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PRINCIPLE OF EQUALITY – NOTION AND APPLICATION IN SERBIAN LAW

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Abstract: The principle of equality (of parties) means that all subjects in a legal relationship are put in an equal position, i.e. equal legal position. It is a principle describing a relationship between two wills, which may be the one of coordination or subordination. Despite the fact that in theory the equality of parties is viewed through the lens of equality of two wills, this principle is also applied in the areas where the relationship between parties is defined as the one of subordination. The principle of equality is studied in private and public law alike, but is considered to be a differential principle of civil law by the national legal science. One should differentiate between the principle of equality, studied as a constitutional principle and most often representing "some variety of [an] antidiscrimination principle," and the equality of parties in the capacity of parties to a legal transaction. At the constitutional level, legal equality involves the equality of citizens, i.e. natural persons, protected by the provisions of non-discrimination, both direct and indirect. On the other hand, parties to a legal transaction or civil law subjects are equal when entering into a civil law relationship, but also during the exercise of their contractual rights and obligations. The idea behind the principle of equality is to ensure equal treatment in unequal social circumstances. This paper focuses on the analysis of the notion of legal equality in Serbian law. It is the author's objective to show in which areas of law and in which form the principle of equality features, giving the most interesting examples of individual situations where equality is discussed.

Keywords: Principle of equality, legal equality, public and private law.
Field: Social sciences

1. INTRODUCTION

On one hand, equality may be viewed as the expression of equality of individual party wills or, on the other hand, as equality before the law without any discrimination whatsoever. Equality of parties may be reflected in equal rights and obligations, but also in the "equality of rights and abilities" (Guo, 2019: 142) in order to avoid putting any parties into a specific legal position. Although Hobbes believes that "nature made people...equal in the faculties of body and mind" (Lurie, 2020: 177), people differ from one another in their rights, abilities, opportunities and expectations. "Absolute equity and equality of everyone in relation to everyone" (Jovanović, 2018: 20) is called injustice in theory. It is the author's objective to show in which areas of law and in which form the principle of equality features, giving the most interesting examples of individual situations where equality is discussed.

The idea behind the principle of equality is to ensure equal treatment in unequal social circumstances. Some authors distinguish between formal, procedural and substantive equality. Formal equality exists when law applies equally to everyone. Procedural equality introduces special procedures to compensate for unequal social positions of parties. Finally, substantive equality is aimed at the outcomes of the application of law (Hawthorne, 1995: 160). Other authors divide procedural equality into: equipage equality, rule equality and outcome equality (Rubenstein, 2002: 1867-1868).

One should differentiate between the principle of equality, studied as a constitutional principle and most often representing "some variety of [an] antidiscrimination principle" (Rubenstein, 2002: 1869), and the equality of parties in the capacity of parties to a legal transaction, where it is commonly not studied through the lens of (anti) discrimination, but where discrimination may very well be present. Equality is mentioned in private and public law alike. In public law, it is considered to be "a fundamental principle of democracy" (Jowell, 1994: 2). In the national legal science, it is called "the differential principle of civil law" (Nikolić, 2006: 110). Equality guaranteed in principle sometimes disguises substantive or de facto inequality. To achieve legal certainty, efforts are made to provide equal treatment to "unequal" (usually in the economic sense) parties by various mechanisms specified by the legislator.

In private law, this principle means that there is a relationship of coordination between parties. In public law, on the other hand, the relationship between parties is defined as the one of subordination and it is only in rare cases that inequality resulting from the inequality of parties in public law relationship may be viewed through the lens of characteristics of the principle of equality in civil law.

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2. EQUALITY AS THE CONSTITUTIONAL PRINCIPLE

The right to equality is a fundamental human right, which entails non-discrimination on any grounds. At the constitutional level, legal equality involves the equality of citizens, i.e. natural persons, protected by the provisions of non-discrimination, both direct and indirect. Article 21 of the Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia, No. 98/2006) contains a general non-discrimination provision, but also a specific provision guaranteeing equality between women and men, with the obligation of the state to pursue the policy of equal opportunities in the field of gender equality (Article 15), on one hand, and a specific provision (Article 76(2)) prohibiting any form of discrimination based on membership of a national minority, on the other hand (Pajvančić, 2009: 32-33). The terms 'equity' and 'equality' are used equally in the Constitution of the Republic of Serbia to denote formal legal equality of natural persons. They are guaranteed equality in the exercise of their rights (equality "before the Constitution and law") and equity in the provision of legal protection. Equality as the constitutional principle guaranteeing equal legal protection to all natural persons has also been made concrete on a micro level, reflecting in individual relationships between natural and/or legal persons. In this situation, the state acts as the guarantor of the principle of equality, but it may also have a different role, as the paper will demonstrate.

Equality in this form is guaranteed by a number of international legal provisions, both universal and regional (OHCHR & IBA, 2003: 636-648). All the provisions specified prohibit a form of discrimination or unequal treatment, which provides individual states with a foundation for adopting the principle of equality as the constitutional principle.

3. EQUALITY OF PARTIES IN THE CAPACITY OF PARTIES TO A CIVIL LAW RELATIONSHIP

In Serbian law, the principle of equality is laid down in the Obligations Act (Official Journal of the Socialist Federal Republic of Yugoslavia, Nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, Official Journal of the Federal Republic of Yugoslavia, No. 31/93, Official Journal of Serbia and Montenegro, No. 1/2003 – Constitutional Charter and Official Gazette of the Republic of Serbia, No. 18/2020) – hereinafter referred to as: the OA, whose Article 11 provides that parties to the relationship of obligations are equal. Article 7 of the Preliminary Draft Civil Code of the Republic of Serbia defines equality as legal equality and guarantees that subjects shall have legal equality in civil law relationships. Apart from equality proclaimed in principle, Article 14 of the OA specifies that when entering the relationship of obligations, parties shall not establish rights and obligations creating for anyone or taking advantage of the monopoly position in the market. The prohibition of creating or abusing the monopoly position or dominance has been incorporated in the Constitution of the Republic of Serbia since 2006 (see Article 84(2) of the Constitution). If a party creates conditions for establishing or taking advantage of the monopoly position or dominance in the market, they will put the other party into an unequal position, thus impairing the principle of equality at the same time.

Parties to a civil law relationship or civil law subjects are equal when entering into a civil law relationship. The principle of equality applies not only at the execution of the contract, but also during the exercise of contractual rights and obligations (Veljković: 2021, p. 17). As civil law subjects may include natural and legal persons, they are always equal in a civil law relationship, regardless of their formal status. This means that the following may be in an equal position: "an individual vis-à-vis the state, a customer vis-à-vis a seller, a service user vis-à-vis a service provider" (Popov, 2005: 30), despite the fact that there is substantive inequality between these parties, which is not relevant in civil law. The legal position of subjects in a civil law relationship is legally equal, irrespective of the economic power of the subjects (Babić, 2020: 15). However, due to the different status of subjects in a civil law relationship, one can often notice the existence of the so-called "de facto inequality of parties" (Kašćelan, 2018: 115), which manifests itself e.g. in a loan contract between a bank and a loan beneficiary. In this case, the bank is considered to be "the superior contracting party" exclusively determining the content of the loan contract, while the loan beneficiary accepts pre-defined contractual terms, which leads to the inequality of contracting parties at the execution of the contract (from the Judgment of the Supreme Court of Cassation No. Rev 1615/2016 dated 16 May 2018). Given that "individual wills must be equal in order to be able to establish mutual rights and obligations" (Antić, 2008: 44-45), the law of obligations employs different mechanisms to eliminate de facto inequality. In the afore-mentioned case, the rule of contract interpretation to the advantage of the inferior contracting party from Article 100 of the OA is applied. The excessive damage institution from Article 139 of the OA is additionally applied to this end, along with the possibility for the court to invalidate the contractual provision for the exclusion of liability for simple negligence, if the agreement derives from the debtor's monopoly position or unequal position of the contracting parties in

general, as stipulated in Article 265(2) of the OA, followed by the invalidity of the provision of the insurance contract for the forfeiture of right to compensation or the sum insured when the insured person (party in an inferior position to the insurer) fails to discharge an imposed or agreed obligation after the occurrence of the insured event, as referred to in Article 918 of the OA, etc.

Consequently, legal equality of parties may exist even when there is a relationship of superiority and inferiority in the background of a civil law relationship. One will is stronger in any relationship (Vodinelić, 2016: 119) and not only in a relationship where public authority is one of the parties. Therefore, equality may characterise not only a private law relationship, but also a public law relationship, although it is fully exercised in civil law (private law) relationships.

4. EQUALITY OF WILLS OF PUBLIC AND PRIVATE PARTNERS AT THE EXECUTION OF A PUBLIC CONTRACT

Public private partnership is a modern concept of infrastructure development and public service provision. It is created when a public partner selects its future private partner in a tendering procedure or in another way. In the Republic of Serbia, it is governed by the Public Private Partnerships and Concessions Act (Official Gazette of the Republic of Serbia, Nos. 88/2011, 15/2016 and 104/2016) – hereinafter referred to as: the PPPCA. The fact that the public partner party includes the state, local self-government, different agencies, public companies, state institutions, etc. raises the question whether the public partner on a public private partnership (hereinafter referred to as: the PPP) project acts from the position of iure imperii, in compliance with the principle of subordination as a fundamental principle of public law, to protect public interest.

Under the PPPCA, public and private partners are equal. Under Article 6(10) of the PPPCA, the principle of equality of contracting parties means that "mutual relations of subjects to a public contract are based on their equality and the equality of their wills". The analysis of this legal provision fails to make it clear whether the wills of contracting parties are equal only at the execution of the contract or subsequently during the performance of the contract, too.

A public contract is a type of an administrative contract, to which the rules of the law of obligations apply accordingly or subsidiarily. Being the overarching area of law, private law interferes with this contractual relationship, changing the position of the public partner. In this type of contracts, the public partner cannot unilaterally amend or revoke contractual provisions, but can take a range of actions that may harm the private partner (e.g. amend legislation, levy additional taxes, etc.), thus putting itself into a superior position after all. Based on this, one may conclude that formal legal equality does disguise substantive inequality between the public and private partners in the background.

The primary role of a public body is to exercise public authority, i.e. act iure imperii. However, when a public body is a contracting party in private law relationships, it should act as a holder of private rights and obligations, i.e. iure gestionis. On the other hand, the exercise of public (general) interest ought to be a priority for the public partner in these contractual relationships. Therefore, legal equality, which exists at the execution of the contract ("When entering into a contract, they are equal subjects") (Vodinelić, 2016: 197-198) and which indicates that the relationship between the public and private partners is the one of coordination, may develop into the one of subordination once there is a need to protect public interest.

If the same contractual relationship is viewed from the perspective of comparative law, it may be noted that in German legal doctrine the administrative contract is characterised by legal equality of parties not only during the act of its execution when individual wills are freely declared. On the other hand, there is no equality between contracting parties in the French administrative contract. According to the French legal doctrine, the essence of the administrative contract is in the agreement of wills on an unequal legal basis, i.e. in a superior position of the public law party (Tomić, 2005: 297-309). The principle of equality does not apply in the case of concessions either, because "the relationship of concession is the relationship of legal inequality between contracting parties to the advantage of the grantor, while at the same time being the relationship with the priority objective: exercise of public interest" (Dabić, 2005: 274). Some believe that concessions enjoy a special treatment compared to other public private partnerships (Divljak, 2006: 284). Nevertheless, like with any rules, there is an exception here, too. Certain authors feel that the concession holder is "an equal subject of the relationship of concession with the state, which even turns into the state in functional terms" (Zemanek, 1957: 21, cited according to Krvavac, 2011: 310).

To sum up, in civil law the principle of equality of parties is applied when it comes to the exercise of legal equality in rights and obligations, equality of wills when entering into a contract, equal opportunities for amending or terminating the contract, etc. On the other hand, although the public and private partners are equal when entering into a public contract, the public partner's role as the defender of public interest

continues to exist throughout the term of the contract and, if required, it may act with the prerogatives of public authority. However, despite the fact that typical administrative contracts have originated from civil law contracts, the principle of equality is not applied there, because of the existence of the so-called derogation clauses (Milenković, 2017: 67-80), which establish a negative relationship between contracting parties. Therefore, a standard civil law contract is not considered to be a proper institution for the disposal of public resources (Popovski, 2017: 297) or in other cases when public interest ought to be protected.

5. PRINCIPLE OF EQUALITY IN COMMERCIAL LAW

In commercial law, the principle of equality is applied as part of the legal nature of the (same-class) shareholder treatment. Despite the fact that Article 269 of the Companies Act (Official Gazette of the Republic of Serbia, Nos. 36/2011, 99/2011, 83/2014 – another act, 5/2015, 44/2018, 95/2018 and 91/2019) states that all shareholders shall be treated equally under equal circumstances, there is a stance in legal theory that the so-called "general shareholder equality" does not exist, but only equal treatment of same-class shareholders, presuming "equal action and equal treatment with regard to rights and obligations in all cases" (Vasiljević, 2011: 307).

If the state happens to be a shareholder, the principle of equality is applied in its original form, regardless of the fact that the state is the holder of imperium. For instance, under the Public Property Act (Official Gazette of the Republic of Serbia, Nos. 72/2011, 88/2013, 105/2014, 104/2016 – another act, 108/2016, 113/2017, 95/2018 and 153/2020) – hereinafter referred to as: the PPA, the Republic of Serbia, the autonomous province and local self-government may invest public funding in the equity of a public company and a for-profit corporation performing or not performing the activity of general interest (Art. 42 and 43 of the PPA) in the form of equity participation, whereby they acquire shares, i.e. stakes (Art. 14 of the PPA) and receive equal treatment as the other equity holders.

In some countries, there is a possibility for the state to keep control of the operation of the private law subject by ensuring continuous performance of public services by the so-called "golden shares". Even though there is no legal foundation for this type of shares in the Republic of Serbia, they have been used in practice (see the examples of special rights provisions for the state in the form of golden shares at NIS j.s.c. Novi Sad in: Lepetić, 2012: 172-173). They are "a mechanism for the state to maintain certain powers over privatised companies of strategic importance and general interest (...)", making it impossible for the companies to execute major decisions without prior or subsequent consent of the holder of golden shares (Jovanić, 2004: 248). Since the state becomes a shareholder to defend public interest in this case, it does not have an equal treatment as the other shareholders. Consequently, it is possible to think of suspension of the principle of equality to the advantage of the state as the holder of imperium.

6. PRINCIPLE OF EQUALITY IN OTHER BRANCHES OF LAW

The principle of equality is also applied in other areas, such as procedural laws (criminal procedural law and civil procedural law), where the relationship between procedural subjects is observed, along with labour law, where the (in)equality between the worker and the employer or among the workers is observed, etc.

The equality of parties in civil proceedings means that the claimant and the defendant have equal rights in civil proceedings. Under Article 2(1) of the Civil Proceedings Act (Official Gazette of the Republic of Serbia, Nos. 72/2011, 49/2013 – Decision of the Constitutional Court, 55/2014, 87/2018 and 18/2020) – hereinafter referred to as: the CPA, parties have the right to legal, equal and equitable protection of their rights. Neither party in civil proceedings shall be in a substantially more favourable position than the counterparty. Equality is reflected in the equal right to discussion, equal opportunities for the use of means of evidence, etc. So, the court is under an obligation to provide the parties with the opportunity to use their procedural means in a way that does not put them into a substantially less favourable position than the counterparty (Keča & Knežević, 2021: 693). The right to the procedural equality of parties is interpreted as an element of the right to a fair trial as a constitutional principle in Article 32(1) of the Constitution of the Republic of Serbia (Decision of the Constitutional Court, Constitutional Appeal No. 776/2008 dated 31 March 2011, published in the Official Gazette of the Republic of Serbia, No. 36/2011 dated 27 May 2011). Inequality in civil proceedings may result from selective application of procedural rules, e.g. not the same rules are applied to all parties to the proceedings or there is a difference in the application of rules with regard to the subject matter of the dispute.

Parties to criminal proceedings are equal in principle because of the dual role of the public prosecutor. As the public prosecutor is a party to criminal legal proceedings, their position vis-à-vis the

defendant is equal in principle. However, the public prosecutor is a state authority at the same time, which means that they have an obligation to work in the public interest and which affects the equality of parties to criminal proceedings indirectly.

In labour law, the principle of equality means "the equality of opportunity to exercise socio-economic rights in the area and equality in the use and protection of those rights" (Jovanović, 2018: 37). Equality in labour law is ensured through non-discrimination, which is supplemented by positive discrimination (Jovanović, 2018: 37).

7. CONCLUSION

Equality may be discussed from several aspects. This paper focuses on the analysis of the notion of legal equality in Serbian law. It should be reiterated that equality (of genders, races, religions, etc.), being a constitutional, i.e. non-discrimination principle, differs essentially from the equality of parties to a private law or public law relationship. Inequality in general, legal inequality certainly included, is not prohibited. The objective pursued is action (on one's own or with the help of the state) to transform substantive inequality into formal equality. Unilateral and authoritative instruments, going against the principle of equality, are allowed in areas where public interest should be protected. Being a sensitive issue, equality is primarily taken care of by the legislator. That is why the principle of equality has been incorporated into a number of provisions, both of national and international concern. Perceiving the differences in the way the principle of equality is understood when viewed from different legal aspects, it may still be concluded that the idea is the same in all the areas where one aspires to substantive equality: ensure equal treatment in unequal social circumstances.

REFERENCES

Antić, O. (2008). Obligaciono pravo. Beograd.
Babić, I. (2020). Uvod u građansko pravo i stvarno pravo. Beograd: Projuris.
Vasiljević, M. (2011). Kompanijsko pravo, Pravo privrednih društava. Beograd: Pravni fakultet.
Veljković, D. (2021). Ugovori u privredi. Beograd: Forum media.
Vodinelić, V. (2016). Javno i privatno pravo. Beograd: Službeni glasnik.
Guo, R. (2019). Theoretical Research on the Principle of Equality in Civil Law from the Perspective of Civil Society. Asian Social Science, 15 (10), 141-148.
Dabić, Lj. (2005). Ugovor o koncesiji u oblasti energetike. Pravo energetike. Zbornik radova. Ur. Branislava Lepotić-Kovačević. Beograd: Pravni fakultet, 267-295.
Divljak, D. (2006). BOT model projektnog finansiranja infrastrukture. Zbornik radova Pravnog fakulteta u Novom Sadu, 3, 275-288.
Jowell, J. (1994) Is Equality a Constitutional Principle. Current Legal Problems, 47 (2), 1–18.
Jovanović, P. (2018). Načelo jednakosti u radnom pravu. Zbornik radova Pravnog fakulteta u Novom Sadu, 1, 17-39.
Jovanić, T. (2004). Zlatne akcije i neki oblici državne kontrole nad poslovanjem privatizovanih preduzeća koja obavljaju delatnosti od opšteg interesa. Pravo i privreda, 41 (5-8), 246-264.
Kašćelan, B. (2018). Sporna pitanja u vezi sa ugovornom odredbom o naknadi za obradu kredita. Harmonius, 110-129.
Keča, R. & Knežević, M. (2021). Isključenje odgovora na žalbu u sporu za objavljivanje odgovora na informaciju. Zbornik radova Pravnog fakulteta u Novom Sadu, 3, 687–708.
Krvavac, M. (2011). Rešavanje sporova u oblasti međunarodnih koncesija. Pravni život 11, 297-314.
Lepetić, J. (2012). Zlatne akcije u kompanijskom pravu Srbije. Pravo i privreda, 49 (4-6), 164-178.
Lurie, G. (2020). Proportionality and the Right to Equality. German Law Journal, 21, 174–196.
Milenković, D. (2017). Upravni ugovori u zakonima o opštem upravnom postupku zemalja zapadnog Balkana. Strani pravni život, 3, 67-80.
Nikolić, D. (2006). Uvod u sistem građanskog prava. Novi Sad: Pravni fakultet.
Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer, Office of the United Nations High Commissioner for Human Rights (OHCHR) and the International Bar Association (IBA), 2003.
Decision of the Constitutional Court, Constitutional Appeal No. 776/2008 dated 31 March 2011, published in the Official Gazette of the Republic of Serbia, No. 36/2011 dated 27 May 2011.
Pajvančić, M. (2009). Komentar Ustava Republike Srbije. Konrad Adenauer Stiftung.
Popov, D. (2005). Građansko pravo (opšti deo). Beograd: Službeni glasnik.
Popovski, A. (2017). Zaštita javnoga interesa u raspolaganju javnim dobrom u općoj uporabi. Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 38 (1), 275-302.
Preliminary Draft Civil Code of the Republic of Serbia.
Judgment of the Supreme Court of Cassation No. Rev 1615/2016 dated 16 May 2018.
Rubenstein, William B. (2002). The Concept of Equality in Civil Procedure. Cardozo Law Review, 23 (5), 1865-1915.
Tomić, Z. (2005). Javna uprava i upravni ugovori. Pravo energetike. Zbornik radova. Ur. Branislava Lepotić-Kovačević. Beograd: Pravni fakultet, 297-309.
Hawthorne, L. L. (1995). The Principle of Equality in the Law of Contract. Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law), 58(2), 157-176.
Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia, No. 98/2006).

Obligations Act (Official Journal of the Socialist Federal Republic of Yugoslavia, Nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, Official Journal of the Federal Republic of Yugoslavia, No. 31/93, Official Journal of Serbia and Montenegro, No. 1/2003 – Constitutional Charter and Official Gazette of the Republic of Serbia, No. 18/2020).
Civil Proceedings Act (Official Gazette of the Republic of Serbia, Nos. 72/2011, 49/2013 – Decision of the Constitutional Court, 55/2014, 87/2018 and 18/2020).
Companies Act (Official Gazette of the Republic of Serbia, Nos. 36/2011, 99/2011, 83/2014 – another act, 5/2015, 44/2018, 95/2018 and 91/2019).
Public Private Partnerships and Concessions Act (Official Gazette of the Republic of Serbia, Nos. 88/2011, 15/2016 and 104/2016).
Public Property Act (Official Gazette of the Republic of Serbia, Nos. 72/2011, 88/2013, 105/2014, 104/2016 – another act, 108/2016, 113/2017, 95/2018 and 153/2020).