
2. EXCERPT FROM "ASPECTS OF EUROPEAN AND AMERICAN LEGAL PHILOSOPHY REGARDING FREEDOM OF EXPRESSION AND HATE SPEECH AND THEIR REFLECTIONS OVER THE INTERNET" <i>Ph.D. Nenad Zhivanovski, Media Analyst</i>	9
3. CHARACTERISTICS OF HATE SPEECH IN SOCIAL MEDIA <i>Sead Dzical, PhD at the Institute for Sociological and Political-Legal Research</i>	13
4. OVERVIEW OF THE LEGISLATION, CASE LAW AND NON-LEGAL TOOLS USED FOR PREVENTION OF ONLINE HATE SPEECH <i>Daniel Milo, PhD Senior Advisor at the Ministry of Interior of Slovak Republic</i>	17
5. COMBATING STEREOTYPES, RUMOURS AND DISCRIMINATION <i>Niall Crowley, Independent Equality and Diversity Expert, former Chief Executive Officer Equality Authority of Ireland</i>	25
6. STEREOTYPES AND PREJUDICES AS CAUSE FOR DISCRIMINATORY PRACTICES – REVIEW OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS <i>Zaneta Poposka, PhD in International Human Right Law</i>	35
7. RELIGIOUS HATRED AND SECULARISM AS AN ANSWER <i>LLM. Aleksandar Markovski, Public Prosecutor in Public Prosecutors Office in Skopje</i>	51
8. SYNERGY OF EFFECTIVE LEGISLATION AND QUALIFIED PROFESSIONALS AS A RESPONSE TO HATE SPEECH <i>Aneta Arnaudovska, Judge, Director of the Academy for Judges and Prosecutors</i> <i>"Pavel Shatev", Skopje</i>	69

6. STEREOTYPES AND PREJUDICES AS CAUSE FOR DISCRIMINATORY PRACTICES – REVIEW OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Summary

This paper discusses the stereotypes and prejudices against a certain social group as limiting factors for the individual choices of people belonging to the respective group, which consequently lead do discrimination, stigmatization, hate speech and eventually to bias-motivated violence. The analysis is conducted on the basis of the case law of the European Court of Human Rights.

In this context, the analysis of the case law and the findings of the Court are given special place with regard to the stereotypes in cases of discrimination on the grounds of sex and gender, ethnic and racial background, disability, status of HIV positive people, sexual orientation, religion and belief. On the other hand, the paper analyses the religious, ethnic and homophobic prejudices which are the underlying cause of hate crimes.

1. Introduction

Contemporary societies consider that law is a powerful tool that construes the social reality and inclusion of all individuals in the modern societal life. Nowadays, this is used to tackle discrimination which results from different treatment of people with certain protected characteristic such as ethnic background, sex and gender, disability, religion and belief, age, sexual orientation and similar, as well as the stereotypes and prejudicial attitudes of people against these people or groups, stigma; and social environment and structure. Stereotypes and prejudices against a certain group in the society impose limits to individual choices for members of the respective group and lead to subordination, inequality, discrimination, stigmatization, hate speech and eventually to bias-motivated violence.

Prejudices and stereotypes against different groups of people are deeply rooted in the everyday life. Prejudices are antipathies based on wrong or inflexible generalization which may be expressed, felt as well as directed towards a group of people with certain protected characteristic as a whole or towards an individual with certain protected characteristic, only because of the fact that they belong to the group¹. One can note that it is the prejudices against respective people that serve as fundamental force which is in fact hidden behind the exclusion of this group of people from economic opportunities and social life, in general. This is so because these individuals are not perceived as individual members of the society who should be individually judged and not based on prejudices and stereotypes. On the contrary, they are considered

¹ See: G.W.Allport, *The Nature of Prejudice*, Cambridge, MA: Addison-Wesley, 1954.

as members of the respective social group which is created due to certain beliefs and attitudes of the majority and most often on the basis of such prejudices and stereotypes.

Thus, one can raise the question – how does discrimination against someone occur on certain discriminatory ground or protected characteristic? Namely, prejudices (they comprise of two levels, i.e.: one level is the undertaken action, the other level is its interpretation) and stigma for members of certain group with protected characteristic, although they are wrong because of their humiliating nature, are always related to the real or assumed abnormality or atypicality. This refers to disability, chronic disease, old age, homosexuality or minority group such as the non-majority religion, ethnic background, etc. Regardless if the perception is positive or negative, it serves to separate the people with certain protected characteristic from the other people and therefore it is unacceptable². The protected characteristic itself is not criterion for separation and making difference. It is only a reflection of some other characteristic which is considered as essentially related and dependent on the existence or inexistence of protected characteristic. In other words, the respective characteristic is an indicator for many other characteristics to which it is assumed to be related. In fact, this is one of the key discussed issues in the debate for protection from discrimination on different grounds. Namely, in many cases, the use of protected characteristic as assumption for existence or inexistence of other characteristics (experience, ability, motivation, productivity, competitiveness etc.) may be wrong or at least questionable. For these reasons, one of the fundamental goals of the anti-discrimination legislation should be the elimination of such assumptions. Instead of having such generalization, one can propose an individual assessment of characteristics i.e. abilities of the individual.

The neglected existence of a protected characteristic can sometimes function in the same way. That is, neglecting the difference of a person with protected characteristic, his/her problems and capacities shall result in discrimination. For instance, neglecting the fact that people with physical disability use wheelchairs to move instead of walk, or that blind people use the Braille alphabet versus a black and white printed text, leads to their inaccessibility as well as exclusion of these people from societal life.

Having generalized the stereotypes, the concrete attributes are then imposed to individuals just because of the fact that they belong to a certain group, and one derogates the fact that every individual is unique. This is how stereotypes affect the people who are members of certain groups with protected characteristics, thus producing wrong indicators about their abilities.³ Therefore, these should be prohibited through adoption of legislation that bans discrimination on different grounds as well as through challenging such cases in the case law.

² See: Z. Poposka, *Discrimination on the grounds of handicap in the international human rights law*, Faculty of law, Justinian I, Skopje, 2012. In addition, see: H.C.Covey, *Social Perceptions of People with Disabilities in History*, Springfield, IL, 1998.

³ About the analysis of age classification, see more details in: B. Kadriu, *Age discrimination in international human rights law*, Faculty of law, Justinian I, Skopje, 2010.

2. Protection from discrimination according to the European Convention on Human Rights and Fundamental Freedoms

The principle of equality is the fundamental principle of human rights which is articulated in all international and regional instruments on human rights. Conceptually, equality and prohibition of discrimination may be seen as both positive and negative formulation of the same principle⁴. Although legal instruments are formulated so as to emphasize the prohibitions, i.e. discrimination, yet, this prohibition serves to ensure the ideal of equality, which is in fact the purpose of the prohibition.

The European Convention on Human Rights and Fundamental Freedoms⁵ (hereinafter: ECHR or Convention), was signed on 4 November 1950. It is a legally binding document for all European countries that ratified it. They are obligated to implement the Convention so that they will proclaim the guaranteed rights from the Convention and its Protocols through the national law and ensure legal protection for every individual on national level. The effects from the judgments of the European Court of Human Rights (hereinafter: ECHR or Court)⁶ are both *inter partes* and *erga omnes*.

Discrimination prohibition is explicitly specified in Article 14 of ECHR, which reads as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". This anti-discrimination clause does not make difference between direct and indirect discrimination and discrimination is considered as single phenomenon. The ECHR for many years considered only cases of direct discrimination⁷, however; the shift in the case *Thlimmenos*⁸, case *D.H*⁹ and case *Zarb Adami*¹⁰ changed the previous course¹¹ and the Court started to consider the cases of indirect discrimination, as well. With regards to the clause, one has to point out that there are several characteristics, that is: it has accessory character, its application does not always condition the violation

⁴ See: A.F.Bayefsky, The Principle of Equality or Non-Discrimination in International Law, 11 Human Rights Law Journal 1, 1990, page.1.

⁵ See: The European Convention for the Protection of Human Rights and Fundamental Freedoms, came into force on 3 September 1953. Country ratified the Convention on 10 April 1997. The wording of ECHR with all Protocols thereto, including the list of member-states is available on: <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

⁶ All judgments of the European Court for Human Rights may be found on the website of the Court in the database HUDOC on: <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=42786913&skin=hudoc-en>.

⁷ See: A.McColgan, Discrimination Law: Text, Cases and Materials, Oxford: Hart, 2005, page.9.

⁸ See: ECtHR, *Thlimmenos v. Greece* [GC], Reports 2000-IV, from 6 April 2000, paragraph 44.

⁹ See: ECtHR, *D.H. and Others v. Czech Republic* [GC], no.57325/00, from 13 November 2007.

¹⁰ See: ECtHR, *Zarb Adami v. Malta*, no.17209/02, from 20 June 2006.

¹¹ Seeing the equality and non-discrimination principle symmetrically and from the aspect of the model of formal equality.

of some fundamental freedoms and rights which are protected by ECHR, and it includes an open list of discriminatory grounds. Additionally to Article 14, the Protocol 12¹² to ECHR was also adopted as a separate international agreement that includes general prohibition of discrimination. The clause in Protocol 12¹³ is of independent nature, i.e. it is not related to the rights and freedoms protected by the Convention, and has a wider scope. It is applied to all rights which are guaranteed to the citizens in the domestic legal system, thus stipulating that "enjoyment of all rights stipulated by law shall be provided to all without discrimination regardless of sex, race, skin color, religion, political or other belief, national or social background, national minority, ownership, birth or other status" as well as "no one will be discriminated against by public authorities on any of the above stated grounds". Furthermore, the Commentary on the Protocol 12 specifies that although the Protocol principally protects the individuals from discriminatory behavior by the state, private relations are also protected to a certain extent, especially the private relations among individuals which is normally expected to be regulated by the state. For instance: arbitrary prohibition for access to work, entry in restaurants, or services that private individuals make available to the public, such as health care services, water-supply or electricity supply etc.

3. Case law of the European Court of Human Rights in cases of discrimination based on certain stereotypes

The analysis of the case law and findings of the Court regarding stereotypes in cases of discrimination on the grounds of gender and sex, ethnic and racial background, status of HIV positive people, sexual orientation as well as religion and belief are given special consideration in this part of the paper.

3.1. Gender stereotypes. Two types of gender stereotypes in cases of discrimination are said to cause much concern according to the case law of the European Court of Human Rights. The first type of stereotypes and prejudices are based on the idea that man are superior and women are inferior which leads to the wide spread practice of coercion and violence, in particular the domestic violence as form of exercising control over women. The second group refers to certain stereotypes about social roles that both groups have in the society, i.e. the mother as figure that provides care for the children and elderly family members, and the father as person that earns for living and financially supports the family.

¹² See: Protocol No.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.177. Open for accession on 4 November 2000, and came into force on 1 April 2005, in accordance with Article 5 of the Protocol. Country ratified it in 13 July 2004. Available on: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG>

¹³ The intention is not that Protocol 12 should replace Article 14, but somehow to complement it, thus accepting the already established case law regarding the prohibition of discrimination. Also, the Commentary stipulates the meaning of the general prohibition of discrimination which is identical to Article 14 with regard to the discriminatory grounds and evolved subtypes of fundamental rights and freedoms.

The idea about the superiority of men and inferiority of women as a stereotype in the case *Opuz v. Turkey*¹⁴ has led to the wide spread practice of coercion and violence as a form of exercising control on women by men (paragraph 75), as well as tolerance on the part of the state institutions about this phenomenon, which is contrary to the international standards¹⁵. According to the allegations of the applicant, the domestic legislation of Turkey is discriminatory because the life of a woman in Turkey is treated as inferior in the name of the family community, while the Civil and Criminal Code additionally treat a woman as second-class citizen whereby she is primarily seen as ownership of the society and the man in the family (paragraph 178). In this context, the Court found violation of Article 14 in connection with Article 2 and Article 3 of the Convention and specified that "given the general and discriminatory judicial passivity in Turkey, although unintentionally, but mainly affecting women, the Court believes that the violence suffered by the applicant and her mother can be considered as gender-based violence, which is a form of discrimination against women. Despite the reforms undertaken by the Government in the past several years, the overall irresponsibility of the judicial system and the impunity which is enjoyed by the perpetrators, indicates the lack of sufficient commitment to take adequate measures for resolution of the domestic violence problem" (paragraph 200).

The case *Eremia v. Moldova*¹⁶ is similar, where it is stated that patriarchal and discriminatory attitudes enhance the vulnerability of women to violence and abuse, particularly to domestic violence which is excused by the society and is not adequately acknowledged among the civil servants, the society and women themselves, thus resulting in insufficient protection infrastructure for victims of violence (paragraph 37). The same paragraph of the judgment also includes the opinion of the **UN Special rapporteur for violence against women** where it is stated that women from Moldova suffer from different forms of violence, among others, also from domestic violence, which is closely related to the overall subordinate position of women in the society. The authorities did not realize their positive obligation and did not protect the applicant from domestic violence and punish the perpetrator, which means violation of Article 14 in connection with Article 3 of the Convention. The Court thought that the authorities do not seriously understand the problem of domestic violence in Moldova and the discriminatory effect on women (paragraph 89). Additional concern is that research shows that women with higher educational degree and economic status do not report the incidents of violence, there is no recognition of domestic sexual violence as something wrong in the society, and there is fear among the victims that they will be considered responsible and shall be

¹⁴ See: ECtHR, *Opuz v. Turkey*, no. 33401/02, from 9 June 2009

¹⁵ See: CEDAW Committee, *Fatma Yıldırım v. Austria*, from 1 October 2007. In the decision of the Committee in the case *Fatma Yıldırım v. Austria* it was stated that the state should provide not only adequate legal framework, but also its effective implementation in practice. Also see: CEDAW Committee, *A.T. v. Hungary*, from 26 January 2005.

¹⁶ See: ECtHR, *Eremia v. Moldova*, no. 3564/11, from 28 May 2013.

rejected if they report the cases of domestic violence (paragraph 37).

Stereotypes largely contribute to the traditional gender roles of both men and women, which results in lack of support for the individuals who do not fully epitomize the respective stereotype, i.e. traditional gender roles. This is clearly expressed in the case *Konstantin Markin v. Russia*¹⁷, where two types of stereotypes prevail: first, the mother is responsible for the household and childcare, and second, the idea about army service and warfare is for men and not women. Women are closed at home due to such stereotypes, while men are placed somewhere outside the home, thus hurting both genders equally (paragraph 119 and paragraph 120). In this case, the Court found violation of Article 14 in connection with Article 8 of the Convention, thus judging the gender stereotypes especially with regard to child care (paragraph 143). Furthermore, the Court specified that the promotion of gender equality is nowadays the main goal of the member-states of the Council of Europe, and for these reasons, the tradition or general assumptions that prevail as social attitudes in a certain country are not sufficient to justify the different treatment based on gender. For instance, states are prevented to impose traditions that arise out of the primordial role of man and second-rate role of a woman in the family (paragraph 127).

In addition to this case, the Court found violation of the Convention in many other cases, thus stating that stereotypes and prejudices are not adequate justification for discriminatory treatment. For instance, in the case *Zarb Adami v. Malta*, the explanation of the Government that the release from a duty to be a lay judge for a person that cannot participate in the work of the court because s/he should take care of the family is more successfully utilized by women than men as well as the fact that defense attorneys show tendency to reexamine women lay judges more than men due to "cultural reasons", were not sufficient for the Court to justify the different treatment based on sex (paragraph 81 and paragraph 82). This argumentation is based on the stereotypical perception of a woman as the only one taking care of children and elderly family members and therefore the Court found violation of Article 14 in connection with Article 4 paragraph 3 line g of the Convention. Similar reasoning of the Court can be noticed in the case *L. and V. v. Austria*¹⁸ about bias based on sexual orientation (paragraph 52), and in the case *Inze v. Austria*¹⁹ where different treatment is based on birth and other status (paragraph 44).

3.2. Ethnic/racial stereotypes. The case law of the European Court of Human Rights particularly emphasizes the stereotypes that affect Roma people in the education sector through cases of Roma segregation in schools and classes for children with disabilities, thus stressing their inferiority which leads to complete stigmatization. It is interesting how the Court links prejudices and stereotypes in

¹⁷ See: ECtHR, *Konstantin Markin v. Russia* [GC], no. 30078/06, from 22 March 2012.

¹⁸ See: ECtHR, *L. and V. v. Austria*, nos. 39392/98 и 39829/98, from 9 January 2003.

¹⁹ See: ECtHR, *Inze v. Austria*, no. 8695/79, from 28 October 1987.

one whole, that persist for long time and become institutionalized, which inevitably turn into stigmatization of whole group, in this case the Roma. This process that emerges in education further spreads in the other spheres of social life, whereby this group is solidified on the margins of the society. There are numerous cases about this question which is further elaborated below.

Namely, in the *case Orsus v. Croatia*²⁰, by invoking the opinion of the Advisory committee for the Framework Convention on the Protection of National Minorities²¹, it is stated that the separation of Roma students from other students in physically divided schools or classrooms is stigmatizing the Roma (paragraph 68). It further adds that the educational system should take into account the language and culture of the respective minority/community. In the same context is the *case D.H. v. The Czech Republic*, where the Court confirmed that different treatment may appear in the form of disproportional prejudicial effect on the general policy or practice (paragraph 184). Furthermore, the Court accepted that Roma are special type of marginalized and vulnerable group that need special protection in accordance with the Convention, and concluded that due to segregation “the applicants acquired education that enhances their difficulties and compromises their further personal development, instead of tackling their real problems and assisting their integration in mainstream schools and development of skills that will alleviate their life with the majority population” (paragraph 207). The same logic was used in the *case Sampanis and Others v. Greece*²².

*The case Horvath and Kiss v. Hungary*²³, goes even further thus stating that due to culturally biased school assessment, Roma are continuously and systematically categorized as persons with mild mental disability and are further segregated in special schools for children with disabilities, which results in segregation. In all the cases, the Court found violation of Article 14 in connection with Article 2 of Protocol No.1, i.e. indirect discrimination. Namely, the Court pointed out that prejudices are source of discrimination with regard to the limitation of fundamental rights that affect the vulnerable and historically discriminated group, however; the findings of the Court are still very mild when it comes to the influence of attitudes and practices based on prejudices in such cases. An interesting fact about the *case Horvath and Kiss* is that the Court judging that “the legislation applied in practice at that time had disproportional detrimental effect on the Roma community ... and the Court thinks that applicants suffered a discriminatory treatment” is linked with the same type of vulnerability and history of discrimination and prejudices against another group, i.e. people with mental disability, thus repeating its findings from the *case Alajos*

²⁰ See: ECtHR, *Orsus and Others v. Croatia* [GC], no. 15766/03, from 16 March 2010.

²¹ See: Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Croatia adopted on 6 April 2001, paragraph 49.

²² See: ECtHR, *Sampanis and Others v. Greece*, no. 32526/05, from 5 June 2008.

²³ See: ECtHR, *Horvath and Kiss v. Hungary*, no. 11146/11, from 29 January 2013.

*Kiss v. Hungary*²⁴, according to which the Court searches for many difficult reasons for any limitation of fundamental rights (*Horvath and Kiss v. Hungary*, paragraph 128, and *Alajos Kiss v. Hungary*, paragraph 42 and paragraph 44). Thereby, it opened the possibility for introduction of positive obligations for the state in cases of discrimination against people with disabilities.

3.3. Intersectional discrimination²⁵. The stereotype related to the position of a woman of African origin who works as a prostitute is subject of the case law of the European Court of Human Rights, compared to the women with “European phenotype” that also deal with prostitution. In the case *B.S. v. Spain*²⁶, the Court found violation of Article 14 in connection with Article 3 of the Convention, because domestic courts did not take into account the special vulnerability of the applicant related to her position as woman of African origin that works as prostitute. In this way, the authorities did not manage to take all possible steps to establish whether the discriminatory behavior of the police (racial comments with offensive content based on gender and ethnicity) played its role in the events (paragraph 62).

3.4. Stereotypes about people with disabilities. In the above stated case *Alajos Kiss v. Hungary*, persons with disability are subject of historic prejudices with permanent consequences that resulted in social exclusion, while such prejudices are included in the legislative stereotypes that prohibit individualized assessment of capacities and needs of people with mental disability (paragraph 42). This is a very important understanding by the Court which clearly expressed its attitude that prejudices against people with disabilities are often institutionalized in legally justified stereotypes that allow the overall social exclusion of this group of people by law. The Court stated that “if the limitation of fundamental rights refers to an especially vulnerable group in the society which suffered significant discrimination in the past, such as the people with mental disabilities, then the margin of appreciation of the state is significantly narrower and there must be very strong reasons for any limitation of fundamental rights” (paragraph 42).

3.5. Stereotypes about HIV positive people. The case law of the European Court of Human Rights points out the stereotypes that refer to people with certain health status. In both cases, the group consists of HIV positive people whereby the whole group is stigmatized through creation of false link between the disease transmission and the irresponsibility of the person, which further strengthens the other forms of stigma and discrimination, such as racism, homophobia and misogyny. Like in the cases of racial discrimination, the Court set clear link between prejudices and stereotypes and the stigma towards certain group.

²⁴ See: ECtHR, *Alajos Kiss v. Hungary*, no. 38832/06, from 20 May 2010.

²⁵ Intersectional discrimination is a type of multiple discrimination and occurs when there is a unique combination of two discriminatory grounds, and it is on the crossroad between individual grounds protected by the anti-discrimination legislation. See: S.Fredman, Double Trouble: Multiple Discrimination and EU Law, The European Network of Legal Experts in the Non-Discrimination Filed, European Anti-Discrimination Law Review Issue No.2, October 2005, page.13-19.

²⁶ See: ECtHR, *B.S. v. Spain*, no. 47159/08, from 24 July 2012.

In the case *Kiyutin v. Russia*²⁷, this stereotype is clearly expressed. Namely, the Court unambiguously concluded that “certain prejudices emerge from ignorance about the transmission of AIDS, which then stigmatize and marginalize people infected with HIV virus ... and as consequence, HIV positive people are vulnerable category with history of prejudices and stigmatization, which is why the state should be given narrow margin of appreciation in the selection of measures for different treatment that separates this group only on basis of their HIV status” (paragraph 64). Also, in the case *I.B. v. Greece*²⁸, the Court thinks that HIV-positive people face a range of problems, not only of medical nature but also professional, social, personal and psychological, and above all, sometimes with deeply rooted prejudices even among the most educated people (paragraph 80). In both cases, the Court found violation of Article 14 in connection with Article 8 of the Convention.

3.6. Homophobic stereotypes. There are numerous cases that refer to discrimination on the ground of sexual orientation that emerge from existing stereotypes about people from the LGBT community, particularly that they are not capable of having stable relationships and raising children due to their life style, thus taking into consideration the best interest of the child. Both stereotypes were challenged by the Court.

The position of the Court that “different treatment only on the basis of sexual orientation is unacceptable according to the Convention” is expressed in the case law, especially in the cases *Vallianatos and Others v. Greece*²⁹ (paragraph 77) and *X and Others v. Austria*³⁰ (paragraph 99). In the case *Vallianatos*, the Court unambiguously confirmed that “homosexual couples are as capable as the heterosexual couples to enter a stable and committed relationship ... same-sex couples share their lives, have same needs for mutual support and assistance just like the opposite-sex couples” (paragraph 81). In the case *X and Others v. Austria*, which refers to the exclusion of homosexual couples from adoption of a child by the second parent, the Court stated that when the states determine the ways of protecting the family and the respect for family life in accordance with Article 8 of the Convention, they need to take into consideration the developments in the society and the change in perception about matters and relations related to the social and civil status, including the fact that there is no single way or one choice with regard to one’s family or private life.

²⁷ See: ECtHR, *Kiyutin v. Russia*, no. 2700/10, from 10 March 2011.

²⁸ See: ECtHR, *I.B. v. Greece*, no. 552/10, from 3 October 2013.

²⁹ See: ECtHR, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 и 32684/09, from 7 November 2013.

³⁰ See: ECtHR, *X and Others v. Austria* [GC], no. 19010/07, from 19 February 2013.

(paragraph 139).³¹ In both cases, the Court found violation of Article 14 in connection with Article 8 of the Convention.

Furthermore, stereotypes about the behavior of people with homosexual orientation who serve the army are separately analyzed in the case *Smith and Grady v. the United Kingdom*³², where these people were dismissed from the army only because of their homosexuality. The stereotype here is that the presence of open or assumed homosexuals in the armed forces shall have significant negative effect on the morale and accordingly on the military power and operational efficiency of armed forces (paragraph 95). The Government in its defense went as far as to claim that homosexuality creates special problems of certain type and intensity which are not created by race or gender (paragraph 102). The Court did not agree with this position and found violation of Article 8 of the Convention.

3.7. Religious stereotypes. The case law of the European Court of Human Rights emphasizes the stereotypes that refer to underlying superiority of the major religion and inferiority of smaller religions, in particular with regard to the religious movement of the Jehovah's Witnesses which is a separate social minority group that lives according to certain rules. Namely, in the case *Hoffmann v. Austria*³³, the Court analyzed whether the awarded custody of a child to a father who is Catholic in comparison with the mother who belongs to the Jehovah's Witnesses only because of the mother's religion is in accordance with Article 14 of the Convention. The claims that the environment of the Jehovah's Witnesses will lead to social isolation of children due to the views of the religious movement that any mutual relations with people who do not belong to the Jehovah's Witnesses should be discouraged, any expression of nationalism (such as singing the national anthem) and religious tolerance, as well as the life and health threatening risk for the children because of prohibited blood transfusion (paragraph 10), are clearly stated in the case. However, the Court does not agree with this attitude thus emphasizing that "making difference only on the grounds of religion is not acceptable" (paragraph 36), and accordingly found violation of Article 8 of the Convention in connection with Article 14 of the Convention.

³¹ Additionally, in the case *Salgueiro da Silva Mouta v. Portugal* and in the case *E.B. v. France*, the Court implicitly accepted that there are no reasons why the child should not be raised by a lesbian or gay person that lives with same-sex partner. Similar finding was adopted by the Inter-American court of human rights in the case of *Atala Riffo and Daughters v. Chile* (judgment from 24 February 2012) where it is stated that sexual orientation is part of a person's intimacy and it is not important when one considers the aspects related to the adequacy of a person to be a parent.

³² See: ECtHR, *Smith and Grady v. the United Kingdom*, nos. 33985/96 и 33986/96, from 27 September 1999, ECHR 1999VI.

³³ See: ECtHR, *Hoffmann v. Austria*, no. 12875/87, from 23 June 1993.

4. Case law of the European Court of Human Rights in cases of hate crimes based on certain stereotypes

The analysis of the case law and findings of the Court in connection with religious, ethnic and homophobic prejudices in cases of hate crimes is given prominent place in this part of the paper. The purpose is to show the existence of tendency for discriminatory practices, which are based on prejudices and negative stereotypes. If this is not tackled by application of the anti-discrimination legislation, they can largely give rise to hate crimes.

4.1. Religious stereotypes. The case law of the European Court of Human Rights confirms the existence of stereotypes that refer to the superiority of major religions and inferiority of smaller religions, whereby in certain contexts it leads not only to discrimination as proven in the above stated *case Hoffmann*, but also to hate crime based on the religious affiliation of the applicants who are members of Jehovah's Witnesses and Hare Krishna Hindu. These stereotypes are present in numerous cases.

Namely, in the *case Begheluri and Others v. Georgia*³⁴, the Court links the discriminatory motives of the attackers, regardless if they are individuals or officials (state agents), during the attacks on the applicants who were Jehovah's Witnesses, with the existence of wide spread prejudices against this religious group accompanied with several attempts for violence against them (paragraph 142 and paragraph 179). Furthermore, such discriminatory attitudes led to a situation in which although they were aware that the attacks would most probably be motivated by religious hatred, the authorities simply ignored the probable religious motivation behind the violence, thus creating a systemic practice on the part of Georgia to reject any adequate and efficient investigation about violent crimes against Jehovah's Witnesses (paragraph 144). The Court considered it as unacceptable and therefore found violation of Article 3 of the Convention because the competent authorities were inefficient in the prevention of religious motivated violence. This created a climate of impunity by the Georgian authorities, which consequently encouraged other attacks on Jehovah's Witnesses throughout the whole country (paragraph 145). By analyzing the violation of Article 14 of the Convention, the Court unambiguously expressed its position that "treating the religiously motivated violence and brutality on equal footing with cases that do not have the same connotation, is similar to ignoring the specific nature of the crimes which are very destructive for fundamental human rights" (paragraph 173). The Court found violation of Article 14 in connection with Article 3 and Article 9 of the Convention.

Other cases that refer to the same prejudices are *Milanovic v. Serbia*³⁵, и

³⁴ See: ECtHR, *Begheluri and Others v. Georgia*, no. 28490/02, from 7 October 2014.

³⁵ See: ECtHR, *Milanovic v. Serbia*, no. 44614/07, from 14 December 2010.

*Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*³⁶. Namely, in the case *Milanovic*, the Court emphasized that the prejudices against the people belonging to the Hare Krishna Hindu by the majority orthodox population were crucial. Thus, the Court stressed that besides the investigation of violent incidents with probable religious biased motive, state authorities have additional obligation to take all reasonable steps in order to clarify the motive and specify whether religious hatred or prejudices had their role in the events (paragraph 96). However, in the concrete case, the state undertook something more than *pro forma* investigation (paragraph 100). For these reasons, the Court found violation of Article 14 in connection with Article 3 of the Convention. In the case *Members of the Gldani Congregation of Jehovah's Witnesses and Others*, the Court noted that the rejection by the police to intervene immediately on the place of the incident in order to protect the applicants from religiously motivated violence, as well as the following indifference shown by the competent authorities towards the applicants was largely a consequence of their religious beliefs (paragraph 140). For these reasons, the Court found violation of Article 14 in connection with Article 3 and Article 9 of the Convention.

4.2. Ethnic/racial stereotypes. Several stereotypes are processed in the case law on the European Court on Human Rights in cases of hate crimes that most often refer to the inferiority of Roma who are subjected to police abuse as well as violence from other individuals, as well as racially motivated prejudices against people with Sudanese origin. The feeling of fear and inferiority, destroyed dignity and creation of adverse environment are common for all applicants.

In the case *Nachova v. Bulgaria*³⁷, the Court analyzed whether the violent act by the officials in which two members of the Roma community lost their lives is motivated by racial prejudices. Namely, the existence of any evidence about racial verbal offending used by the officials while doing the operation that includes use of force against people of ethnic minorities or other groups is very important about the question whether the violence was illegal or motivated by hatred (paragraph 164). In this case, it is important to consider the context of the background, i.e. existing discrimination against Roma people by the authorities in Bulgaria. Furthermore, according to the European Roma Rights Centre, Roma community is further largely excluded from social life and faces extreme poverty, illiteracy and unemployment (paragraph 138). ECRI proposes trainings for the local administration in order to raise the awareness and tackle the existing prejudices (paragraph 53). According to the wording of the Court "racial violence is especially harmful to human dignity and because of its dangerous effects, authorities are requested special caution and energetic response ... therefore, authorities must utilize all available means for fight against racism and racial violence, thus strengthen the vision about democracy in the society where difference is not

³⁶ See: ECtHR, *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, from 3 May 2007.

³⁷ See: ECtHR, *Nachova and Others v. Bulgaria [GC]*, nos. 43577/98 и 43579/98, ECHR 2005VII, from 6 July 2005.

experienced as a threat, but as source of wealth” (paragraph 145). Also, the Court reminds that Article 14 of the Convention implies the obligation of the state to uncloak the possible discriminatory motivation behind the violent incidents (paragraph 161). Given the lack of adequate and efficient investigation by the authorities in order to check and verify the probable racist motivation, the Court found violation of Article 14 in connection with Article 2 of the Convention.

In the case *Abdu v. Bulgaria*³⁸, the Court reiterated its position that in any investigation of violent incidents motivated by racist attitudes/motives³⁹, authorities are obligated to take all reasonable measures and decide whether racial motivation exists and if the feelings of hatred or prejudices based on the ethnicity of the person (in this case of Sudanese origin) had their role in the respective case. Thus one can conclude that acting in cases of racially motivated violence and brutality like in cases that have no racial pretext would be like closing one’s eyes to the specific nature of the crimes which are especially destructive to the fundamental human rights (paragraph 29). In the analysis of the case, the Court invokes the ECRI Report on Bulgaria for 2009, the UN Report on elimination of racial discrimination as well as the findings of the Bulgarian Ombudsman who expressed concern regarding the increase in the number of racially motivated hate crimes and called the authorities “not to consider these crimes as violation of public order ... but to investigate possible hate crimes” (paragraph 37). The Court found violation in Article 3 both separately and in connection with Article 14 of the Convention.

In the same context like in the case *Nachova v. Bulgaria*, the Court in the case *Secic v. Croatia*⁴⁰ stressed that Article 14 of the Convention implies the obligation of the state to uncloak the possible discriminatory motivation behind the violent incidents (paragraph 66). Furthermore, the Court concluded that it is unacceptable that the police was aware that most probably the respective event was caused by ethnic hatred, but allowed that the investigation lasted for more than seven years, without taking serious action in order to identify and persecute the perpetrators (paragraph 69), thus found violation of Article 14 in connection with Article 3 of the Convention. The same findings were given in the case *Seidova v. Bulgaria*⁴¹ (paragraph 70).

In the case *Angelova and Iliev v. Bulgaria*⁴², the Court reiterated the importance of racial motivation of the perpetrator of crime, and the authorities did not take into consideration the motivation and did not undertake adequate investigation

³⁸ See: ECtHR, *Abdu v. Bulgaria*, no. 26827/08, from 11 March 2014.

³⁹ In accordance with the case *Moldovan and Others v. Romania* (no.2) and the case *B.S. v. Spain*, discriminatory comments and racial offending must in any case be considered as aggravating factor when one considers a case related to the violation of Article 3 of the Convention.

⁴⁰ See: ECtHR, *Secic v. Croatia*, no. 40116/02, from 31 May 2007.

⁴¹ See: ECtHR, *Seidova v. Bulgarija*, no. 310/04, from 18 November 2010.

⁴² See: ECtHR, *Angelova and Iliev v. Bulgaria*, no. 55523/00, from 26 July 2007.

(paragraph 105). An interesting fact about this case is that the Court clearly underlines the connection between the wide spread prejudices about Roma people and violence against this group, thus emphasizing the role of authorities in ensuring continuous condemnation of racism by the society and maintaining the trust of the minorities in the ability of the government to protect them from the danger of racial violence (paragraph 116). The Court found violation of Article 14 in connection with Article 2 of the Convention.

4.3. Homophobic stereotypes. The case law of the European Court of Human Rights proved that the predetermined bias of the heterosexual majority against the homosexual minority, motivated by views related to the religious beliefs of the majority are the reason for occurrence of hate speech and hate crime on the grounds of the sexual orientation of the applicants.

In the case *Identoba and Others v. Georgia*⁴³, the Court confirms the conclusion from the case *Smith and Grady v. the United Kingdom*, where it is stated that “action based on predetermined bias by the heterosexual majority against the homosexual minority may in principle be considered in the framework of Article 3 of the Convention”, adding that discriminatory comments and offending must in any case be considered as aggravating factor with regard to violation of Article 3 of the Convention (paragraph 65). In its analysis of the case, the Court stated that the attack of the LGBTI activists during the peaceful march to mark the International day against homophobia was provoked by people with hostile attitude towards the LGBTI community in Georgia. Furthermore, the violence which consisted mainly of hate speech and serious threats as well as sporadic physical violence caused fear, anxiety and uncertainty in all the applicants (paragraph 79). According to the Court, the state did not fulfill its positive obligation to protect the protesters although there was information about the negative attitudes towards the sexual minorities in some parts of the society, as well as the fact that the organizer of the march has warned the police about the probability that abuse might occur, in addition to the non-fulfillment of the obligation to conduct an efficient investigation that would reveal the biased motivation and identification of the perpetrators of the homophobic violence (paragraph 80). An interesting fact about the case is that the Court found violation of Article 3 in connection with Article 14 of the Convention, thus warning that “given the absence of investigation, it would be difficult for the state to implement the measures for improved police security at similar peaceful marches in future, which in turn undermines the public trust in the state policy for fight against discrimination” (paragraph 80).

Conclusion

Stereotypes and prejudices against groups of people with protected characteristic prevent one to perceive the members of the affected groups as individuals and members of the society that need to be judged on individual basis.

⁴³ See: ECtHR, *Identoba and Others v. Georgia*, no. 73235/12, from 12 May 2015.

On the contrary, they are seen as members of the respective social group which is created through mostly negative beliefs and attitudes of the majority which are based on such prejudices and stereotypes. Having generalized the stereotypes, the concrete attributes are then imposed to individuals just because of the fact that they belong to a certain group, and one derogates the fact that every individual is unique.

The case law of the European Court of Human Rights shows that prejudices are both the reason and manifestation of discriminatory treatment. If not condemned as unacceptable in the society it shall give rise to hate speech that further develops in hate crime. If these prejudices and stereotypes remain unchallenged in the society, there is a risk that they can be legalized and institutionalized by the legal system. Therefore, the state has the obligation to recognize, identify the detrimental effects and tackle the existing stereotypes and prejudices in the society and challenge them by modifying the social and cultural trends of behavior of different groups, such as men and women, majority and minority, different age groups, people with/out disability, people with different confession or religion, heterosexuals and LGBTI people.

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