

POSITIVE ACTION DECLARED UNCONSTITUTIONAL

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This contribution is a critical reaction to the recently adopted ruling of the Constitutional Court of the Slovak Republic in which the Constitutional Court concluded that the adoption of positive action measures is in conflict with the rule of law principle and with the principles of equality and non-discrimination. This ruling is considered extremely significant, not only because it denotes principally from the present case law of the Slovak Constitutional Court, but mainly because it departs from the generally recognised principles of International and European Human Rights Law.

In October 2004, the Slovak Government challenged the compliance, of the provision of the *antidiskriminačný zákon* (Anti-discrimination Act)¹ regarding the positive action principle, (Section 8 paragraph 8 of the Anti-discrimination Act)² which had been implemented from the Council Directive 2000/43/CE of 29 June 2000 concerning equal treatment between persons irrespective of racial or ethnic origin, with several provisions of the Slovak Constitution, in the Constitutional Court.

The motion had been initiated by the Minister of Justice, arguing mainly that the challenged provision of positive action constituted a positive discrimination, which is forbidden by the Slovak Constitution.³

The situation was a bit curious, since the same Government which had challenged the constitutionality of the principle of positive action, had, in its resolution of April 2003⁴ and the resolution of November 2003, only a couple of months before it filed the motion with the Constitutional Court, adopted specific measures containing programs of positive actions towards and in favour of the Roma population.

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1 *Zákon č. 365/2004 Z. z. rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon)* [Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other laws (Hereinafter Anti-discrimination Act)].

2 The mentioned provision of Anti-discrimination Act states: *With a view to ensuring full equality in practice and compliance with the principle of equal treatment, specific positive actions to prevent disadvantages linked to racial or ethnic origin may be adopted.*

3 Article 12 paragraph 2 of the Slovak Constitution states: *“Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.”*

4 *Uznesenie vlády č. 278/2003 z 23. apríla 2003* [Governmental Resolution no. 278/2003 of 23 April 2003].

On 18th October 2005, the Constitutional Court delivered a final ruling on the merits of the case declaring the incompatibility of Section 8 paragraph 8 of the Anti-discrimination Act with Article 1 paragraph 1 (Rule of Law principle), the first sentence of Article 12 paragraph 1 (principle of equality), and Article 12 paragraph 2 (non-discrimination principle) of the Constitution of the Slovak Republic. The Constitutional Court dismissed the rest of the motion. The decision was taken by the minimal majority of the plenum of the Court. Four judges of the total number of eleven judges who were present at the plenary session of the Constitutional Court presented their dissenting opinions, and one judge presented his concurring opinion, disagreeing only with the reasoning of the ruling. The ruling has been published in the Collections of Laws under no. 539/2005 on 7th December 2005. Since that date, Section 8 paragraph 8 of the Anti-discrimination Act has lost its applicability.

From the reasoning of the decision it is quite clear, that the Constitutional Court declared the incompatibility of the positive (affirmative) action as such, i.e. in its principle, with the Slovak Constitution. The Court has argued, *inter alia*, that “*it is obvious from the Article 12 paragraph 2 of the Slovak Constitution as well as from its standing interpretation of the Court which must be [stand] to, that the Constitution prohibits both positive and negative discrimination for the reasons stated in this provision, i.e. having regard to sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. For all that, adoption of specific compensatory measures, although generally recognized as legislative techniques for the prevention of disadvantages pertinent to racial or ethnic origin, is incompatible with the Article 12 paragraph 2 of the Constitution, and therefore also with the Article 12 paragraph 1 of the Constitution.*”

From the reasoning it seems that the Slovak Constitutional Court also declared the doctrine of material equality, on which the provision of the Anti-discrimination Act implementing the positive action principle is based, unconstitutional as such, because of its inconsistency with the prohibition of positive discrimination contained in Article 12 paragraph 2 of the Slovak Constitution.

This conclusion is rather surprising since the Constitutional Court, in the past, has already several times declared “positive discrimination” to be instrument of material (*de facto*) equality being consistent with the Slovak Constitution. For instance, in its ruling Ref. no. PL. ÚS 10/02 of 11th December 2003 the Constitutional Court said that “*preferential treatment of some group of natural persons for their specific, often disadvantageous attributes, as compared with other natural persons, by adoption of special legal regulations, is not a*

*discrimination of other natural persons but on the contrary, it must be understood as a security of the constitutional principle which is inherent in Article 12 paragraph 2 of the Constitution.”*⁵

The principle of positive action is a standard instrument of international human rights law, and is contained in a number of international treaties by which the Slovak Republic is bound. For instance, the International Convention on the Elimination of All Forms of Racial Discrimination (1965) in its Article 1 paragraph 4 provides that “*special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*”

Similarly, the Framework Convention for the Protection of National Minorities (1995) in its Article 4 paragraph 2 and 3 states that “*the Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.*”

In the view of the European Court of Human Rights, Article 14 of the European Convention on Human Rights and Fundamental Freedoms protects individuals placed in similar situations from discrimination in their enjoyment of their rights under the Convention and its Protocols. However, a difference in the treatment of one of these individuals will only be discriminatory if it “*has no objective and reasonable justification*”, that is, if it does not pursue a “*legitimate aim*” and if there is no “*reasonable relationship of proportionality between the means employed and the aim sought to be realised*”.⁶

5 In this case the Constitutional Court put under judicial review the provisions of Labour Code allowing the students, and only the students, to conclude special agreements on brigade-work with employers. The Court decided that although the challenged provisions constitute “positive discrimination” of students in comparison with other natural persons, the aim of these special agreements is legitimate (these special agreements on student brigade-work were considered by the Constitutional Court as instruments which might enhance the access of students to labour market and thus improve their social-economic situation while studying) and consistent with the principle of equality and principle of non-discrimination.

6 See, among other authorities, *Lithgow and others v. United Kingdom*; *Inze v. Austria*; *Darby v. Sweden*.

Material protection of the principle of equality and the principle of non-discrimination is generally considered as a standard approach also in EU law. The forms of “positive action” contained in Council Directive 2000/43/EC (Article 5) and Council Directive 2000/78/EC (Article 7) are not considered discriminatory, provided they are reasonably and objectively justified by the need to remedy discrimination, and remain proportionate to the discrimination to be addressed, and are temporary, i.e. do not lead to the maintenance of separate rights for different groups.

In the view of the EU Network of Independent Experts on Fundamental Rights, presented in the Thematic Comment no. 3 concerning the protection of minorities in the European Union, “*because of the specific situation of Roma minority in the Union, positive action measures should be adopted in order to ensure their integration in the fields of employment, education and housing. This is the only adequate answer which may be given to the situation of structural discrimination - and, in many cases, segregation - which this minority is currently facing.*”⁷

The ruling of the Slovak Constitutional Court declaring non-compliance of the positive action principle contained in the Anti-discrimination Act with the Slovak Constitution will, in opinion, have far reaching consequences on the further protection of minorities in the Slovak Republic in general, but in particular on the Roma minority. It is obvious, that the widespread *de facto* discrimination suffered by the Roma minority is cannot be reduced or eliminated without a reasonable use of positive action. Therefore, the decision of the Slovak Constitutional Court will, in my opinion, considerably influence the situation of Roma population in the Slovak Republic, and in fact, it might lead to serious aftermath which could impact the whole population, not only the Roma minority.

7 Thematic Comment no. 3: The protection of minorities in the European Union, available at http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm# (Last visited 27th March 2007).