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THE PROTECTION OF EQUAL TREATMENT UNDER THE CODE OF ADMINISTRATIVE PROCEEDINGS – BETWEEN TRUTH AND ILLUSION

Abstract

This article deals with the issue of equal treatment principle protection under the administrative proceedings. It discovers the essence of the principle under the Polish Constitution, the EU Treaties, and the Convention of Human Rights and Fundamental Freedoms, together with the views of the case-law of the Constitutional Tribunal, European Court of Justice, and the Court of Human Rights. The author reveals the fact, that Poland was the only Member State which amended the administrative proceedings in order to fulfil the non-discrimination directives' goals which turned out to be an inappropriate, unsatisfactory decision. In addition to failing to adopt one of the directives related to equal treatment principle on time, the provision added to the Code seems to be superfluous, difficult to operate, and – distorting the fundamental principles of the proceedings, including the equal treatment principle itself. The conclusion of the article consists of a few proposals for remedies against the described law-making defect.

Keywords

administrative proceedings – reopening the proceedings – final decision – equal treatment – discrimination

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*“(...) if five different drafters
produce five different Bills, it suggests that
legislative drafting is an art rather than
a precise science”***

According to Article 32 of the Polish Constitution: “1. All are equal before the law. All are entitled to equal treatment by public authorities. 2. No one shall be discriminated against in political, social or economic life for any reason”. The principle of equality in law-making binds the legislature to treating equally all individuals that are in analogous, or relevantly similar, situations (Article 67 Section 1 in connection with Article 32 Section 1 of the Constitution). The Constitutional Court has repeatedly emphasized that the principle of equality enshrined in Article 32 Section 1 of the Constitution refers to the guaranteed equal treatment of legal entities within the specified class (category). All legal entities in analogous positions should be treated equally, and therefore the same measure, without differentiation, both discriminatory and favouring should be applied. Only entities which are different may be treated differently. The evaluation of all legislation from the point of view of the principle of equality must therefore be preceded by a thorough examination of the parties legal positions and the sample is analysed in terms of their common features, as well as distinguishing features¹.

The choice of such distinguishing features should be based on fair criteria. The Court pointed out that if the legislature differentiates between legal entities that have a common feature, it introduces a significant departure from the principle of equality. It is only acceptable if three conditions are satisfied: firstly, the differentiation introduced by the legislature must be rationally justified, namely, it must be related to the purpose and content of the provisions in which controlled norm is contained; secondly, the importance of the interest served by the

** G. Bowman, *The art of legislative drafting*,

<http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/190031/dale.pdf> [last accessed: 4.06.2014].

¹ See the judgment of 28.05.2002, P 10/01, Orzecznictwo Trybunału Konstytucyjnego [Decisions of Constitutional Tribunal; OTK] 2002, no. 3/A, item 35.

differentiation of similar entities must be in proportion to the seriousness of the interests that will be affected by the different treatment of similar subjects; thirdly, the differentiation of similar entities must be based on constitutional values, principles or norms². The deviations from the imperative of equal treatment of similar subjects must always be the basis for persuasive arguments. Thus, the “differentiation of the legal situation of similar entities is more likely to be declared compatible with the Constitution, if it is in accordance with the principles of social justice and if it implements those principles. On the other hand it shall be deemed unconstitutional discrimination (favouring) if it is not supported by the principle of social justice. In this sense, the principles of equality before the law and social justice largely overlap”³.

Equality between people is one of the fundamental principles of most law systems of the European countries. It has developed from Aristotle’s proportional or geometric orientation of equality (unlike the arithmetical one), which appears to be the basis of distributive justice⁴ and is now reflected in the basic European acts, instead of putting the principle in a general way, reflecting the concept of discrimination, derived from the US commercial law system⁵.

Articles 20, 21 and 23 of the Charter of Fundamental Rights of the European Union prohibit any discrimination on any ground and require equality between people to be ensured in all areas. This principle

² See judgments of: 6.05.1998, K 37/97, Orzecznictwo Trybunału Konstytucyjnego [Decisions of Constitutional Tribunal; OTK] 1998, no. 3, item 33; 3.09.1996, K 10/96, Orzecznictwo Trybunału Konstytucyjnego [Decisions of Constitutional Tribunal; OTK] 1996, no. 4, item 33; 16.12.1996, U 1/96, Orzecznictwo Trybunału Konstytucyjnego [Decisions of Constitutional Tribunal; OTK] 1996, no. 6, item 55; 19.02.2001, SK 14/00, Orzecznictwo Trybunału Konstytucyjnego [Decisions of Constitutional Tribunal; OTK] 2001, no. 2, item 31; 24.10.2001, SK 22/01, Orzecznictwo Trybunału Konstytucyjnego [Decisions of Constitutional Tribunal; OTK] 2001, no. 7, item 216; 2.04.2003, K 13/02, Orzecznictwo Trybunału Konstytucyjnego [Decisions of Constitutional Tribunal; OTK] 2003, no. 4/A, item 28; 3.03.2004, K 29/03, Orzecznictwo Trybunału Konstytucyjnego [Decisions of Constitutional Tribunal; OTK] 2004, no. 3/A, item 17.

³ See the judgments of the Constitutional Tribunal of: 3.09.1996, K 10/96, 16.12.1997, K 8/97, Orzecznictwo Trybunału Konstytucyjnego [Decisions of Constitutional Tribunal; OTK] 1997, no. 6, item 70 and 13.04.1999, K 36/98, Orzecznictwo Trybunału Konstytucyjnego [Decisions of Constitutional Tribunal; OTK] 1999, no. 3, item 40.

⁴ J. Schwarze, *European Administrative Law*, London: Thomson Reuters 2006, p. 552.

⁵ P. Cane, *Administrative Law*, New York: Oxford University Press 2004, p. 561.

is also expressed in Article 10 of the Treaty on the Functioning of the European Union. Article 2 of the Treaty Establishing the European Community provides that promoting such equality is one of the Community's essential tasks. Similarly, Article 3 of the Treaty requires the Community to aim to eliminate inequalities and to promote equality in all its activities.

Despite the above-mentioned difference in the legislative method, the European Court of Justice explains the core of the principle of equality (non-discrimination) in the same way as the Polish Constitutional Tribunal does. According to the Court, "[t]he prohibition of discrimination, which is one of the fundamental principles of Community law, requires that comparable situations should not be treated in a different manner unless such a distinction can be objectively justified"⁶. The principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it. It is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified⁷.

Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms together with Article 1 of Protocol 12 to the Convention also prohibit discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

The European Court of Human Rights defines the principle similarly to the expressions used in the views of the European Court of Justice or the Polish Constitutional Court: "[a]rticle 14 does not forbid every difference in treatment in the exercise of the rights and freedoms

⁶ Judgment of the Court (First Chamber) *Commission of the European Communities v. Portuguese Republic*, Case C-334/03, Judgment of 20.10.2005, E.C.R. 2005/10A/I-8911.

⁷ Judgments of the Court (Grand Chamber) *The Queen, on the application of ABNA Ltd and Others v. Secretary of State for Health and Food Standards Agency*, Case C-453/03, Judgment of 6.12.2005, E.C.R. 2005/12A/I-10423; Judgment of the Court (Grand Chamber) *M.G. Eman and O.B. Sevinger v. College van Burgemeester en Wethouders van Den Haag*, Case C-300/04, Judgment of 12.09.2006, E.C.R. 2006/8-/I-8055.

recognized. (...) It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. National authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention”⁸. The Court explains that “[f]or the purposes of Article 14, a difference of treatment is discriminatory if it has «no objective and no reasonable justification», that is, if it does not pursue a «legitimate aim» or if there is not a «reasonable relationship of proportionality between the means employed and the aim sought to be realised»”⁹.

Every administrative organ or court in Poland is obliged to apply the Constitution directly unless the Constitution provides otherwise (Article 8). It refers to every provision of the Constitution, not only the self-executing ones¹⁰, although it might appear complicated in several cases, as it requires analysing not only in accordance with the constitutional

⁸ Judgment of the European Court of Human Rights of 23.07.1968, application no. 1474/62.

⁹ Judgment of the European Court of Human Rights of 28.11.1984, application no. 8777/79.

¹⁰ E. Kustra, *Normatywny wzór prawodawstwa ukształtowany w okresie transformacji* [Normative Pattern of the Legislation Developed During the Period of Transformation], [in:] E. Kustra (ed.), *Przemiany polskiego prawa (1989-1990)* [Polish Law Changes (1989-1990)], Toruń: Wydawnictwo Uniwersytetu Mikołaja Kopernika 2001, p. 19.

provision, but also understanding the case law or the science of law¹¹. The courts have already accepted this way of applying the Constitution and benefit from it¹².

The main consequence of the statement is that every individual is free to raise the principle in his case to get proper legal services. The protection is broad as it concerns every activity of human life, especially social life and the relations with administrative bodies. It depends on the administrative body (finally a judge) whether the raised question of equality is an issue in a case or not.

The principle of equality may be referred to both in making law (an obligation of creating the law under the principle of equality [non-discrimination]) and in applying law (the requirement of equal treatment by public authorities in the application of law)¹³. As far as the substantive law is concerned, the principle of equal treatment is mostly analysed within the text of the law and the interpretation of it. The principle itself is derived from Article 32 Section 1 of the Constitution, applied directly as a source of legal norms. It is considered there whether the rights and obligations are equally distributed among the individuals in the same legal situation. Within the substantive law the authority is obliged to grant rights and impose obligations on individuals without any prejudice in interpretation. No personal characteristic should affect an administrative decision if it is not set forth in the legal norm or derived from the fundamental principles. In the interpretive process the authority is obliged to exclude the unequal result of law interpretation and choose the equal one. If it is not possible and all interpretations lead to unequal treatment of an individual, the law is unequal itself. The only way of eliminating that error, apart from

¹¹ B. Banaszak, *Wpływ integracji europejskiej na prawo i system konstytucyjny Polski* [Impact of European Integration on the Law and Constitutional System in Poland], Warszawa: C.H. Beck 2009, pp. 52-53.

¹² Judgments of the Administrative Supreme Court: of 11.01.2013, II GSK 2331/11, and of 23.10.2012, I PSK 2146/11, www.orzeczenia.gov.pl [last accessed: 4.06.2014].

¹³ B. Banaszak, *Zasada równości w orzecznictwie Trybunału Konstytucyjnego* [The Principle of Equality in the Jurisprudence of the Constitutional Court], [in:] K. Działocha (ed.), *Sześć lat Konstytucji Rzeczypospolitej Polskiej. Doświadczenia i inspiracje* [Six Years of the Polish Constitution. Experience and Inspiration], Warszawa: Wydawnictwo Sejmowe 2003, p. 24.

a law change, is to challenge the existing law with an action taken by the Constitutional Tribunal.

The principle of equal treatment refers also to the procedural legal norms. It means that no one should be treated differently within the administrative procedure because of his personal characteristic, unless the law allows for it or other principles justify such behavior on the part of an authority. Again, the principle of equal treatment belongs to the basic principles of law, guaranteed by the Constitution, and applied directly. In particular proceedings, equal treatment is understood as an obligation to treat each party to the process in the same way. In detail, an authority should allow every party to be informed about the case, to give each party access to the files, to serve the pleadings in the proceedings on every person who has the right to receive them within a reasonable time and so on.

If any of the above-mentioned obligations is violated, an individual is able to draw the authority's attention to it or raise that fact in an appeal. It refers to substantive as well as to procedural law infringement, since the administrative bases are broad. To raise a discrimination plea it is not necessary to prove the influence of the equal treatment principle violation on the outcome of the case completed by a final decision. If the violation was flagrant, it may be understood as the basis for the annulment of the final decision under Article 156, paragraph 1, point 2 of the Code regardless of the fact whether the appeal is made or not, or even prior to the appeal. Unequal treatment may also lead to the omission of one of the parties in the proceedings, which may become grounds to reopen the closed proceedings under Article 145, paragraph 1, point 4 of the Code. Article 145, paragraph 1, point 5 of the Code may also be considered to be grounds to reopen the proceedings on the basis of discrimination, as it refers to new, unknown facts, meaningful to the case. Obviously, a discrimination victim is free to raise his or her plea before the administrative court within the judicial review of the decision¹⁴.

Moreover, the fact of discrimination may be raised in a letter of dissatisfaction or proposal, whose results are not binding, but which

¹⁴ Judgment of the Supreme Administrative Court of 14.11.2013, II FSK 154/12, LEX no. 1394854.

may result in positive effects. Finally, if the Constitutional Tribunal declares a legal norm applied in the individual's particular case to be incompatible with the Constitution, Article 145a of the Code allows an individual to reopen the proceeding.

To sum up, the Polish legal system provides individuals with several measures of combating unequal treatment during administrative proceedings. Indisputably, the principle is firmly protected, like the rest of the principles governing the administrative procedure, established within the Code and the Constitution, such as the principle of legality, the principle of durability of the decision, the principle of objective truth and so on. There is no reason for additional protection of an individual against discrimination. The system is definitely equipped with all necessary tools to fight for equal treatment in administrative law. The same conclusion refers to the Treaties, as they consist of self-executing rules referring to equality principle¹⁵. The constitutional and treaty articles contain legal norms to be applied directly. Equality is an administrative law principle, not only a "basic principle", but also viewed under the heading "of the administration's binding of itself"¹⁶. That is why, in the author's opinion, there is no point in repeating them in directives or national legal acts related especially to administrative law. The case-law of the European Court of Justice or the European Tribunal of Human Rights and the Polish courts prove that the normativity of the equality principle is indisputable.

Under such circumstances, the drafting, among administrative proceedings provisions, of other provisions related to equality is risky, as it may limit the principle. Creating new provisions devoted formally

¹⁵ K. Kowalik-Bańczyk, *Bezpośrednie stosowanie Karty Praw Podstawowych w krajowym postępowaniu sądowym gwarancją skuteczności prawa UE – glosa do wyroku TS z 22.12.2010 r. w sprawie C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Republika Federalna Niemiec* [Direct Application of the Charter of Fundamental Rights in the National Judicial Proceedings as a Guarantee of the Effectiveness of EU Law – Commentary to the Judgment of European Court of Human Rights of 22.12.2010, Case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Germany], *Europejski Przegląd Sądowy* [European Judicial Overview] 2013, no. 3, pp. 40-46; R. Wieruszewski, *Rola i znaczenie Karty Praw Podstawowych Unii Europejskiej dla ochrony praw człowieka* [The Role and Importance of the Charter of Fundamental Rights of the European Union for the Protection of Human Rights], *Przegląd Sejmowy* [The Sejm Review] 2008, no. 2, p. 58.

¹⁶ Schwarze, *supra* note 4, p. 641.

to equality may result in fewer rights of a victim of discrimination, as it always sets new circumstances, limitations, conditions, entitling it to achieve legal protection. The more general the legal structure is, the wider its range is.

Besides, if a new piece of legislation is enacted, there is the impression that the existing law did not sufficiently protect individuals against discrimination. It might be also understood that beforehand the law did not protect people against humiliation and administrative law allowed the authorities to treat individuals unequally, which is obviously not true. Therefore, the presentation of the new legislation as a necessary way of protecting people against discrimination, or the statement that we had no proper protection against it before, is misleading. The core of equal treatment is placed at the heart of human dignity and in the rule of law, which are the essence of democracy and the main values of the European Community. It is not acceptable if in the XXI century we suddenly realise that there was no protection against discrimination until now. Such a conclusion would ruin the *acquis communautaire* or the case-law of the main jurisdictions in Europe and the Polish Constitutional Tribunal as well as the Polish courts, whose achievements of jurisprudence proves that the courts have always protected human dignity.

The misunderstanding of legislative needs, namely that new administrative legislation concerning discrimination is required, has led to the creation of provisions referring to the principle of equality, which, in the author's view, simply distort the essence of equality. Excessive legislation results in legislatively defective acts, not able to be enforced and, what is more important, it narrows protection instead of broadening it.

Despite the wide treaty protection equality, the European Commission has proposed legislation which defines and describes the main areas of discrimination: the labour market and access to and the supply of goods and services¹⁷. The Commission has also defined the features to be protected, such as: religion or belief, disability, age or sexual

¹⁷ In accordance with Article 57 of the Treaty on the Functioning of the European Union, services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

orientation as regards employment and occupation¹⁸, and has provided the means of preventing or combating discrimination at the same time. Finally the propositions were embodied in several directives: the Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women who are engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood¹⁹, the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin²⁰, the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation²¹, the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services²², the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation²³. For the purposes of this article they will collectively be called the EU equality legislation. Although it might be an unpopular statement, what has to be emphasized is that other grounds of discrimination that may occur, such as, for example, addictions, unusual appearance, poverty, illnesses, traumatic past, family disorder, and many others remain beyond the directives or any EU secondary legislation. Does it mean that such cases of discrimination are allowed under EU law? Of course it does not. As it was already shown in this article, the Treaties and the Charter of Fundamental Rights of the European Union contain strong protection against discrimination on any grounds.

¹⁸ Article 1 of the Directive 2000/78/WE; Article 3 of the Directive 2010/41/UE; Article 2 of the Directive 2000/43/WE; Article 2 of the 2004/113/WE.

¹⁹ Official Journal L 359 of 19.12.1986, pp. 0056-0058, which was withdrawn by Directive 2010/41/EU of the European Parliament and of the Council of 7.07.2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

²⁰ Official Journal L 180 of 19.07.2000, pp. 0022-0026.

²¹ Official Journal L 303 of 2.12.2000, pp. 0016-0022.

²² Official Journal L 373 of 21.12.2004, pp. 0037-0043.

²³ Official Journal L 204 of 26.07.2006, pp. 0023-0036.

The same applies to the constitutions of EU Member States, which are mostly applied directly²⁴. Choosing only some of the grounds of discrimination to be fought against is therefore in my opinion not a perfect idea, as it simply turns the general protection of equal treatment for every individual into the favouring of only some of them, leaving the rest of the victims of unequal treatment behind with the tools derived from the Treaties and national provisions.

According to Article 288 of the Treaty on the Functioning of the European Union, “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. A directive demands from the State Members a legislative activity in order to fulfil its aims. The main goal of equal legislation is to provide every individual with equal treatment. No difference in treatment should be made which may violate the principle of equality.

Owing to the fact that the directive is mostly not applied directly, every Member State should introduce into its legal system institutions and rules of law that may be understood as a “framework for combating discrimination based on any grounds in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment”²⁵. Normally, the directive states the date of implementation so that all Member States achieve the directive goals at the same moment, which is a tool for unification among the EU members.

As far as the directive 2004/113/EC is concerned, Poland appeared to be a state which delayed the implementation, so the Commission introduced proceedings against Poland at the European Court of Justice. The Commission accused Poland of failing to adopt the directive on time. Unfortunately Poland did not manage to defend itself sufficiently, although

²⁴ For instance see: Articles 3, 51 and 117 of the Italian Constitution; the Chapter IV of the Maltese Constitution; Articles 18 and 204 of the Portuguese Constitution; Article 12 Paragraph 1 and 2 of the Slovakian Constitution (only vertically); Articles 14, 15 and 63 of the Slovenian Constitution; Articles 14 and 53 of the Spanish Constitution; Articles 10 and 90 of the Turkish Constitution.

²⁵ Article 1 of the Directive 2004/113/WE; Article 1 of the Directive 2000/43/WE; Article 1 of the Directive 2006/54/EC; Article 1 of the Directive 2010/41/UE; Article 1 of the Directive 2000/78/WE; Article 1 of the Directive 2006/54/WE.

the equality principle is broadly protected under the Polish legal system. The Court declared that, “by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, the Republic of Poland failed to fulfil its obligations under that directive. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of the obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended. Member States should have brought into force the laws, regulations and administrative provisions necessary to comply with this Directive by 21 December 2007 at the latest”²⁶.

The directive 2004/113/EC provides several means of fighting against discrimination. As far as the administrative procedure is concerned, one of them is stipulated in its Article 8. The article provides that Member States “shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of the obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended”. The rest of the above-mentioned directives contain similar provisions²⁷.

As a result of the adjudication of the European Court of Justice, Poland adopted a law in order to fulfil the aims of the directive. The Act of Implementing Certain Provisions of the European Union in the Field of Equal Treatment of 3 December 2010²⁸ came into force on the 1 January 2011. The Act contains numerous amending provisions, for there

²⁶ Judgment of the Court (Fifth Chamber) of 17.03.2011, *Commission v. Poland*, Case C-326/09, E.C.R. 139/4.

²⁷ Article 7 of the Directive 2000/43/WE; Article 1 of the Directive 2006/54/EC; Article 9 of the Directive 2010/41/UE; Article 9 of the Directive 2000/78/WE.

²⁸ Dziennik Ustaw [Polish Journal of Laws] 2010, No. 254, item. 1700.

is a large number of provisions changing the existing ones (in several acts) in order to make the act operate properly.

Since Article 8 of the directive 2004/113/EC and the rest of the EU equality legislation refer to administrative procedure, as long as it deals with equal treatment, and oblige Member States to introduce a law which is an administrative procedure and allows every person who “consider himself wronged by failure to apply the principle of equal treatment to him, even after the relationship in which the discrimination is alleged to have occurred has ended”, the Polish Parliament decided to make amendments in the Code of Administrative Proceedings.

The amending provision of the Code of Administrative Proceedings is Article 24 point 1 of the Act of 3 December 2010. It introduces Article 145b into the text of the Code of Administrative Proceedings, providing the Code with an extra basis for the reopening of proceedings. According to Article 145b § 1 proceedings may “be reopened when the court’s decision was issued stating a violation of the principle of equal treatment under the Act of 3 December 2010 on the implementation of certain provisions of the European Union in the field of equal treatment (Journal of Laws No. 254, item. 1700), if the violation of this rule affected the outcome of the case completed by a final decision”²⁹.

Article 145b of the Code establishes a new basis for the reopening of the proceedings. It is necessary to mention that the reopening of proceedings, according to the Polish Code of Administrative Proceedings, allows the reopening of the closed proceedings only if the legal conditions are fulfilled. The conditions for the reopening of the proceedings entitle an individual to demand reopening the proceeding in certain situations. Originally, there were only seven bases for the reopening in the original text of the Code (from 1960). Significantly, there have been only two changes among the Code leading to an additional two extra bases for the reopening of the proceedings for fifty years. The modifications were connected with excluding the administrative body (or its employee) and the consequences of establishing the Constitutional

²⁹ Every English translation of the Code of Administrative Proceedings provisions cited in the article comes from the work by M. Bińkowska, A. Chelchowski, R.A. Walawender, *The Code of Administrative Proceedings*, Warszawa: C.H. Beck 2010.

Tribunal for the administrative proceedings (the individual's right to demand the reopening of the closed proceedings because of the Tribunal's adjudication, owing to which the provision the administrative body had applied appeared to be unconstitutional). The third meaningful alteration within the reopening basis was made in 2011 by Article 24 point 1 of the Act of 3 December 2010, introducing Article 145b to the Code.

According to the draft of the Act of 3 December 2010, Article 145b of the Code is to enable every individual who suffered from those kinds of discrimination which are specified in the directives to reopen the proceeding if the violation of the principle of equal treatment determined the administrative decision which was proved in court³⁰.

Unfortunately, Article 145b of the Code leads to the misunderstanding of the principle of equal treatment. Moreover, it creates a principle overriding other principles, which is not justified by any legal (or even moral) reasons. Especially, it does not improve the casuistic, defective EU law. Instead, it seems to degrade the quality of legislation even more.

Firstly, it is essential to emphasize that the reopening is an exception to the principle of durability of an administrative decision³¹. The principle is set forth in Article 16 paragraph 1 of the Code of Administrative Proceedings. Under Article 16 paragraph 1, "decisions which are not appealable in the administrative course of proceedings or by request for reconsideration shall be final. Such decisions may be quashed, amended, declared invalid or the proceedings may be reopened only in instances provided for in the Code or separate statutes".

The reopening of the proceedings is another extraordinary remedy against a final administrative decision available to a party, apart from the amending or quashing of a decision and the declaration of invalidity. The principle of durability of administrative decisions provides individuals with legal certainty, which is derived from the rule of law. It is necessary

³⁰ The draft – the Sejm paper number VI.3386.

³¹ About the essence of the principle of durability of administrative decision see: Z. Kmiecik, *Koncepcja decyzji ostatecznej (w ujęciu Kodeksu postępowania administracyjnego i Ordynacji podatkowej)* [The Concept of the Final Decision (under the Administrative Code of Procedure and the Tax Code)], *Zeszyty Naukowe Sądownictwa Administracyjnego* [Administrative Courts Scientific Review] 2008, no. 2, p. 9.

to balance every exemption to the principle against the principle of proportionality, determining the permissible scope of derogation from the principle of durability and providing the exemption with the necessary weight of protected interests measured by the importance of the exemption. It should be also precisely deliberated and, what is more important, incorporated into the legal text properly, in order to clarify the circumstances allowing the closed proceedings to be reopened and to make the application of the provision at least possible. The point is that if a certain value is to be protected, the safeguard should not be illusive. The principle of effectiveness of the EU law, obliges the Member States to use any measures to fulfil the EU goals, in particular those resulting from the Treaty. Adding any provision to a legal text, just any provision, is not enough, for the law has to be practicable, that is capable of being applied in the proceedings. Moreover, careless legislative action might cause more harm than doing nothing.

Secondly, Article 145b of the Code apparently expresses an independent basis for the reopening of proceedings because of discrimination. Under Article 145b of the Code a confirmed discriminatory act may cause the reopening of the proceedings if the violation of equal treatment influenced the decision. As a consequence, it is challenging to discover how Article 145b of the Code is to operate together with the question, which is here under consideration, of whether the provision is adequate to the goals of the directives.

According to § 6 of the Ordinance of the Council of Ministers of 20 June 2002 on the Principles of Legislative Technique³², “[p]rovisions of an act shall be drafted to reflect the legislator’s intent in a manner that is precise and comprehensible for the addressees of the regulations set forth therein”. As far as the principle is concerned, the above-mentioned exemption should also be created in a way preventing extensive interpretation.

Article 145b of the Code does not reflect the legislator’s intention at all. In this case, the intentions of the legislator are equivalent to the goals of the directives, namely to protect individuals against discrimination as defined by the directives. To achieve this aim, the Member States

³² Dziennik Ustaw [Polish Journal of Laws] 2002, No. 100, item 908.

remain free to choose adequate measures. Especially, before creating a new law, each Member State should have evaluated the existing state of the legal system, in order to decide if the new legislation is necessary and if so, to select perfect legislative measures. As has already been presented, Polish law is complete as far as the principle of equal treatment is concerned. The constitutional principle of equal treatment is understood broadly, and it refers to any kind of discrimination that may occur, even those forms of discrimination still undefined, directly applied to both substantive and procedural administrative law. The case-law proves that the principle operates in practice. In the author's opinion, there was no need to amend the Code. Perhaps, it was necessary as far as civil law is concerned, for instance, to provide individuals with a more firm basis for the claim.

Furthermore, Article 145b of the Code refers to equal treatment on the grounds described by the Act of 3 December 2010, that is gender, race, ethnicity, nationality, religion, creed, belief, disability, age, or sexual orientation. Any other individual features which could constitute the cause of unequal treatment remain beyond the protection stipulated in Article 145b and they include poverty, addictions, illnesses, uncommon appearance, ugliness, smell, lack of education, and many others. According to Article 145b of the Code, people who differ from the majority in the above-mentioned sampled characteristics do not deserve similar protection as those, featured by the Act of 3 December 2010. It has to be emphasized that the question was raised in the legal opinion of dr Piotr Czarny, the Sejm's expert³³.

Moreover, Article 145b of the Code provides the rule of equal treatment with special protection. The Code does not protect other principles the same way. There are several fundamental legal principles that are applied within the administrative proceedings, such as legality, the principle of objective truth, the principle of durability of decisions. Extraordinary protection of only one of the principles weakens the rest of them, as their violation does not allow anyone to reopen the closed case. What is more, the mechanism of reopening the closed proceedings

³³ The opinion attached to the bill, the Sejm paper no. 3386, pp. 1-2 and 4-5, available online: www.sejm.gov.pl [last accessed: 4.06.2014].

especially undermines the power of durability of the decision and the rule of law, the fundamental principles of administrative proceedings and of the relation between the authorities and individuals. As has been said before, such possibility cannot be incorporated into the legal text recklessly. There is no legal justification or even explanation why for weakening the warranties that are the basis of lawful administrative proceedings. Consequently, an individual who has suffered from discrimination acquires more rights than an individual who has suffered from other violations of the law.

The two above-mentioned remarks lead to the conclusion that Article 145b of the Code introduces imbalance and inequality into the proceeding instead of making the principle of equal treatment firm, which was the legislator's aim. From this point of view such provision should have never been created.

Fortunately for the proceedings, for the rule of law, and for other fundamental procedural principles, the application of Article 145b of the Code is predictably seldom, unsatisfactory, and difficult. Due to the fact that there are several defects in the legislation, it is also not operative at all.

There is a collision between Article 145a and Article 145b of the Code, as both refer to the adjudication of a court. Article 145a of the Code enables an individual to demand the reopening of the closed administrative proceedings because of the Constitutional Tribunal's declaration that the applied provision is unconstitutional.

It has to be recalled that the principle of equality is constitutionalised in Article 32 Section 1 of the Constitution and becomes a common standard of constitutional control. Article 145b of the Code stipulates that the victim should obtain the adjudication of a court, but it does not explain which kind of adjudication. Since the provision does not mention any kind of court that may be considered, there is an opinion that Article 145b of the Code refers to any court, including the Constitutional Tribunal, the European Court of Justice, or the European Court of Human Rights³⁴. The statement determines the conclusion that if there

³⁴ A. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Proceedings. Commentary], Warszawa: Lex 2013, p. 874.

is discrimination in the adjudication of the Constitutional Tribunal, there are two competitive procedures to be carried out provided by the Code. Such a situation may cause enormous complications. Some of them seem to be irresolvable, such as the limitation periods for raising claims which differ under both Articles. According to Article 145a of the Code the application for reopening should be submitted within one month of the date on which the judgment of the Constitutional Tribunal takes effect. Under Article 145b of the Code the demand should be submitted within one month of the day that the court judgment takes effect. The Constitutional Tribunal's judgment comes into force on the day it is pronounced. Its effect may, however, be delayed under Article 190, Section 3 of the Constitution. It is therefore complicated to indicate the proper limitation period under both articles, especially if it is taken into account that both articles express the exemptions from the principle and appear to be specific provisions. The administrative body dealing with the reopening application is to consider the limitation periods on its own.

In the author's view there is no reason for differentiating the situation of individuals on the basis of the grounds for reopening the proceedings if it depends on the same factor, namely the court judgment. It is not justified to treat one court as more important than others, as the highest judicial instances are taken into account.

It is worth mentioning that under regular circumstances the Code does not allow the reopening of proceedings closed because of the adjudication of the European Court of Justice, or the European Court of Human Rights which influenced the final decision, in contrast to what is permissible after the Constitutional Tribunal's adjudication. However, it does so allow if discrimination is the issue (under Article 145b). Again, the victims of discrimination are favored among others suffering from different law infringement, especially from violating the fundamental principles. The rest of the individuals are allowed to rely on Articles 154, 155, 161 of the Code³⁵.

³⁵ Z. Kmiecik, *Postępowanie administracyjne i sądownoadministracyjne a prawo europejskie* [*Administrative Proceedings and Administrative Courts Proceedings and European Law*], Warszawa: Wolters Kluwer 2010, pp. 44-46.

Returning to the idea of “court”, mentioned in Article 145b of the Code, another problem occurs. Namely, the only court that takes part in the administrative cases is the administrative one, whose task is a judicial review. If the court indicates a law violation, it is able to annul the decision or even declare it invalid. It is therefore clear that Article 145b does not refer to an administrative court. Otherwise, the article would be unnecessary. If an administrative court is able to annul the decision because of the equality principle violation – the reopening of the administrative procedure would be redundant. Furthermore, it is hardly possible to imagine a procedure in which an administrative court might adjudicate about discrimination which may influence the administrative procedure, since the administrative court in Poland is still mostly not a substantive one.

The court which is under consideration is the common court to which, under Article 13 Sections 1 and 2 and Article 14 Section 1, a victim of discrimination is enabled to take an opponent. An opponent is ordinarily a person who misbehaved against the claimant in the area of equal treatment. It may happen in any kind of legal relation described by the Act of 3 December 2010, mainly within the scope of access to public goods (Article 4), distributed by the administrative bodies.

It is uncertain who is to be sued, as the provisions of the Act of 3 December 2010 do not explain it. If it is to be an administrative body, it would be a difficult task, since under Article 417¹, paragraph 2 of the Civil Code, in order to recover damages from an administrative body, the law violation must be first declared by a competent organ (the administrative court). Unless a claimant obtains such an adjudication, his claim remains groundless. The administrative court adjudication concerns only the acts of administration bodies (or their inactivity). That is why there is always the need to challenge the decision at court if the victim of discrimination, which happened during the administrative proceedings, wishes to receive compensation for it.

It is possible to receive compensation from an administrative body only if the decision appears to be unlawful and is quashed by the court. Under such circumstances, however, the subject of the future reopening does not exist anymore. In other words, the claimant who sues

an administrative body after the decision was quashed is not able to reopen any proceedings, since there are no proceedings.

Suing a public official is even more complicated, as (under Article 5 points 1-3 of the Act of 20 January 2011 of the financial liability of public officials for flagrant violation of the law³⁶) it requires the decision not only to be unlawful and quashed, but to have been declared invalid and the public official's behaviour to be culpable. Analogously there is no way to reopen the proceeding, as the subject of the proceeding which is to be reopened does not exist.

There is one more obstacle in enforcing Article 145b of the Code, namely the limitation periods. According to Article 146 Section 1 of the Code, the decision cannot be quashed in the reopening proceedings conducted under Article 145b of the Code if a period of five years has elapsed from the day the decision was served or pronounced. Taking into consideration the real duration of a lawsuit and the limitation periods, it is impossible for the victim of discrimination to comply with the limitation period set under Article 146 Section 1 of the Code.

Even if the claimant is able to sue the defendant immediately, there is little chance of closing a civil lawsuit within 5 years from the occurrence of discrimination, as such trials would last for years (including all possible instances). Considering the fact that the claimant is obliged to obtain administrative court adjudication first, the limitation period is not reasonable at all.

Furthermore, it is even impossible for the claimant to comply with the limitation period set for the claims arising from breach of the principle of equal treatment. According to Article 15 of the Act of 3 December 2010, the period of limitation for such claims is 3 years from the date when the victim has learnt about the infringement of the principle of equal treatment, but not longer than 5 years after the incident of this rule violation.

As has been shown before, in order to sue the defendant, the claimant must appeal against the decision and challenge it in the administrative court. If at least one of the parties submits a cassation complaint to the Supreme Administrative Court, the proceedings will certainly last

³⁶ Dziennik Ustaw [Polish Journal of Laws] 2001, No. 34, item 173.

more than 3 years. The fact implies that exceeding the limitation period for the claim will be nearly automatic.

Obviously, the limitation period is not to be reset, since it is a substantive one. The same conclusion refers to the limitation period set under Article 146 Section 1 of the Code. It cannot be reset as it is not a limitation period for the party, but for the administrative organ. The limitation period also cannot be interrupted³⁷. These remarks prove that the opportunity for reopening administrative proceedings is illusory.

Lastly it is worth mentioning only that under Article 145b of the Code, reopening is possible if there is adjudication which influenced the decision. As it has been explained, mainly common court adjudications should be considered here. It is hardly imaginable how civil court adjudication on discrimination redress may affect the final decision. The provisions presented in this article stipulate that there is an influence, but the other way round. The decision (or the whole administrative proceedings) affects the civil proceedings as it may appear to be the source of the breach of the principle of equal treatment.

It should not be disputed that discrimination is a negative phenomenon itself. But the fight against it may not harm other legal goods or weaken their protection. In other words, the law must not be treated instrumentally just in order to cover the expectations of some politicians without reasonable thinking. Making law is a difficult task. It is a kind of art: requiring creativeness and accuracy³⁸. Probably the directives are superfluous and not sufficient enough to provide European Union citizens with the principles of law. But because of the fact that the directives exist, all Member States are obliged to introduce the directives' aims effectively, using proper means of legislation. It is worth presenting how the rest of Member States have dealt with the challenge of implementing

³⁷ Judgment of the Supreme Administrative Court of 18.02.2010, I OSK 561/09, LEX no. 595425.

³⁸ G. Bowman, *The art of legislative drafting*, <http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/190031/dale.pdf>, pp. 5, 9 [last accessed: 4.06.2014].

the equal treatment directives, especially in the area of administrative proceedings, no matter whether there is a Code or not³⁹.

There are no special measures for proceedings in Austria, apart from the fact that NGOs can act on behalf of a victim in some proceedings⁴⁰. There are no special measures for administrative proceedings in Belgium⁴¹, Bulgaria⁴², Croatia⁴³, Cyprus⁴⁴, the Czech Republic⁴⁵, Denmark⁴⁶, Finland⁴⁷, Germany⁴⁸, Greece⁴⁹, Hungary⁵⁰, Iceland⁵¹, Italy⁵², Ireland⁵³, Latvia⁵⁴,

³⁹ About the codification of administrative proceedings in certain Member States see J.-B. Auby (ed.), *Codification of Administrative Procedure*, Bruxelles: Bruylant 2014, pp. 1-28.

⁴⁰ D. Schindlauer, *Country Report 2012. Austria. State of Affairs up to 1st January 2013*, p. 71-92, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁴¹ E. Bribosia, I. Rorive, *Country Report 2012. Belgium. State of Affairs up to 1st January 2013*, pp. 132-134, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁴² M. Ilieva, *Country Report 2012. Bulgaria. State of Affairs up to 1st January 2013*, pp. 78-79, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁴³ L. Kusan, *Country Report 2012. Croatia. State of Affairs up to 1st January 2013*, pp. 52-53, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁴⁴ C. Demetriou, *Country Report 2012. Cyprus. State of Affairs up to 1st January 2013*, pp. 194-195, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁴⁵ P. Boučková, *Country Report 2012. Czech Republic. State of Affairs up to 1st January 2013*, pp. 79-80, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁴⁶ P. Justesen, *Country Report 2012. Denmark. State of Affairs up to 1st January 2013*, pp. 76-77, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁴⁷ R. Hiltunen, *Country Report 2012. Finland. State of Affairs up to 1st January 2013*, pp. 87-88, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁴⁸ M. Mahlmann, *Country Report 2012. Germany. State of Affairs up to 1st January 2013*, pp. 96-97, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁴⁹ T. Theodoridis, *Country Report 2012. Greece. State of Affairs up to 1st January 2013*, pp. 92-93, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁵⁰ A. Kadar, *Country Report 2012. Hungary. State of Affairs up to 1st January 2013*, pp. 109-110, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁵¹ G.D. Gudmundsdottir, *Country Report 2012. Iceland. State of Affairs up to 1st January 2013*, pp. 51-52, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination>, [last accessed: 4.06.2014].

Liechtenstein⁵⁵, Lithuania⁵⁶, Malta⁵⁷, Netherlands⁵⁸, Norway⁵⁹, Portugal⁶⁰, Romania⁶¹, Slovakia⁶², Slovenia⁶³, Spain⁶⁴, Sweden⁶⁵, or Turkey⁶⁶.

⁵² C. Favilli, *Country Report 2012. Italy. State of Affairs up to 1st January 2013*, pp. 68-69, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁵³ O. O'Farrell, *Country Report 2012. Ireland. State of Affairs up to 1st January 2013*, pp. 106-107, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁵⁴ A. Kamenska, *Country Report 2012. Latvia. State of Affairs up to 1st January 2013*, pp. 74-75, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁵⁵ W. Marxer, P. Hornich, *Country Report 2012. Liechtenstein. State of Affairs up to 1st January 2013*, p. 59-60, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁵⁶ G. Andriukaitis, *Country Report 2012. Lithuania. State of Affairs up to 1st January 2013*, pp. 67-69, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁵⁷ T. Ellul, *Country Report 2012. Malta. State of Affairs up to 1st January 2013*, pp. 78-81, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁵⁸ R. Holtmaat, *Country Report 2012. Netherlands. State of Affairs up to 1st January 2013*, pp. 110-112, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁵⁹ E. Leona McClimans, *Country Report 2012. Norway. State of Affairs up to 1st January 2013*, pp. 71-73, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁶⁰ M. Manleiros, A. Rosado, *Country Report 2012. Portugal. State of Affairs up to 1st January 2013*, pp. 103-107, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁶¹ R. Iordache, *Country Report 2012. Romania. State of Affairs up to 1st January 2013*, pp. 111-117, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁶² J. Debreceniová, Z. Długosowa, *Country Report 2012. Slovakia. State of Affairs up to 1st January 2013*, pp. 135-138, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁶³ N. Kogovsek Salamon, *Country Report 2012. Slovenia. State of Affairs up to 1st January 2013*, pp. 84-90, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁶⁴ L. Cacho, *Country Report 2012. Spain. State of Affairs up to 1st January 2013*, p. 98, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁶⁵ P. Norberg, *Country Report 2012. Sweden. State of Affairs up to 1st January 2013*, p. 81, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁶⁶ D. Kurban, *Country Report 2012. Turkey. State of Affairs up to 1st January 2013*, p. 120, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

There is no formal code of administrative procedure in Luxembourg, but there is a compilation of laws relating to administration, called *code administratif*, out of which the general statute of civil servants provides for the rules relating to the relationship between them and administration⁶⁷. The administrative provisions do not allow an individual to challenge an administrative act, but enable civil servants to complain against the misbehavior of another civil servant. Such a procedure is administrative, but it can lead to the administrative court if the complaint has been rejected by the administrative organ of higher instance. It can only lead to administrative/financial sanctions against the author, and not to civil or penal sanctions⁶⁸.

In France much of the practical content of the legal principle of equality is to be found in administrative case law, where it serves to evaluate, in an ongoing and routine way, the full range of delegated legislation and administrative decisions. Administrative jurisprudence has developed historically around three dimensions of equality – with respect to taxation, access to public services, and public burdens and obligations – which, since 1946, have been constitutionalized as “general principles of law”⁶⁹. In France, since most of the legislation is transversal for all grounds of discrimination, cases are referred to as precedents whether or not they discuss issues related to the same grounds for discrimination. All claims against the public service, in matters related to employment of public agents and to access to public service (such as access to school and social rights), in all matters dealing with the public service including education, or of general principles of administrative law that also provide recourse against discrimination, must be brought before the administrative courts. The administrative court may rectify the situation and/or award damages.

⁶⁷ T. Hoffmann, *Country Report 2012. Luxembourg. State of Affairs up to 1st January 2013*, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁶⁸ *Ibidem*, p. 70.

⁶⁹ Preamble of the Constitution of 1946, paragraph 1; S. Latraverse, *Country Report 2012. France. State of Affairs up to 1st January 2013*, p. 9, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

There are no specific recourses or sanctions in matters related to education and/or housing⁷⁰.

The British legal system is also free from codification, but the principle of equal treatment is firmly settled within the case-law. That is why no new legislation was needed in order to fulfil the directives' goals⁷¹.

According to the administrative law of some Member States, a complaint about unequal treatment is to be put before the administrative bodies. In Macedonia special administrative procedures is to be submitted to administrative bodies. In Macedonia special administrative procedures can be raised before of the Commission for Protection against Discrimination, which may result in the Commission's opinion and recommendation. The victim of discrimination has similar rights in Slovenia. The Slovenian General Administrative Procedure Acts is applied in discrimination proceedings, which can be requested to begin by anyone who feels himself/herself to be a victim of unequal treatment by the administrative body⁷². In Turkey an individual may be awarded compensation by the administrative organ which is controlled by the administrative court afterwards⁷³. However the procedure does not undermine any administrative acts, but envisages a recommendation for rectifying the violation of the equality principle⁷⁴.

In Greece, the victim of discrimination in the public sector has the right to demand redress before the administrative courts⁷⁵. There are similar provisions in the legal system of Liechtenstein⁷⁶.

According to Hungarian administrative law the Equal Treatment Authority has authorisation to act against any discriminatory action irrespective of the grounds of discrimination (sex, race, age, etc.)

⁷⁰ Latravesse, *supra* note 69, p. 131.

⁷¹ A. McColgan, *Country Report 2012. United Kingdom. State of Affairs up to 1st January 2013*, p. 20, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁷² Kogovsek Salamon, *supra* note 63, p. 86.

⁷³ Kurban, *supra* note 66, p. 120.

⁷⁴ B. Kotevska, *Country Report 2012. The Former Yugoslav Republic of Macedonia (FYROM). State of Affairs up to 1st January 2013*, p. 76, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁷⁵ Theodoridis, *supra* note 49, p. 91.

⁷⁶ Marxer, Hornich, *supra* note 55, p. 59.

or the field concerned (employment, education, access to goods, etc.)⁷⁷. Similar authorities have been created in other Member States, for instance: the Commission for Citizenship and Gender Equality in Portugal.

Again, such new provisions do not allow the raising of any extraordinary claim. Discrimination on any grounds is prohibited in every EU Member State. As equal treatment is a common procedural principle⁷⁸, often expressed in directly applied constitutional norms⁷⁹, the equality-demand may be raised as an ordinary basis for challenge⁸⁰, and not an extraordinary measure. Rarely is the right stated as a separate provision. For example, there is a challenge to the procedure provided for in the Estonian Law on Administrative Procedure. According to Article 71(1), “a person who finds that his or her rights are violated or his or her freedoms are restricted by an administrative act or in the course of administrative proceedings may file a challenge”⁸¹. Nevertheless, it still remains a regular measure, not a special, extraordinary one. In England, in cases involving the Convention of Human Rights and Fundamental Freedoms rights, the strength of the reasons required to justify the challenged conduct must be at least as great as those applied by the European Court of Human Rights in relation to the same question⁸². It is worth mentioning, that in some legal systems unequal treatment may become also a complaint filed with the Administrative Court, or for instance in in Lithuania⁸³ and Croatia within the scope of judicial review⁸⁴.

⁷⁷ Kadar, *supra* note 50, p. 111.

⁷⁸ Gudmundsdottir, *supra* note 51, p. 13 and 51; Article 11 of the Act on Administrative Procedure of Iceland.

⁷⁹ For example in: the Articles 3, 51 and 117 of the Italian Constitution; the Chapter IV of the Maltese Constitution; Articles 18 and 204 of the Portugal Constitution; Article 12 paragraph 1 and 2 of the Slovakian Constitution (only vertically); Articles 14, 15 and 63 of the Slovenian Constitution; Articles 14 and 53 of the Spanish Constitution; Articles 10 and 90 of the Turkish Constitution; Schwarze, *supra* note 4, p. 555.

⁸⁰ Demetriou, *supra* note 44, p. 203; Hiltunen, *supra* note 47, p. 87; Kamenska, *supra* note 54, p. 74.

⁸¹ V. Poleschchuk, *Country Report 2012. Estonia. State of Affairs up to 1st January 2013*, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

⁸² Cane, *supra* note 5, p. 260.

⁸³ Andriukaitis, *supra* note 56, p. 68.

⁸⁴ Kusan, *supra* note 43, p. 52, p. 196.

Significantly, there are no provisions, comparable to Article 145b, among the legal systems of other EU countries. There are two areas that the countries focused on: the equality bodies, which are the organs obliged to care for compliance with equal treatment in the society and the right to achieve satisfactory compensation for the harm suffered by an individual who has been discriminated against. It is a domain of the civil law, so adequate regulations appear in the civil codes. The administrative proceedings seem to remain free from the superfluous non-discrimination provisions, avoiding the Polish case of excessive legislation leading to an effect opposite to the intended one. Moreover, some of the above-mentioned reports describe the constitutional principle of equality which remains valid in administrative law as a sufficient tool to fight against any kind of discrimination⁸⁵. According to the administrative courts' internet database⁸⁶, no decision under Article 145b has been challenged in the court so far. It may be concluded the new provision is not as popular as was predicted by the legislators.

Multiplication of the bases for reopening weakens the durability of administrative decisions, and lowers the trust an individual should feel towards authority and the law. What is more, it causes more harm than it seems to repair. False thinking about the protection of the principle of equal treatment led to misunderstanding it and to creating faulty law with no chance of successful operating. Law-making is an art, but also a challenging technique. One should be careful while accessing this area, since as much as it could be improved, it could be also spoiled.

There is no perfect solution for bringing order into the described chaos, but it is not impossible. Of course, the most satisfying legislative action would be to repeal Article 145b of the Code. As such a suggestion appears to be not acceptable to the politicians, as they have already announced the existence of this provision to the European Commission⁸⁷, a possibility to be considered would be, as I suppose, to amend Article 145b of the Code into an operative law. It may be done, for example,

⁸⁵ Justesen, *supra* note 46, pp. 23-24.

⁸⁶ www.orzeczenia.nsa.gov.pl [last accessed: 4.06.2014].

⁸⁷ Ł. Bojarski, *Country Report 2012. Poland. State of Affairs up to 1st January 2013*, pp. 101-103, <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination> [last accessed: 4.06.2014].

by turning the basis for reopening into a proceeding principle, binding in every kind of procedure and related to any grounds for discrimination, and not only those specified in the Act of 3 December 2010.

