The Idea of Equality in the Czech and European Law

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1. FREEDOM, EQUALITY, AND THE PROBLEM OF LEGAL EQUALITY

The constitutions of modern states, international conventions on human rights and supra-national European community law in their essential documents are not based on the neutrality of values,[1] but in their normative clauses they express basic inviolable values of a democratic society, following up especially on the basic human rights and freedoms. These values bear in themselves not only a certain social orientation, but they also fulfil significant social function by securing the continuity of the social development with regard to its values and thus represent the load-bearing construction of the society. These essential values were not accepted only by democratic revolutions and modern democratic constitutions, but also by international conventions on human rights and the „Charter of the Basic Rights of EU" accepted at the end of 2000 in Nice in the form of a political declaration, which was a year later incorporated into the proposal for the „Convention on the Constitution for Europe". In the preamble of this Charter of Basic Rights of EU it says: „The Union, being aware of its spiritual and moral heritage, is based on indivisible and general values of **human dignity, freedom, equality, and solidarity**, it is based on the principles of democracy and respecting the rules of law".[2]

The continuity in values, which has also its historical dimension, from the spiritual values prefers especially the **values of freedom and equality**, representing the essential social ideals, to which the legal-philosophical and legal-theoretical ideas are connected, but also the positive law approaches and political scientific, sociological, economic, and other concepts. All these concepts make the effort to identify, demarcate, and characterise the mutual relationship of the values of freedom and equality.

1.1. FREEDOM AND EQUALITY AS VALUES ANCHORED IN THE LAW

By its position in social and political programmes, the values of freedom and equality represent attractive social and political ideals, but they are also values anchored in the law and also updated values (lived through, factitive) in everyday life of a concrete society. We are interested in the values of freedom and equality especially from the point of view of its legal anchoring, i.e. from the point of view *de lege lata*.

The values in law have the function of a final purpose, as general objectives, at which a person aims. Apart from the terminal values we can also characterise the category of instrumental values, i.e. values as the means by which we reach something important for ourselves. Freedom, then, belongs mainly to the

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[1] Compare e.g. the first judgment of the Czech Constitutional Court, file mark. Pl. ÚS 19/93.

[2] Syllová, J., Pítrová, L., Svobodová, M. et al. Ústava pro Evropu (Komentář) [Constitution for Europe (Commentary)]. Praha: C. H. BECK, 2005, p. 126.

terminal values. It is the source of the law and modern law is the tool for the protection of freedom as the possibility of free volitional action, i.e. the lack of enforcement (negative definition of freedom), but on the other hand the demarcation of the realm of freedom, in which nobody is allowed to interfere (positive definition of freedom).[3]

Equality, on the other hand, should rather be included in the instrumental values. It represents one of the basic principles of the hierarchy of the society and of the social relationships, which is, however, based primarily on the formal equality, with regard to the impossibility to reach material equality (physical, mental, and social equality of people). This moment is reflected also in the principle of legal equality. The principle of formal equality is on the one hand empty and value–neutral from the point of view of content, but when related to a concrete legal order it forces us to state explicitly the relevant moments of legal differentiation and coming out of the request for equality before the law.[4] Modern law as the warrant of the right of an individual to freedom is based on equality, namely legal equality, which is one of the axiomatic principles of the law and forms the basis for justice provided by the law.

1.2. EQUALITY AS EQUALITY BEFORE THE LAW

The effort to diminish tensions between the actual inequality of people with regard to their abilities and their social status and between the political ideal of social equality (the idea of social compensation) gained legal expression in modern law in the form of the principle of equality before the law (equality of rights).

The principle of equality before the law as the crucial postulate of the law lies in the effort of the law to create equal (the same) access to the law to the subjects of the law. This objective is reached in law by legislative anchoring and the actual establishment of:

- Formal equality,
- Content requirements of equality.

Legal equality thus contains in it two different components, as already John Stuart Mill noted:[5]

1. Equality before the law.
2. Equality in law.

Equality before the law expresses the equality (sameness) during the application of the law, i.e. that the valid legal norms are applied in the same way and that the irrelevant elements with regard to the content of the legal norm will not be taken into account. Equality before the law may in connection with this be characterised as the principle that given the same relevant conditions, the same legal consequences will arise in all of the judged cases, while the relevant legal order determines which conditions are relevant and which legal consequences should occur in such conditions. The basis thus lies in giving the same protection of law to all the subjects of the law, i.e. preventing the arbitrariness in relation to one of the subjects of the law. For all the same (equal) persons (equality is given by the viewpoints determined by the relevant legal norm) must thus be under the same relevant conditions dealt with in the same way in the given viewpoint of the law. The same (equal) dealing with the same (equal) persons is in fact nothing else than a correct application of the general rule, which fulfils the requirement of formal justice.

Equality in law on the other hand grasps on the contrary the fact that the clauses of the legal norm assert the principle of equality in the content, i.e. legal norms cannot contain any discriminating or privileging clauses, i.e. they determine certain concrete rights and obligations that are the same for all the relevant legal subjects. The principles of equality in the law relates to the determination of borders in which the legal norm is applied, i.e. so that the relevant conditions concerning especially the personal extent norm, not making unjustified differences between the individual legal subjects, are stated. The inequality based on the legal norm might occur especially in the case when a certain group of people would be deprived of a certain law, or the group will be prevented from using the law, or an obligation is imposed on it without a cause. The principle of content equality thus supposes that legal differentiation in the access to certain rights and in the imposed obligations between the legal subjects will not be determined arbitrarily, it, however, does not follow from this principle that everybody must be granted any law or that any obligation should be made softer as it has been done to another legal subject.

The principle of legal equality must be perceived as the enforcement of both of the stated principles. The equality in law as the expression of content requirements of equality speaks of the concrete laws and obligations determined equally (in the same way) to all legal subjects. The equality before the law then expresses equal (the same) approach to all the legal subjects in compliance with the content criteria of equality anchored in the law.

Equality may be looked upon also as a state of non–discrimination, which is usually expressed in the law in the form of the prohibition of discrimination

[3] On this issue see KNAPP, V. Teorie práva [The Theory of Law]. Praha: C. H. BECK, 1995, pp. 14 and foll.

[4] On this issue see WEINBERGER, O. Filozofie, právo, morálka [Philosophy, Law, Morals]. Brno: MU, 1993, pp. 15 and foll.

[5] MILL, J.S. Utilitarianism. In Warnock, M. (ed.) On Liberty. London: Collins, 1962, p. 301.

and is looked upon both as a principle and a basic right.

2. THE PROHIBITION OF DISCRIMINATION AS A WARRANTY OF EQUALITY?

The prohibition on discrimination is made public in constitutions or legal orders with the aim to prevent an exclusion of a certain group of people as a result of not recognising their identity. The creators of the European Constitution also made this step. In the Convention on the Constitution for Europe they filed this prohibition immediately after the requirement of equality before the law.

In Article II–81 on the prohibition of discrimination it literally says: *„Discrimination on any ground such as sex, race, colour, ethnic, or social origin, genetic features, language, religion or belief, political or other opinions, belonging to an ethnic minority, property, birth, handicap, age, or sexual orientation is prohibited."*

The second paragraph then complements this with the statement that *„within the area of application of the Constitution, without violating its special clauses, any discrimination on the basis of citizenship is prohibited".*[6]

From the normative point of view, prohibition always expresses something that is not allowed, something that must not happen. In this sense it means that it is not allowed to disrespect the defined forms of identity. This prohibition is thought to be a necessary prerequisite for the removal of discriminating inequalities.

In the following text, however, we will try and show that this approach is narrow and that in its essence it reproduces the dangerous formalism, which it paradoxically conserves or even deepens the discriminating inequalities between people.[7]

The problem of equality, as was already mentioned in the first part of the contribution, is naturally connected with the issue of justice. From this point of view, the prohibition of discrimination is not only a question of accepting the plurality of cultures, styles of life, etc., but also already about the question of creating the conditions for equality of chances, access to social resources, functions, free communication, etc.

2.1. THE CONDITIONS OF EQUALITY: RECOGNITION, OR REDISTRIBUTION?

Within the legal and political philosophy grounds, it is the question of equality and equal rights that is nowadays being discussed as a problem of the relationship between recognition and redistribution.

„Recognition" implies in itself the Hegelian motive, in which inter–subjectivity is a predecessor of subjectivity. This is put in contrast to the requirement of liberal individualism. Recognition, on the contrary to redistribution, presupposes „morality" as the situation enabling good life and self–realisation of a person. Redistribution is then connected with procedural creation of moral consciousness as a prerequisite to the realisation of good and just relationships.[8]

The question of „redistribution" was of central importance in the projects of egalitarian liberalism. In the second half of the twentieth century this is fully reflected in the situation of democratic nation states. The egalitarian distributive policy to a certain extent pacified the problems arising from the failure of recognition. The question of recognition of variability thus did not result in open conflicts. Their escalation was to a great extent caused by the globalisation process.

The abolition of the traditional borders brought with it trans–cultural encounters. The growing plurality of values and lifestyles led to new political ambitions. The attention of political and legal philosophy thus concentrated on the so–called „struggle for reco-

[6] On this see European Constitution. Convention on the Constitution for Europe. Newsletter 2005, p. 13.

[7] The programmes of the so–called affirmative action are based on this false construction of ideas. In English, the term „affirmative action" is used, which is translated into Czech as „positive discrimination" The word–for–word meaning of the term „affirmative action" is an action that should lead to the affirmation of a certain identity. These programmes require a regulation of the inequalities resulting from cultural or ethnic differences to be anchored in the law.

[8] The category of *„recognition"* (in German Anerkennung) has its origin in Hegel's Phenomenology of Spirit. Through recognition, Hegel explains the process of the constitution of a person's subjectivity: a person becomes an autonomous subject by the recognition of the other subject, by which it is also recognized. On this, see HEGEL, G.W.F. Phenomenology of Spirit. (Fenomenologie ducha) Praha: ACADEMIE, 1964.
In the second half of the 20th century, the existentialists returned to this category. Nowadays, the issue experiences its renaissance especially in the work of a known German philosopher Axel Honneth and also the north–American ethic Charles Taylor. Honneth introduced his concept of recognition in the work „Struggle for Recognition. On the moral grammar of social conflicts". See HONNETH, A. Kampf um Anerkennung. Zur moralischen Grammatik sozialer Konflikte. Frankfurt: Suhrkamp, 1992.
Charles Taylor became famous with his work „Multi–culturalism and the policy of recognition". See TAYLOR, CH. Multikulturalismus und die Politik der Anerkennung. Frankfurt: Suhrkamp, 1997.
On the other hand, the notion „redistribution" is a notion connected with the concept of distributive justice developed by liberalism. The description of its subject matter was recently attempted by a known American theorist J. Rawls in his theory of justice as fairness. On this see RAWLS, J. Teorie spravedlnosti (A Theory of Justice). Praha: Victoria Publishing, 1995.
For more on the comparison of these two categories, see FRASEROVÁ, N., HONNETH, A. Přerozdělování nebo uznání? (Redistribution, or recognition?) Praha: FILOSOFIA, 2004.

gnition" In their contexts redistribution was a marginal issue. The contemporary discourse on equality and equal rights, however, shows that the strategy of the implementation of the idea of equality and justice cannot disregard the thematic work on the relation between „recognition" and „redistribution". Trying to find a solution to this problem caused many clashes of different opinions. The best–known clash that is currently going on is the one between the North–American philosopher Nancy Fraser and the German philosopher Axel Honneth. The core of the problem lies in the question of preventing the remedies of uneven distribution to strengthen the un–recognition, or the remedies of un–recognition to strengthen the uneven distribution.

Fraser suggests a two–dimensional concept of justice that should prevent the reduction of the aims of justice to one of them. At the same time she steps out against any institutionalised strategy leading to the required integration of recognition and redistribution, and in such a way to the remedy of injustice. In connection with this she speaks of „non–reformist reforms".[9] We are to understand this suggestion in the following sense: the implemented reforms shall be governed by the aim of changing the structure of impulses and political opportunities in such a way that they do not give rise to injustice in the long term. The prohibition of discrimination would thus become a useless norm and it would also become unnecessary to anchor any group rights.[10]

The basic presumtion for such strategy is the implementation of participation parity that, according to the author, enables a democratically conducted public discussion. The confirmation of the rights to recognition and redistribution is only possible in the situation of participation parity and the participation parity is the condition of the confirmation of the rights. According to Fraser, however, this is not a move in circles, but reflection that enables the participants of the discussion to understand that they are the originators of justice.[11]

Now we are getting to the point from which the criticism of the two–dimensional conception of justice from the part of Alex Honneth starts. He openly claims to be an adherent of the so–called „normative monism" and thinks that the structure of recognition integrates in itself also the problem of redistribution. In connection with this, he speaks of the plurality of three equivalent principles of social justice.[12] These three principles then should *„during the analysis of struggles and processes of changes normatively inform on the fact which moral requirements can be considered justified"*[13].

Fraser sees the way to the implementation of the equality principle in modern democratic society in connection with the „participation parity" of the reform strategy. Honneth, on the other hand, sees it as a result of historical development on whose basis the structural changes of social integration happen.

2.2. CONDITIONS OF CONSTITUTIONAL WARRANTY OF EQUALITY AND JUSTICE IN THE PROCESS OF EUROPEAN INTEGRATION

In the considerations on the fact when equality and justice are being connected with the way justifiable objectives are articulated, however, the question arises as to how their implementation in everyday life is possible. Both opinions run into the problem of normative warranty of equality and its practical applicability. The solution to this problem is connected especially with political processes of the democratisation of society. In this context, however, the legal dimension of the problem is still standing aside. Essential questions remain unanswered. „What normative form should the constitutional protection have, so that it would effectively guarantee the citizens'equality before the law not only in the process of the proceeding European integration, but also the world globalisation?", „Why the legal protection of equal rights in a constitutional democracy is not sufficient?"

The answer to the first question requires critical judgement of the traditional articulation of the Charter of Human Rights and Freedoms. The formalism of the prohibition of discrimination shows that modern democratic state respecting the rule of law should take a systemic approach to rights.[14] System transformation would lead to such a situation in which both private and public autonomy would be considered to be spheres of equal value in the life of a person. Variability would neither be an obstacle, nor an object of restriction of access to the political and social–economic rights.

[9] Fraser offers the strategy of „non–reformist reform" as the alternative, third way that should overcome the deficits suffered by the political strategies of affirmation as well as transformation. Ibid, pp. 111–119, 120.

[10] Ibid.

[11] Ibid.

[12] Honneth comes out of the perception, as he himself says, that the „subjects in modern societies are, while forming their identities, limited to three forms of social recognition that are based on the principles specific for a given sphere: on the principle of love, equal treatment before the law, and social appraisal." Ibid., p. 233.

[13] Ibid.

[14] The German philosopher and sociologist J. Habermas presented the concept of rights as the system of laws built upon logical genesis in his discourse theory of the law. For more details see HABERMAS, J. Faktizität und Geltung. Frankfurt: Suhrkamp, 1992.

The word „access" has a fundamental meaning here. Thus we have arrived to searching for the answer to the second of the above–stated questions. It is exactly the situation of access, or the chance to have access to the vital sources that integrates in itself the perspective of recognition and redistribution. The prohibition of discrimination in this sense means stopping halfway.

3. THE IDEA OF EQUALITY IN THE LAW OF THE CZECH REPUBLIC AND EC FROM THE POINT OF VIEW OF INFORMATION

The continuing penetration of the society with information technologies causes in law, apart from particular, immediate, and direct effects, also a number of graduate changes of the concept. Among other things, the approaches to the law that instead of its authoritativeness, regulative or outstanding features take notice rather of its organisational or informational character are experiencing renaissance[15]. Any organised structure, including the society, in its essence or in the things that make its base stable and resistant with regard to entropy, is based on a seemingly trivial element – on information. It is, however, the reality of the contemporary society that the word „information" is used for basically any message, i.e. also those that do not fulfil the original definition. We may thus encounter many examples of *contradictiones in adiectis,* as for example „incorrect, redundant, or confusing piece of information[16]" The examples when the (apparent) information does not function as an anti–entropy factor are at the same time very frequent and appear abundantly both in the area of information on the facts that exist and in the area of information on what will or should be, i.e. between the information on norms, which are of special importance for the science of the law.[17]

Practical experience with the application of quantitative information methods in law, and especially rich experience with the formal logic approach to legal norms lead us, together with the knowledge gained during the creation of norms and other forms of participating in the life of information communities, to the necessity to enrich the set of tools of the information approaches to law also with the method assessing the quality of normative and non–normative functions, and this especially with regard to their sense or purpose[18]. Casuistic or classic logical method can namely be meaningful in the process of the application of the law only when the particular norm has been evaluated as having an *ad hoc* character with regard to organising information. As was suggested above, the organisation of a certain system, in this case the system of social relations, is not only a matter of quantity or logical structure of logical information, but in the first place the matter of its quality. At this point it is therefore necessary to deviate a little from the basis of the information methodology of cybernetics, i.e. the branch whose aim was the understanding of the essence of the functioning of living organisms and the imitation of its essence the next step[19] – its founder himself, Norbert Wiener, was a strong adherent of the opinion that the essence of life, or the individual organisational processes that form it, can be understood and described with the use of casuistic methods, or concretely experimental or applied mathematics.[20]

3.1. NORMATIVE CHARACTER OF EC LAW AND THE INFORMATION EQUALITY

There is no doubt that the contemporary legal order of EC countries creates, seen from the above–suggested point of view, a very specific information system. In contrast to the classic system of state normative information it is extended with the community dimension. By this, it gains in size and complexity and with regard to that, also the probability of the occu-

[15] The academician Viktor Knapp is considered to be one of the founders of the notion of the law as an information system. See KNAPP, V. O možnosti použití kybernetických metod v právu (On the possibility to use cybernetics method in the law). Praha: Nakladatelství československé akademie věd, 1963.

[16] Information, however, is in fact defined to be only such a message that leads to the reduction of entropy, i.e. information is only such a message that is correct and necessary – compare WIENER, R. Cybernetics. Cambridge: MIT Press, 1948.

[17] With the use of positivist methodology, it is possible to name this kind of information as normative utterances – cf. KELSEN, H. Všeobecná teorie norem (General theory of norms). Brno: Masarykova univerzita v Brně, 2000.

[18] Convincing arguments to which the Czech Constitutional Court returns again, were presented in the period between the two world wars by a significant representative of the so–called Brno school of normative theory, Professor Karel Engliš – see ENGLIŠ, K. „Kritika normativní theorie." (The Criticism of normative theory). in Brněnská škola právní teorie. Praha: Karolinum, 2003, pp. 203 and foll.

[19] The imitation of living organisms with the use of inorganic substances later became the load–bearing topic of cybernetic research – and the equally significant philosophical dimension of this branch was thus put in the shade, to the harm of the humanities – compare WIENER, N. Cybernetics or Control and Communication. Paris, Cambridge–Mass., and New York: Hermann & Cie., the Technology Press, and John Wiley & Sons, 1948.

[20] In his principal work Wiener thus unequivocally declares to be an adherent of Leibniz's philosophy – Compare ibid, p. 12.0.

rrence of a redundant or a defect element grows. If then the sense of the law, including the EC law, to organise the society, i.e. to reduce social entropy, is taken into account,[21] it definitely makes sense to examine the possibilities of the individual addressees to accept and process the information and also in this context discuss the issues of existential and functional equality of the subjects with respect to the state and its law. The prerequisite for the generality as the definition characteristics of the legal norm is namely, among others, also the accessibility of the information network formed by them,[22] i.e. the equality of the subjects with regards to the access to information on legal norms[23].

In the situations where the subjects have, for whatever reason, relevant legal normative information for the respective life situation, their behaviour is motivated by other biogenic and sociogenic factors[24]. This situation, in the case when the normative character of the law is based on the normative tendencies of other normative systems,[25] does not always have to cause conflicts - the action of the subject is in the vast majority of cases conforming both with the norms of whose existence the subject knows, and with those legal norms, of which the legal subject is not informed. Not even in the case when a conflict arises between the legal norm of whose existence the subject is aware and the concrete action of the subject, it need not be considered an action violating the system of the normative character based on this, not even on the individual scale, but only on condition that the occurrence of such conflicts is exceptional and that the trust in the sense of legal norms on the part of the subject continues[26]. This trust then need not be based on somebody's knowledge or on the subject's awareness of the existence of concrete legal norms – it is sufficient if the existence of the law, its sense and purpose are quite clear to the subject[27].

In the given context, the construction of this type of legal normative trust, i.e. some kind of *„a priori" uninformed belief in the law* above the relatively heterogeneous group of addressees – subjects under the EC bodies' jurisdiction, seems to be a bit problematic. Although material sources of different normative systems are all over EC very similar as far as the basic features are concerned, the pertaining variability of cultural traditions presents an obvious obstacle to the development of EC law in the same line as the legal orders of historic communities, i.e. that it relied on the normative character of the law in the above–outlined sense, i.e. based not on the perfect distribution and individual reception, but on the already mentioned traditional *a priori* belief in the law.

In the previous section, we outlined the topical situation in which the legal normative utterances present in the contemporary EC state embodied also into a supra–state structure with its own legal order form such a complex information system that its mastering is not possible for objective reasons. It is then even less possible to base the normative character of EC law on the already mentioned factual and complete information of all the addressees of the legal norms on their content[28]. From the point of view of information science[29] it seems, however, that the gradual improvement of the methods and technologies of the digital data processing and the growing level of penetration of the European society with the information network services, new possibilities of creating normative systems not on the historic *a priori* belief in the law, but on the belief in the accessibility and transparency of the normative utterances and other normative information on the EC law will arise. This form of the trust in law, which results in the possibility of the EC law to work with even a higher level of normative and effective features, may be based on the provided information on the sense, purpose, and aim of the EC

[21] Reality is a bit different in this sense – on this compare e.g. MANSELL, W., METEYARD, B., THOMSON, A. A critical Introduction to Law, 3rd ed. London: Cavendish Publishing, 2004, pp. 9 and foll.

[22] This principle becomes apparent among others by the obligatory publication of the normative legal acts or in the principle of the prohibition of its retro–activeness.

[23] The approach of the subjects to the discursive processes of the law formation, which is also a significant element of the legal idea of equality, shall not be discussed at this point her.

[24] See NAKONEČNÝ, M. Motivace lidského chování (Motivation of human behaviour). Praha: Academia, 1997, p. 12.

[25] Especially the system of the so–called social or habitual norms and further the system of religious norms – on this compare e.g. MARA, A. Norm Origin and Development in Cyberspace: Models of Cybernorm evolution. Washington University Law Quarterly, No. 78, pp. 59 and foll.

[26] This can be illustrated by an example from practical life – in Bolognese wood, it is by a local directive prohibited to drink alcoholic drinks. An uninformed tourist who decides to take refreshment in the form of lightly alcoholic drink is on the basis of this informed by the present policeman and is asked not to open another bottle after having drunk the open one. Although a normative conflict has occurred here, it did not shake to the slightest extent the trust of the tourist in the sense and objective of French law.

[27] In this sense it is possible to point at a whole number of directives and norms whose sense lies in the building trust in law as well as on similar direction of the decision practice of the courts, especially of the Czech Constitutional Court.

[28] If there is now no expert in the law who could state that s/he knows the whole of the Czech law, it will be even less possible to train all the addressees of the composite norms of the Czech Republic and EC to their full knowledge.

[29] In the original sense here, i.e. as science on the methods of compiling and distribution of information on the law – nowadays, however, this notion is used, especially in the Alpine legal environment, above all for the science on the digital compilation of legal data and also for the information technologies law.

law, followed by the knowledge or merely awareness of the mechanisms and techniques through which the EC law can be generally accessible[30]. While the first aspect of this partially *a posteriori* built belief in law is based mainly on the political and media activity, the second aspect lies primarily in the sphere of interest of legal informatics, especially the development of technological and logical mechanisms through which the information equality between the addressees of the EC law will be reached[31].

[30] Without requiring a higher standard level of pre-understanding – on this notion see ESSER, J. Vorverständniss und Methodenwahl in der Rechtsfindung. Frankfurt am Main, 1970.

[31] Here in the sense of equality in the possibilities to access the EC law when necessary.