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EQUALITY BEFORE THE LAW AND THE AUTHORITIES*

Equality before the law and the authorities is, along with the principle of legality, one of particular importance for the criminal process. Its importance is as obvious as it is specific. However, it should be noted that equality is a relative right and not an absolute one. The article in question examines the latter position and explains some of the aims of the applicability of that principle. At the same time, the research aimed at analyzing the legislation and practice regarding the application and observance of the principle of equality, and as a result, the research comes with recommendations regarding the completion and modification of the criminal procedural legislation in this respect.

Keywords: the principle of equality, non-discrimination, immunity, special categories of procedural subjects, procedural sanctions.

EGALITATEA ÎN FAȚA LEGII ȘI A AUTORITĂȚILOR

Egalitatea în fața legii și a autorităților este, de rând cu principiul legalității, unul de o importanță deosebită pentru procesul penal. Importanța acestuia pe cât este de evidentă, cu atât și specifică. Totuși este de menționat că egalitatea este un drept relativ și nu absolut. Articolul în referință analizează această ultimă poziție și vine a explica unele deziderate privind aplicabilitatea principiului respectiv. Totodată, cercetarea a avut ca scop analiza legislației și practicii cu privire la aplicarea și respectarea principiului egalității, iar ca urmare cercetarea vine cu recomandări privind completarea și modificarea legislației procesuale penale în acest sens.

Cuvinte cheie: principiul egalității, nediscriminarea, imunitate, categorii speciale de subiecți procesuali, sancțiuni procesuale.

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Introduction. Full and real equality of citizens is manifested in all areas of social life and, especially, in the legal field.

“Within the conquest of the French Revolution of 1789, which abolished class privileges, with judges and procedures applicable only to nobles, equality before the law and the judiciary became a fundamental principle in all democratic laws. However, discrimination in judicial treatment still persisted even in democratic laws, on the grounds of race, ethnicity, political affiliation, etc.” [1, p. 70].

In 1946 the Economic and Social Council of the United Nations adopted Resolution no. 5 (I) establishing a UN body called the Commission on Human Rights (in 2006 the Commission became the UN Human Rights Council). This commission was responsible for promoting and drafting international acts on respect for human rights and fundamental freedoms. One of the most important tasks of that commission was to draft the Universal Declaration of Human Rights (UDHR) [2].

Methods and materials applied. Theoretical, normative and empirical material was used in the elaboration of this publication. Also, the research of the respective subject was possible by applying several methods of scientific investigation specific to the theory and doctrine of criminal procedure: logical method, comparative analysis method, systemic analysis, etc.

The purpose of the research. Research and analysis of the internal normative framework, jurisprudence and doctrine on equality before the law and the authorities and the effect of its non-compliance in the context of ensuring and guaranteeing the rights and freedoms of the parties in criminal proceedings.

Results obtained and discussions. According to art. 1 of the UDHR, All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

At the same time, art. 2 of the UDHR regulates that, 1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political

or other opinion, of national or social origin, wealth, birth or arising from any other situation. 2. In addition, no distinction shall be made on the basis of the political, legal or international status of the country or territory to which a person belongs, whether that country or territory is independent, guarded, non-autonomous or subject to any limitation of sovereignty.

At the same time, the provision of art. 7 of the UDHR stipulates that, All people are equal before the law and are entitled without any discrimination to equal protection of the law. All persons have the right to equal protection against any discrimination in violation of this Declaration and against any challenge to such discrimination.

These provisions are practically the first realized at international level and tell us about the principle of equal rights of persons. At the same time, we notice that these regulations also talk about non-discrimination. Therefore, non-discrimination, along with equality before the law and the right to equal application of the law without any discrimination, is the fundamental and general principle of the protection of human rights.

In accordance with art. 2 paragraph (1) of the International Covenant on Civil and Political Rights, The States Parties to the present Covenant undertake to respect and guarantee to all individuals in their territory the competence recognized in this Covenant within their jurisdiction, without distinction of any kind, in particular race, color, religion, political opinion or any other opinion, national or social origin, wealth, birth or based on any other circumstance [3]. That covenant is another international legal instrument governing the principle of equality.

Article 26 of the Covenant not only guarantees to all persons equality before the law and the right to equal protection by law, but also provides that any discrimination shall be prohibited by law and shall be guaranteed to all persons equal and effective protection against all discrimination, in particular on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other circumstance.

The principles of equality and non-dis-

crimination are at the heart of all human rights treaties: International Covenant on Civil and Political Rights; Covenant on Economic, Social and Cultural Rights; Convention on the Rights of Persons with Disabilities; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child, etc.

“Equality and non-discrimination are among the fundamental principles and rights in the field of international human rights law. Closely related to human dignity, they are the basis of all human rights. Articles 1 and 2 of the Universal Declaration of Human Rights proclaim that all human beings are equal in dignity and rights and condemn discrimination on several grounds, the list of which is not exhaustive” [4].

“The principle of equality of persons in criminal proceedings is considered as a requirement and as a guarantee for the balance between the interests of the individual and those of society, for the harmonization and safeguarding of these interests, which is a public interest, a necessity for justice” [5, p. 9].

The principles of equality and non-discrimination are at the heart of the concept of the rule of law. As noted by Member States in the Declaration of the UN General Assembly Summit on the Rule of Law at National and International Level, adopted by General Assembly Resolution 67/1 of 24 September 2012, “All persons, institutions and entities, public and private, including the state itself, have the obligation to respect laws that are fair, impartial and reasonable and have the right, without distinction, to equal protection of the law (paragraph 2). They also declared their commitment to respecting the equality of all people regardless of race, sex, language or religion [paragraph 3]” [6].

The International Human Rights Framework contains international tools to combat various forms of discrimination, including discrimination against indigenous peoples, migrants, minorities, people with disabilities, and discrimination against women, discrimination

based on religion, gender or sexual orientation. In the Declaration of the Rule of Law Summit, Member States also recognized the importance of ensuring that women, on the basis of equality between men and women, fully enjoy the benefits of the rule of law. Member States have committed themselves to using the law to protect their equality and ensure their full and equal participation in society, including in government institutions and the judiciary, and have reaffirmed the establishment of an appropriate legal and legislative framework for prevention and elimination of all forms of discrimination and violence against women and ensure their empowerment and full access to justice.

“The “UN-Women” structure contributes to these issues by supporting the United Nations system in developing global policies, standards and norms, providing technical and financial assistance to Member States and building effective partnerships with civil society. The Declaration recognizes the importance of the rule of law for the protection of children’s rights, including legal protection against discrimination, violence, abuse and exploitation, while ensuring the best interests of children in all areas of life and reaffirms the commitment to the full realization of children’s rights [paragraph 17]. Under the United Nations system, UNICEF is involved in the promotion of the rights of the child and assists Member States in the implementation of the Convention on the Rights of the Child” [7].

ECHR, through the content of art. 14, condemns discrimination, stipulating that The exercise of the rights and freedoms recognized by this Convention shall be ensured without distinction based on, inter alia, sex, race, color, language, religion, political or any other opinion, national or social origin, membership of a national minority, wealth, birth or any other situation [8]. The respective provisions were subsequently completed once the Protocol no. 12 to the ECHR, where, according to art. 1 paragraph (2) and regulate that, No one shall be discriminated by any public authority on any of the grounds mentioned in paragraph 1 [9].

Another European document that has drawn particular attention to the principle of equality is the Treaty on European Union. Ac-

According to that act, it is clear that the European Union is based on the values of equality, including between men and women (art. 2, art. 3 paragraph (3)), respects the principle of equality of its citizens, who receive equal attention from the institutions, its bodies, offices and agencies (art. 9), and is based on the principle of equality (art. 21 paragraph (1)).

The principle of equality is protected by constitutional rules at the national level. Thus, according to art. 16 of the Constitution of the Republic of Moldova, (1) Respect and protection of the person is a primary duty of the state. (2) All citizens of the Republic of Moldova are equal before the law and public authorities, regardless of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin. We note that the Supreme Law contains practically the same provisions as international and European acts. It is to be appreciated that the Constitution, by the expression "primordial duty of the state", gives supreme priority to the person, his rights, their observance and protection, which prevails over other values. At the same time, analyzing the constitutional provisions, it appears that no one can be above the law, and in correlation with the provisions of art. 114, 115, 116 of the Constitution, it follows that justice is unique, impartial and equal for all, mentioning, at the same time, that the establishment of extraordinary courts is prohibited (art. 115 paragraph (3) of the Constitution).

In terms of criminal procedure, the Moldovan legislator comes with clear regulations on the principle of equality. Thus, according to art. 9 of the CCP, (1) All are equal before the law, the prosecuting authorities and the court, regardless of sex, race, color, language, religion, political or other opinion, national or social origin, membership of a national minority, wealth, birth or any other situation. (2) The special conditions of criminal prosecution and trial against certain categories of persons who benefit, according to the law, from a certain degree of immunity are ensured based on the provisions of the Constitution, international treaties, this code and other laws. At the same time, art. 315 of the CCP stipulates that, The prosecutor,

the injured party, the civil party, the defense counsel, the defendant, the civilly liable party and their representatives shall enjoy equal rights before the court with regard to the administration of evidence, participation in their investigation and the formulation of requests and proceedings.

The following conditions or requirements are derived from the respective provisions:

a) the initiation of criminal prosecution, criminal prosecution and trial of criminal cases is carried out for all procedural subjects by the same criminal investigation bodies and courts. This requirement does not affect the jurisdiction of the criminal prosecution body or the courts and does not infringe the principle of equality in this respect;

b) before the criminal prosecution bodies and the courts all procedural subjects have equal rights regardless of sex, race, color, language, religion, political opinion or any other opinion, national or social origin, belonging to a national minority, wealth, birth or any other situation, i.e. without any discrimination. It is natural that in a criminal case the parties have different positions and statuses (for example, the injured party and the suspect), but this fact is not discriminatory, because the criminal procedural law may limit some procedural rights. In such a situation, it is important that the respective rights, obligations and limitations apply equally to all persons who are in the same situation or have the same procedural status. For example, all suspects, accused and defendants are guaranteed the right to silence, defense, free access to justice, etc.; all injured parties are equally guaranteed the right to challenge the person conducting the criminal investigation or judge the criminal case, to reconcile with the perpetrator, to object, etc.;

c) before the courts all parties have equal rights as regards the administration of evidence, participation in their investigation and the formulation of requests and proceedings. In this way, the legislator ensures equal rights for accusation and defense before the court, so that these two parties "fight" on equal and non-discriminatory positions, not giving priority even to one of them;

d) the same procedural rules apply to all persons, without certain persons being privileged and without any discrimination. In other words, the prosecution and trial of criminal cases is done for all parties according to the same procedural rules, i.e. there are no different or discriminatory rules.

Regarding the latter requirement, it should be noted that for some people there are some different requirements or rules. These rules are imposed on persons holding certain positions (for example, deputies, judges, etc.). Regarding these people, acts of criminal prosecution may not be carried out without a certain authorization, vote, approval or acceptance by some state authorities. For example, according to art. 70 paragraph (3) of the Constitution of the Republic of Moldova, The deputy may not be detained, arrested, searched, except in cases of flagrante delicto, or sent to trial without the consent of Parliament, after his hearing. According to these provisions, the deputy cannot be prosecuted or sent to court without the vote in Parliament on the waiver of parliamentary immunity for this purpose.

The presence of parliamentary, judicial and other special immunities is not a personal privilege, but serves as a means of protecting the public interest; it aims to ensure the unhindered fulfillment by specified persons of their professional or other duties, their independence and autonomy, as well as the exclusion of attempts to justify criminal liability.

If there are sufficient grounds and in accordance with the procedures established by law, persons with immunity can also be held criminally liable. Immunity does not allow these persons to be released from criminal liability. Therefore, there is no denial of the principle of equality in situations with a derogatory nature of criminal prosecution of these categories of persons.

In this regard, the Constitutional Court of the Republic of Moldova held: In the aspect that justifies the referral to the interim General Prosecutor, the Court observes that article 95 paragraph (5) of Parliament's Rules of Procedure provides an answer: "The request to waive the immunity of the deputy shall be submitted sepa-

rately for each offense or contravention" [10].

"Equality does not mean uniformity, which is why, if in identical cases the treatment must be identical, the legislator may nevertheless lay down different rules in relation to different situations. Therefore, situations in which specialized courts are set up on certain matters cannot be understood as inequalities... Nor the fact that, in the case of certain persons, holders of special qualities..., the personal jurisdiction of a higher court intervenes... and some special rules of procedure are incidental... it does not mean that they have a privileged situation, but only that the law takes into account certain realities, the effects of which it seeks to annihilate (for example, the influence of such dignitaries in society, but also the risk of harassing them by involvement in criminal proceedings, in order to influence them in decision-making)" [11, p. 28-29]

"Some authors consider that these exceptions are real violations of the principle of equality of citizens before the law, considering them remnants of past historical regimes" [12, p. 41].

Constitutional Court stated that equality is a relative principle. The right to equality is only the right to be treated in the same way as a person in an equivalent legal situation (DCC no. 3 of 18 January 2019, § 28) [13].

At the same time, The Court recalled that equality before the law and public authorities presupposes the absence of any direct or indirect discrimination. Discrimination occurs when people in similar situations are treated differently (direct discrimination) or when people in different situations are treated the same (indirect discrimination), unless such treatment is objectively and reasonably justified (DCC no. 6 of 10 March 2020, § 29) [14].

From the above, we support the view that, "The principle of equality is reflected within the system of social relations" [15, p. 220].

Foreign citizens and stateless persons benefit from the same guarantees, with the derogations provided by law. The judicial system operates on the basis of unique laws, without granting the parties and participants in the

trial any advantages over other participants. The legal status of the participants in the trial is determined only by their procedural status, regardless of the particularities listed, granting them equal rights and obligations.

At the same time, the principle of equality before the law and the authorities, "regarding access to justice, consists in the possibility of any person to go to court for the defense of rights, freedoms and legitimate interests" [16, p. 48].

Additional guarantees may be provided for some participants in the process (for example, minors, mute, deaf, blind or people with other essential disorders of speech, hearing, vision, as well as physical or mental defects, persons who do not possess the language in which the criminal proceedings are conducted). For these categories of persons, the procedural-criminal legislation regulates and grants several procedural guarantees taking into account the physical and mental vulnerabilities, in order to ensure their real equality, putting them "on the same scale" with the other participants.

Therefore, to these persons the criminal procedural law grants the right to an interpreter, interviewer, defenders, representatives, legal representatives, pedagogue, psychologist, as well as other types of guarantees. In this way, the legislation ensures the balance between all participants in the process in order to bring them into equal situations.

It is important to ask ourselves, if there are any guarantees regarding the applicability

of the principle of equality of persons before the law and the authorities? In other words, it must be specified whether the infringement of that principle attracts procedural sanctions.

If we refer to the non-provision of guarantees, the persons mentioned above (minors, mute, deaf, etc.) then the procedural documents drawn up and the procedural actions performed in respect of them attract nullity or inadmissibility.

If we refer to the general conditions of equality and non-discrimination, the CCP does not specifically regulate the procedural sanction. This sanction can be deduced from the provisions of art. 94 paragraph (2) of the CCP, i.e. the inadmissibility of the evidence obtained by violating the constitutional rights and freedoms of the person or the provisions of the criminal procedural law by depriving the participants in the trial of these rights or by restricting the guaranteed rights.

Conclusion. The current provisions of the CCP can be interpreted in the event of a breach of the principle of equality. Therefore, we propose to amend and supplement art. 94 and 251 of the CCP, so that the procedural-criminal law concretely provides for the sanction of nullity or inadmissibility in this case. Or, we support the arguments put forward by some authors [17, p. 141]. which states that the principle of equality is the most important principle of the ordinary criminal process with the principle of legality. Respectively, the procedural sanctions must be appropriate.

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