

The principle of equality and its application in the public administration in the Slovak Republic¹³⁹

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Abstract: *The paper deals with the content and the requirements of the principle of equality before the law. Author analyzes the results of this principle within the public administration of the Slovak republic.*

Key words: *Art. 14 of the Convention on Protection of Human Rights and Fundamental Freedoms, case law of the European Court of Human Rights, equality, non-discrimination,*

INTRODUCTION

The right to equality before the law and the protection of all persons against discrimination are fundamental provisions of international human rights law. The right to equality is central to the human rights system, both as an autonomous legal right and as a subsidiary right related to all other human rights which must be applied without discrimination. It should be stressed that “*non-discrimination*” does not have the same meaning as “*equality*”. However, these two terms are closely intertwined. In its formal meaning, the principle of equality requires that equal situations are treated equally and unequal situations differently; failure to do so will amount to discrimination unless there is an objective and reasonable justification. The word “*discrimination*” normally imports the notion of difference and in law it generally refers to the different treatment of an individual or a group of individuals compared to others, which results in a disadvantage.¹⁴⁰

The discussion of equality is, in general, characterized by considerable conceptual and methodological confusion. This is no different in relation to the discussion of equality in the European legal context. Although there is agreement on the most elementary principles, in practice a wide range of approaches is often adopted by, for example, the European Court of Justice and the European Court of Human Rights. All but three EU and EEA Members States have one or more constitutional provisions regarding equality. The three exceptions are Denmark, Norway and the United Kingdom. In some states the establishment of equality dates several hundreds of years back like in France (1798). In other states the constitutional provisions on equality are of quite recent vintage. In many states the constitutional guarantees on equality are fully applicable in court by individual (e. g. Austria), but the legal status of the various provisions differs significantly from state to state. This affects also the extent of authoritative judicial interpretation of such provisions. Many states have a general equality provision under which citizens (sometimes others as well) are regarded as being “*equal before the law*”¹⁴¹ or “*equal under the law*”¹⁴². Some states, additionally or alternatively provide specifically for equal treatment to be accorded to men and women¹⁴³. States, either in addition to or instead of these provisions, also provide for constitutional protection against “*discrimination*” or “*different treatment*”. Thus most states that have such provisions use the term “*discrimination*” to describe the prohibited treatment, whilst some¹⁴⁴ use the term “*different treatment*” instead. Some states have a

¹³⁹ This work was supported by Slovak Research and Development Agency under the contract No. APVV-0024-12.

¹⁴⁰ See: The Declaration of Principles on Equality and activities of the Council of Europe. Doc. 12778. Strasbourg: Council of Europe. Parliamentary Assembly. Committee on legal affairs and human rights. October 25th 2011. (<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=13190&Language=EN>; August 17th 2014, 13:11 CET.).

¹⁴¹ E. g. Bulgaria, Cyprus, Estonia, Finland, Germany.

¹⁴² E. g. Belgium.

¹⁴³ E. g. Czech Republic, Germany, Poland.

¹⁴⁴ E. g. Finland.

“closed” system of grounds of prohibited discrimination¹⁴⁵. Others¹⁴⁶ have a more “open” system, where the grounds of non-discrimination are only listed approximately. This approach relates to the approach taken in the European Court of Human Rights, where a list of grounds is specified but ‘any other status’ is included as well. Some states prohibit discrimination across the whole range of possible situations where it might arise. Other states (as does the European Court of Human Rights) restrict the prohibition of discrimination to situations where the discrimination is in some way related to other rights protected by the constitution¹⁴⁷. In Hungary, the wording of the Constitution is similar, but the Constitutional Court extended the principle of equal treatment to any kind of right.¹⁴⁸

1. The Council of Europe and the application of the principle of equality and non-discrimination principle

The development in the field of the Council of Europe is particularly marked by a discussion of whether the equality is the right or the criterion of the exercise of rights established by the Convention. The original text of the Convention is based on the non-discrimination provided by the Art. 14. In the year 2000, the text of the Protocol no. 12, which counts with the establishment of the equality as a fundamental human right, has been adopted. It entered into force on April 1st 2005. The practice of the Council of Europe is based on the requirement that public authorities shall treat the addresses of the human rights equal in the same situations and unequal in the dissimilar situations.¹⁴⁹ The Art. No. 14 of the Convention, which has the accessory character and is used mainly in connection with the exercise of other rights, played a major role till the entry of the Protocol No. 12 into the force. The case-law in the matters of the property right protection is a typical example. The Art. No. 14 of the Convention protects the individuals in a similar situation against discrimination in the use of their rights established by the Convention and its Protocols. However, it considers the difference in the legal status of one of those persons to be discriminatory only if it “has no objective and reasonable justification”, if it does not follow a “legitimate aim” and unless there is a “reasonable relationship of proportionality” between the means used and the aim sought to be achieved.¹⁵⁰ Any measure which compromises the guaranteed right must therefore meet the attributes of *legality, legitimacy and proportionality*. Therefore when using the measures that relate to the exercise of rights, the public authorities cannot omit a group of addresses from their scope, just because the procedure of application of the measures would be difficult against this group. The case law does not consider such measures as tools that have a *legitimate aim* within the view of the Convention and it sees in them a breach of Art. 14 of the Convention.¹⁵¹

The wording of Art. 1 of the Protocol no. 12 builds on the wording of Art. 14 of the Convention. Under its section 1 “*The enjoyment of any right set forth by law 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.*” Under its section 2 “*No one shall be discriminated against*

¹⁴⁵ E. g. Romania.

¹⁴⁶ E. g. Poland.

¹⁴⁷ E. g. Lithuania.

¹⁴⁸ See: McCrudden, Ch. – Prechal, S.: The Concepts of Equality and Non-Discrimination in Europe: A practical approach. Brussels: European Commission. European Network for Gender Equality. 2009. p. 1-3. (http://www.google.sk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&ved=0CHMQFjAJ&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FblobServlet%3FdocId%3D4553%26langId%3Den&ei=zIHwU_DiDuLG7AaRloDgBg&usq=AFQjCNFCi_InwtDdb2DKoKpdMojLh4_OQ&bvm=bv.73231344,d.ZGU&cad=rja; August 17th 2014, 12:53 CET.)

¹⁴⁹ See: Decision of ECHR in the case of Thlimmenos v. Greece, application no. 34369/98 of April 6th 2000.

¹⁵⁰ See: Decision of ECHR in the case of Inze v. Austria of October 28th 1987, application no. 8695/79.

¹⁵¹ See: Decision of ECHR in the case of Darby v. Sweden of October 23rd 1990, application no. 11581/85.

by any public authority on any ground such as those mentioned in paragraph 1.” Additional scope of this right applies to the use of specific rights under national legislation and to the enjoyment of rights arising from the obligations of national public authorities. This guarantee also applies to the use of discretion by public authorities and it applies also to any other acts or omissions of public authorities.¹⁵²

Under the Article 3 of the Recommendation CM/Rec (2007)7 of the Committee of Ministers to member states on good administration “shall the Public authorities act in accordance with the principle of equality. They shall treat private persons who are in the same situation in the same way. They shall not discriminate between private persons on grounds such as sex, ethnic origin, religious belief or other conviction. Any difference in treatment shall be objectively justified.” The case-law and the jurisprudence connect the application of this principle with the principle of legitimate expectations, which is, however, more specific. The link is given by the fact that a breach of the principle of legitimate expectations consequently results into the breach of the principle of equality. The principle of equality applies always in specific circumstances. It cannot be successfully invoked by pointing to the differences between the previous and the new legislation. It cannot even condone an illegal activity. The prohibition of discrimination is closely linked to the principle of equality, but it is more specific. Discrimination always leads to a violation of equality, but for specific reasons calculated in the law. The action of administrative authorities on the basis of these reasons constitutes discrimination.¹⁵³

2. The principle of equality in Slovakia

The principle of equality is in general and also in theory defined as the right of individuals to be treated the same in the same cases (formal approach) and to be treated differently in different cases (substantive approach).¹⁵⁴ All provisions of the Constitution of the Slovak Republic (hereinafter “Constitution”) on equality should be seen, interpreted and applied in organic bond, which is especially true of those provisions of the Constitution, which are formulated in a general form (Art. 12. (1), first sentence¹⁵⁵, Art. 12 (2)¹⁵⁶ and Art. 13 (3)¹⁵⁷ of the Constitution), since they represent a fundamental starting point of applying the principle of equality in a particular case, respectively in a particular situation. The Art. 12 (1) first sentence, of the Constitution gives the expression to the constitutional principle of equality in its most general form, which guarantees the equality in its natural concept, that means that people are born equal and are equal in terms of their physical existence. However, such a general concept of the equality requires the concretization for each group of persons, for specific legal cases and for legal situations. The Art. 12 (2) of the Constitution is the general rule of equality, which represents the general concretization of the first sentence of Art. 12 (1) of the Constitution, because it moves the natural concept of equality to the legal one.

This provision of the Constitution provides the general protection against discrimination and in its essence it expresses the equality of all people before the law. The Art. 12 (1) first sentence of the Constitution cannot be interpreted and applied in isolation, that means

¹⁵² See: Svák, J.: Ochrana ľudských práv (z pohľadu judikatúry a doktríny štrasburských orgánov ochrany práv). II. rozšírené vydanie. Žilina : Poradca podnikateľa, spol. s r. o. 2006. p. 990-991. ISBN 80-88931-51-7.

¹⁵³ See: Košičiarová, S.: Princípy dobrej verejnej správy a Rada Európy. Bratislava: IURA EDITION 2012. p. 34 – 39. ISBN 978-80-8078-519-2.

¹⁵⁴ See: Finding of the Constitutional court of the Slovak republic no. PL. ÚS 17/08 of May 20th 2009.

¹⁵⁵ “All human beings are free and equal in dignity and in rights”.

¹⁵⁶ “Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, color, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favored on any of these grounds.”

¹⁵⁷ “Legal restrictions of fundamental rights and freedoms shall be applied equally in all cases fulfilling the specified conditions”.

without the least connection with Art. 12 (2) of the Constitution, which is the general expression of a specific legal prohibition to all the public authorities (prohibition of discrimination - Art. 12. (2) second sentence of the Constitution).

In general the Article 13 (3) of the Constitution reflects the requirement (principle) of equality as one of the key material condition of limitation of all fundamental rights and freedoms. In examining the question whether in a particular case (situation) related to the enforcement of fundamental rights or freedoms the constitutional principle of equality before the law has been violated, the fact whether the command of Art. 13 (3) of the Constitution, under which *“Legal restrictions of fundamental rights and freedoms shall be applied equally in all cases fulfilling the specified conditions”*, has been respected, must be considered first of all.¹⁵⁸

This constitutional norm bounds the legislator to respect it when adopting a certain law and it further bounds all the public administration entities, in the context of their decisions, respectively in the context of their application practice. The public authorities are therefore bound to act consistently in accordance with this norm. Therefore, the law may contain only those limitations which apply equally to all individual (specific) cases, which are of the same species.¹⁵⁹

The Slovak case-law understands the Equality of citizens before the law as an abstract category, but it always counts it to a particular legal norm. The courts consider the equality before the law in the ratio of different subjects. Modern Constitutions understand equality in relative sense. The Constitutions therefore require the removal of unjustified differences. Even the sovereignty of the state does not create the possibility for the state to use the arbitrary measures against individuals. While the State may in certain cases provide specific criteria of equality, but they must be justified by rational and objective reasons. In order to maintain its functions, the State may grant a group of persons less favorably than another group. However, it must not proceed arbitrarily, but it must justify such a procedure as a social necessity.¹⁶⁰ However, this approach is unsustainable in the area of punishment and sanctioning. The rule of law does not accept the fact that one group of persons charged would become less favored compared to another group of persons charged.¹⁶¹ The relation of the principle of equality and the principle of legitimate expectations manifests itself in this respect. In the view of the current legislation and also in the view of its previous conduct the future actions of administrative authority must be predictable. If public authorities within the administrative practice comply with this rule, a difference within the actions of administrative authorities without rational justification should not occur.

The Slovak legislation of the Administrative Code expresses this rule in Art. 3 (5). Under this provision: *“The administrative authorities shall ensure that, in deciding on the merits of identical or similar the cases unjustified differences would not arise.”* This rule also sets forth an obligation to the continuity of administrative practice. However, if some of the grounds for the decision changes, the continuity of the administrative practice cannot be invoked.¹⁶² Therefore, it's a clear violation of the principle of substantive equality and legitimate expectations of subjects of the law, if the first administrative authority permits and qualifies an activity of a legal person to be lawful, and then another administrative authority evaluates the same activity as a violation of the law and imposes a fine for it.¹⁶³

¹⁵⁸ See. The Resolution of the Constitutional court of the Slovak republic no. PL. ÚS 16/08 of May 7th 2008.

¹⁵⁹ See: Finding of the Constitutional court of the Slovak republic no. PL. ÚS 36/95 of April 3rd 1996.

¹⁶⁰ See: Finding of the Constitutional court of the Czech and Slovak federative republic no. Pl. ÚS 22/92, of October 8th 1992.

¹⁶¹ Finding of the Constitutional court of the Slovak republic no. PL. ÚS 17/08 of May 20th 2009.

¹⁶² See: Košičiarová, S.: *Princípy dobrej verejnej správy a Rada Európy*. Bratislava: IURA EDITION 2012. p. 36 – 37. ISBN 978-80-8078-519-2.

¹⁶³ See: Judgment of the Supreme court of the Slovak republic no. 5Sžp/2/2012, of January 31st 2013.

CONCLUSIONS

With the application of the principle of legal certainty in the rule of law the requirement of "general validity, durability, stability, rationality and fair content of legal norms" is linked. When the legislation can be interpreted in two different ways, while the first interpretation is consistent with the Constitution of the Slovak Republic and the second one is inconsistent with it, there is no constitutional reason for the cancellation of such legal norms. All the public authorities are bound by the Constitution of the Slovak Republic with the obligation to apply the legislation in accordance with the Constitution of the Slovak Republic and to protect the constitutionally established principle of equality.¹⁶⁴ The obligation of equality represents the general commitment of the state authorities to the meaning and to the essence of the legislation.

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This paper has been reviewed by the conference committee.

¹⁶⁴ See: Finding of the Constitutional court of the Slovak republic no. PL. ÚS 15/98 of March 11th 1999.