HUNGARIAN LABOUR LAW
E - J O U R N A L

A foreign body in employment law? – The impact of EU accession on Hungarian anti-discrimination law in employment – Part I

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1. Introductory remarks

The primary purpose of anti-discrimination law in employment is to provide legal tools to dismantle and disable harmful stereotypes deeply embedded in the society, traditionally giving rise to the labour market segregation and marginalisation of vulnerable and disadvantaged groups of society. Hungarian labour market could be characterised by several forms of traditionally existing, overt and covert discriminatory trends before the accession of Hungary to the European Union. Even though Hungarian law, including Hungarian labour law had enshrined some initial provisions on prohibition of discrimination before the process of adoption of relevant EU law, European standards in relation of regulation of equality required the implementation of a set of dominantly new and unknown concepts and legal instruments. The implementation of EU law on equal opportunities in employment significantly redesigned the previously existed national law, rendering it much more differantiated and enriching it by several new instruments. Although the implementation of the relevant EU directives was executed even before the accession, the deeper understanding and the practical implementation of the union norms is a long lasting and still ongoing process. Since most of the fundamental legal concepts of anti-discrimination law had been formulated in Anglo-Saxon legal cultures, and were from there adopted to the *acquis communautaire*, those, who consult and apply this set of rules in practice, may still have the impression that anti-discrimination law constitutes an even if not any more

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The author is thankful to Annamária Fürjes (Ph.D; judge at the Budapest-Capital Administrative and Labour Court; consultant judge on European Union law) for her valuable contributions supporting the research, as well as to Krisztina Szolnokiné Csernay (judge at the Administrative and Labour Law Department of the Kúria, consultant judge on European Union law) and Éva Gellérné Lukács (senior legal expert in European law and assistant professor at the Faculty of Law of ELTE University) for the peer review of the text and their useful commentaries.

so new, but „foreign body" among the traditional constructs of domestic labour law.[1] In addition, the body of EU law on equal treatment in employment is also in a dynamically evolving and developing status, primarily thanks to the activity of the Court of Justice of the European Union (hereinafter: CJEU)[2].

The purpose of this series of articles is to give an overview of the impact of the EU law on equal treatment on relevant Hungarian labour law. In Part I, a short description is given on the status of national provisions as existed before the implementation of the relevant EU directives, highlighting the most important regulation needs and challenges identified by the then relevant academic literature. In Part II, the main features of EU and Hungarian law concerning equal treatment in employment is described; further it is evaluated, how far Hungarian labour law has reached in the implementation process in the past 15 years in terms of determining the protected characteristics and the definition of discriminatory conducts. Part III provides further analyse on the achievements of the implementation process (rules on burden of proof, the structure of exemptions and justifications, sanctions and remedies), and, as a conclusion, the main challenges of the oncoming 15 years are addressed in this field. The development of the case law of Hungarian courts, which was recently summarised and evaluated by the Case Law Analysing Group of the Kúria[3] appointed to scrutinise the judicial practice of equal treatment regulation in the field of labour law, is followed up.

2. Challenges of the pre-accession anti-discrimination regulation in employment law

The origin of equal treatment duty in Hungarian employment law dates back to decades before the accession of the country to the EU. However, in the late '90s and early 2000s voices in the academic literature and NGOs promoting human rights became louder and louder calling for a more effective legal intervention against discriminatory patterns in employment, highlighting the weaknesses of existing law, and suggesting the adoption of legal instruments elaborated in Western European and Anglo-Saxon countries having already a better elaborated legal framework on equal treatment.[4] Studies referred to the relevant EU directives as a benchmark of setting the foundation of an effective legal protection against discrimination, and expected the implementation of the non-discrimination regulation of the EU to address some critical shortages of domestic law.[5] In this section we describe

1 See: D. Schiek – L. B. Waddington – M. Bell: *Cases, materials and text on national, supranational and international non-discrimination law*. Hart Publishing, Oxford and Portland, Oregon, 2007. 360.

2 In this study we refer to the predecessor of the CJEU („European Court of Justice") as „CJEU" as well.

3 Before 31 December 2011, the supreme judicial forum of Hungary was denominated as „Supreme Court", subsequently: „Kúria".

4 Kaltenbach, J. – Mohay, Gy.: *Antidiszkriminációs kézikönyv*. Budapest, Clone Design, 2007. 23

5 Gyulavári, T. – Kardos, G.: Javaslat a nemek közötti diszkrimináció esetén a bizonyítási teher megfordításáról szóló 97/80/EK tanácsi irányelv harmonizációjára. In: Kardos G. (ed.): *Törvénykezés és jogérvényesítés a nők elleni diszkrimináció leküzdésére*. Budapest, Szociális és Családügyi Minisztérium Nőképviseleti Titkárság, 2000. 19–26.; Nacsa, B.: Munkahelyi diszkrimináció

the status of the pre-accession domestic non-discrimination law in employment, specifying the most important deficiencies of regulation at that time.

2.1. Constitutional framework

The Constitution[6] used to provide on a general clause on equality since the democratic change of political system in 1989. Article 70/A of the Constitution laid down the following rules.

a) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, color, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever.
b) The law shall provide for strict punishment of discrimination on the basis of Paragraph (1).
c) The Republic of Hungary shall endeavour to implement equal rights for everyone through measures that create fair opportunities for all.

Concerning equality in the field of employment, the Constitution enshrined the principle of equal pay, providing that everyone has the right to equal compensation for equal work, without any discrimination whatsoever.[7]

From the beginning of the ’90s, the Constitutional Court interpreted the above cited general rules in numerous decisions. These decisions formulated several principles and concepts contributing to development of statutory law in sectoral legislation and legal practice concerning equal treatment in various fields of life.[8] A few key findings and statements of the Constitutional Court can be summarized as follows.

– In a very early and prominent decision, the Constitutional Court enlighted the link between (human) equal dignity and equal treatment, holding that the core meaning of Article 70/A of the Constitution is that the law should treat everyone as persons with equal dignity. This principle constitutes the primary standard to jugde whether a specific distinction between groups of society is constitutional or not (and so discriminatory).[9]
– The Constitutional Court, construing the aforementioned articles of the Constitution extensively, made it clear that scope of the prohibition of discrimination reaches beyond the

elleni jogvédelem problematikája Magyarországon. In: Koltay J. (ed.): *A munkaügyi kapcsolatok rendszere és a munkavállalók helyzete*. Budapest, Magyar Tudományos Akadémia Közgazdaságtudományi Kutatóközpont, 2000. 183–221., 196–203., 209., 213.

6 Act XX of 1949 on the Constitution of the Republic of Hungary (in effect from 20 August 1949 to 31 December 2011).

7 Paragraph (2) Article 70/B. of the Constitution.

8 Kiss, B.: *Az egyenlő bánásmód követelménye az Alkotmánybíróság gyakorlatában*. [Acta Universitatis Szegediensis] Szeged, Szegedi Tudományegyetem Állam- és Jogtudományi Kar, 2005. 4.

9 Initially formulated in decisions No. 9/1990 AB, No. 61/1992 AB, and later on reiterated by numerous decisions.

fundamental human and citizens' rights (catalogued in the Constitution), and extends to the whole body of law.[10]

– By introduction of the concept of „homogeneous group", the Constitutional Court designed a conceptual instrument to scrutinise the discriminatory or non-discriminatory nature of any distinctions. A homogeneous group includes persons being in a consistent position in terms of a conception of a specific regulation. Following from the principle of equal treatment, as a general rule, any regulation concerning the members of a homogeneous group should be consistent, except if the distinction between the members is justified by a „reason of due weight" or a „due reason considering objective criteria".[11] The concept on homogeneous group as formulated by the Constitutional Court more or less complied with the same concept employed in the case law of the CJEU.[12]
– By further elaboration of the conditions of the constitutional (non-discriminatory) distinctions, the Constitutional Court introduced a two-tier test of scrutiny. (1) Any distinction concerning rights of persons with the exception of fundamental rights should be constitutional (non discriminatory) provided that the distinction has a reasonable ground according to an objective consideration. In short: by this, the Constitution Court outruled the arbitrary distinctions.[13] (2) Whenever the distinction concerns fundamental rights, a stricter test shall be applied: the distinction can be only justified (and thus considered not to be discriminatory) if it is necessary and proportional as well.[14] Thus, the demonstration of the reasonable ground does not suffice, it should be also attested that the distinctive arrangement was unavoidable.[15]
– The Constitutional Court took the position that the concept of equality as formulated in the Constitution shall exceed the equal treatment of persons without respect of their traditionally embedded disadvantages (formal approach of equality), and target the correction of injustices, inequalities in the society (material approach of equality).[16] Reminding that the

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10 Decision No. 61/1992 AB.

11 Decisions No. 21/1990 AB, No. 1406/B/1991 AB.

12 Kiss (2005) op. cit. 5.

13 The prohibition of arbitrary distinction is directly deducted from the requirement of treating every person as having equal dignity. See Kiss (2005) op. cit. 10.

14 Thus, the Constitutional Court employs the test „necessity and proportionality" used for assessment of constitutionality of restriction of fundamental rights. See Decision No. 20/1990 AB; Kiss (2005) op. cit. 35.

15 Decisions No. 35/1997 AB, No. 30/1997 AB.

16 In the academic literature there are a number of classifications of approaches of equality. A more detailed description of these classifications is presented by Kriszta Kovács (See Kovács, K.: *Az egyenlőség felé. A hátrányos megkülönböztetés tilalma és a támogató intézkedések.* Budapest, L' Harmattan, 2012. 30–56). This study relies basically on the typology introduced by Sarah Fredman, identifying the following four approaches.

- „Equality of treatment" is predicated on the principle that justice inheres in consistency; hence like should be treated alike. This rather formal approach does not take into account existing distributions of wealth and power, thus it may result in unequal outcomes.
- „Equality of results": this conception of equality represents a material approach, concentrating on correcting maldistribution in the society. Such a principle would require unequal treatment, if necessary to achieve an equal impact.
- „Equality of opportunities": this notion of equality (representing a material approach as well) focuses on facilitation personal self-fulfilment, by equalizing opportunities [„the start line"] for all. This approach may comply with inequality

ban on discrimination implies that the law has to treat everyone as equal (as persons having equal dignity), the Constitutional Court affirmed that statutory law constituting a „positive discrimination", implying a distinction between specific groups of the society, shall be considered as constitutional provided that it ultimately endeavours the actual equality of any disadvantaged group. Nevertheless, positive actions have also their limits: they can be held as constitutional as long as they respect fundamental rights of others and do not fail to take account of the principle of equal dignity.[17] It should be noted, however, that the Constitutional Court was initially reluctant to acknowlegde that the equality clause includes the prohibition of indirect discrimination[18] claiming that the prohibition of discrimination concerns exclusively the process and does not affect the outcome of a specific treatment. Later on, the Constitutional Court altered its position and implied the prohibition of indirect discrimination to the scope of constitutional equality clause.[19]

The principles above formulated by the Constitutional Court has had a determining impact on the development of sectoral statutory law on equal treatment. Before 2003, there was no general clause on equal treatment under Hungarian law beyond the Constitution. Since the Constitution imposed duties and activity tests primarily to State actors, further legislation was needed to conceptualise the requirement of equal treatment on various fields of life.

In the first decade after the democratic change of the political system, it was a hotly debated question whether (and if so, to what extent and in which manner) the constitutional principle of equality should penetrate the legal relationships of private entities, given the prohibition of discrimination is

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of treatment and inequality of results as well. Unequal treatment might be necessary to equalize the opportunities of all individuals, but once opportunities are equal, different choices and capacities might lead to inequality of results.

– „Equality as an element of dignity": in terms of this approach, dignity replaces rationality as a trigger for equal rights. As the German Constitutional Court puts it: „Since all persons are entitled to human dignity and freedom and to that extent are equal, the principle of equal treatment is an obvious postulate for free democracy" [Communisty Party, 5 BVerfGE 85 (1956.)] [S. Fredman: *Discrimination law.* Oxford, OUP, 2011. (2nd ed; reprint 2012) 2–3., 20–21., 23–25.]

As Fredman underlines, the choice between different conceptions of equality is not one of logic but of values or policy. [Fredman (2011) op. cit. 25.] Kriszta Kovács suggests that the Constitution (as well as the Hungarian Fundamental Law, replacing the Constitution from 01.01.2012) and the practice of the Constitutional Court takes predominantly the stance of „equality of sources" approach, corresponding notably with the aforementioned category of „equal opportunities". This means that the Constitution/the Fundamental Law, as interpreted by a large body of decisions of the Constitutional Court endeavours to distribute the sources on an equal basis for all, giving an opportunity to everyone to establish his/her plan of life. The political community is responsible toward the marginalized groups, which gives a justification of continuous redistributive activity of the State. See Kovács (2012) op. cit. 50–51., 57., 59., 62.; R. Dworkin: *Sovereign Virtue. The Theory and Practice of Equality.* Cambridge (Mass.), Harward University Press, 2000. 113f., 285–288.

17 Decisions No. 9/1990, No. 30/1997, No. 1/1995. It can be well observed that the same test is employed in terms of the justification of distinctions concerning not fundamental rights and by setting the limits of positive discrimination. Kiss (2005) op.cit. 10.

18 The concept of indirect discrimination is a product of the approach of equality in material sense („equality in results" or „equal opportunities" approaches, see above), claiming that not only the treatment itself but the impact of any specific treatment can count as discriminatory as well. About the concept of indirect discrimination see: A. Lawson: *Disability and Discrimination in Britain – The Role of Reasonable Adjustment.* Oxford–Portland (Oregon), Hart Publishing, 2008. 163.; Schiek et al. (2007) op. cit. 332.; Szajbély, K.: *A pozitív intézkedések fogalma és alkalmazásuk lehetősége a faji diszkrimináció elleni küzdelemben az Európai Unió tagállamaiban*. é.n., http://helsinki.hu/wp-content/uploads/Szajbely_pozitiv_intezkedesek.pdf, 2–4.; Lehoczkyné Kollonay, Cs.: Az egyenlő bánásmódhoz való jog biztosításának jogi eszközei az Európai Unióhoz való csatlakozás nyomán. In: Fazekas, K. – Lovász, A. – Telegdy, Á. (eds.): *Munkaerő-piaci Tükör 2009.* Budapest, MTA Közgazdaságtudományi Intézet, OFA, 2009. 66–81., 74–76.

19 See for example: Decision No. 42/2012. AB, Reasoning [22], [24]–[27], [34]; confirmed by decisions No. 23/2013. AB, No. 3079/2017 AB; Kiss (2005) op. cit. 14–15.; Győrfi, T. – M. Tóth, B.: 70/A. § [A diszkrimináció tilalma]. In: Jakab, A. (ed.): *Az Alkotmány kommentárja*. Budapest, Századvég, 2009. 30–31.

inherently inconsistent with the principles of private law based on the paradigm of market.[20] Both the principle of freedom of contract and the principle of equality are rooted in the protection of human dignity, thus there is no well definable hierarchy between the two principles.[21] Nevertheless, the Constitutional Court also approved in a few decisions around the millennium the thesis[22] that not only actors exercising public authority may perpetrate discriminatory conducts, but also private individuals and entities as well. Whenever they go public through their actions, or they open the access of their resources of limited availability to the public, they are also subject to the ban on discrimination. Only the relationships related to the closest privacy may remain beyond the scope of prohibition of discrimination.[23] As a result, in Hungarian law, a number of sectoral acts enshrined the prohibition of discrimination by the end of the '90s, however, generally in very briefly formulated clauses.[24] The only resource giving guidelines for the interpretation of these initial equality clauses was the bundle of the aforementioned principles established by the Constitutional Court.[25] Furthermore, the same principles were also the primary resources for the proposals on the further development of statutory law on equal treatment.[26]

2.2. Incipient development of the equal treatment duty in the statutory employment law and in the case law (1967-2003)

As referred in the previous section, clauses on prohibition of discrimination existed before the harmonisation of EU anti-discrimination law in the domestic statutory law in a number of sectors, including labour law.

Labour law was one of the branches of law demonstrating sensitivity the earliest toward the principle of equality.[27] The Act II of 1967 on the Labour Code (hereinafter: LC 1967) provided on the prohibition of disadvantageous distinction of workers on the grounds of sex, age, ethnicity, race and origin in the course of establishment of the employment relationship and exercising the rights and fulfilling the obligations arising from the employment relationship, since entry into force.[28] This

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20 Menyhárd, A.: Diszkriminációtilalom és polgári jog. In: Sajó, A. (ed.): *Alkotmányosság a magánjogban*. Budapest, CompLex, 2006. 131–146., 136.; Kovács, K.: Emberi jogaink – Magánjogi viszonyokban. *Fundamentum*, 1998/4. 85–90., 85–87.; Bitskey, B. – Gyulavári, T.: Kell-e [anti]diszkriminációs törvény? *Jogtudományi Közlöny,* vol. 58., 2003/1. 1–8., 5.

21 Menyhárd (2006) op. cit. 137.

22 Decision No. 45/2000 ABH 2000, 344., 349.; cited by Kovács (2012) op. cit. 129–133.

23 See: Kovács (2012) op. cit. 129–153.; Menyhárd (2006) op. cit. 139.; Győrfi – M. Tóth (2009) op. cit. 32.

24 Including the Act IV of 1959 on Civil Code (hereinafter: CC 1959); Act IV of 1957 on the General Rules of State Administrative Procedure; Act LXXIX of 1993 on Public Education; Acti CLIV of 1997 on Health Care.

25 This is reflected in the '90s years' case law as well (e.g. decisions of the – then – Supreme Court: BH1995. 698., BH1997. 210.)

26 Kiss (2005) op. cit. 4.

27 The section 81(2) of the CC 1959 also enshrined the prohibition of discrimination as one of the conducts violating personal rights since 1960.

28 LC 1967, sec. 18(3).

provision was slightly amended in 1989, approximately at the same time with the revision of the Constitution with respect to the democratic change of system and the introduction of Article 70/A. The provision were transposed to the following labour code (Act XXII of 1992 on the Labour Code; hereinafter: LC 1992) with the following text:

> „(1) In relation to employment it is forbidden to discriminate against employees on the grounds of sex, age, nationality, race, origin, religion, political conviction, membership in organizations that represent the employee's interests or activities connected therewith, as well as any other circumstances unconnected with employment. A distinction following unequivocally from the character or nature of the work does not qualify as discrimination.
>
> (2) In the event of a dispute arising in relation to a violation of the prohibition of discrimination, the employer shall prove that his procedure did not violate those provisions contained in para (1).
>
> (3) The employer shall ensure, exclusively on the basis of time spent on the job, professional skills, experience and performance, without discrimination the opportunity of the employees to be promoted to a higher position.
>
> (4) In relation to a specified circle of employees, regulations pertaining to employment may, in connection with employment, stipulate, in the event that conditions are identical, the obligation to give preference."

In order to meet the legal harmonisation obligations related to Hungary's European Union accession, the LC 1992 was amended[29] by inclusion of provisions designed to implement nine European Community directives, including two directives in the field of prohibition of discrimination based on gender.[30] As a result, the above cited formulation of the scope of Section 5 of the LC 1992 was broadened to involve the prohibition of indirect discrimination[31] the family status and disability as protected characteristics[32] and the course of procedure prior to employment.[33] The amended provisions

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29 Through the Act XVI of 2001.

30 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ L 45, 19.2.1975, 19–20); Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ L 14, 20. 01. 1998. 6–8) (hereinafter: "Burden of Proof Directive").

31 For purposes of this Act indirect discrimination shall exist where – on the basis of the characteristics defined in Subsection (1) – an employment-related provision, criterion, condition or practice that is apparently neutral or that affords the same rights to all disadvantages a substantially higher proportion of the members of a particular group of employees, unless that provision, criterion, condition or practice is appropriate and necessary and can be justified by objective factors. (Section 5(2) of the LC 1992). It should be noted that a number of studies had strongly recommended the codification of indirect discrimination, which could have been implied in the original text of the Section 5 of the LC 1992, but the courts were reluctant to accept such an interpretation of this norm. (See: the Supreme Court's judgement No. BH1998. 449. as cited by Nacsa (2000) op. cit. 191., 206.; Gyulavári–Kardos (2000) op. cit. 24.

32 Section 5(1) of the LC 1992.

33 Section 5(3) of the LC 1992.

also laid down that any consequences of discrimination shall be properly remedied. The legal remedy afforded to an employee discriminated against shall not result in any violation of or harm to the rights of another worker.[34]

This amendment did not take into account yet that the European Community in the meanwhile adopted two anti-discrimination directives: the General Framework Directive on equal treatment in employment (hereinafter: Framework Directive)[35] and the Race Equality Directive (Race Directive).[36] These two latter were not implemented in Hungarian law until the adoption of the Act CXXV of 2003 on equal treatment and on the enhancement of equal chances (hereinafter: ETA Act).

The judicial practice related to the cited sections of the LC 1967 and LC 1992 encompassed quite a low number of cases. In the 1990s and the early 2000s, rights of workers having been discriminated against could be asserted on four ways: (1) they could sue the employer before the labour courts, (2) they could initiate the labour control of the labour inspectorate authority, (3) they could initiate misdemeanour proceedings against the employer before the notar or the labour inspectorate authority[37] or (4) the representatives of the trade unions and works councils could also exercise their rights to take actions against the discriminating provisions of the employer (e.g. the local trade union branch could contest such an action of the employer by way of demurrer).[38] A study analysing the efficiency of law enforcement in the field of employment discrimination at the millennium noted that even though there were no official statistics to demonstrate figures of labour law procedures concerning discrimination cases, these lawsuits were rather scarce.[39] The labour law inspectorates dealt with approximately ten cases per year, dominantly concerning discrimination based on adherence to workers' representative organisations; victims of gender and ethnical discrimination could or did not seek remedies on these ways either.[40] Nevertheless, several indications could be detected showing that discriminatory stereotypes and patterns penetrated the labour market. For instance figures on gender wage gap (in 1994: 80,3%; in 1995: 88,1%; in 1996: 78,9%[41]) are telling statistics.[42] Discriminatory acts of employers remained predominantly in latency. Hence, a number of studies were dedicated to explore the shortages of the regulation, which could not provide effective legal tools to remedy

34 Section 5(7) of the LC 1992.

35 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 02. 12. 2000. 16–22).

36 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19. 07. 2000. 22–26.)

37 According to the section 93 of the Government Decree No. 218/1999 (XII.28) on specific misdemeanours the workplace discrimination by the employer constituted a misdemeanour.

38 LC 1992, sec. 23.

39 Nacsa (2000) op. cit. 187.; Kardos, G. – Nacsa, B. – Gyulavári, T.: A nemek közötti diszkrimináció értelmezése az Európai Bíróság esetjogában és a magyar bírósági gyakorlatban. In: Kardos (2000, ed.) op. cit. 1–18., 13.

40 Nacsa (2000) op. cit. 187. Another study provides the data that in 1998 only three proceedings were initiated by the labour inspectorates, out of which two concerned job posts. [Gyulavári–Kardos (2000) op. cit. 25.]

41 The percentage of the average income of female employees in relation of the male employees' average income as 100%.

42 Resource: Nacsa (2000) op. cit. 186.

the violation of rights of workers to equal treatment. Attention were drawn to the fact that the legal harmonisation obligation in terms of anti-discrimination regulation of the European Community did not only require the Hungarian State to the formal adoption of relevant EC law, but, as the Commission expressly referred in its White Paper, the practical enforceability of these rules were also required to be ensured.[43]

An outstanding initiative of this period should also be recalled: the lawyers of the Secretariat of Equal Opportunities[44] filed a „test claim" in 1997 with the Monor City Court,[45] in order to test the practical opportunities and weaknesses of remedying discriminatory injuries by judicial way. (The subject matter of the claim was a discriminatory job post.) In Hungary, unlike in Anglo-Saxon countries, test cases do not have longstanding traditions. Thus, this procedure and the judgement inspired a great attention and a meaningful discussion among the employment law and human rights professionals,[46] delivering useful findings and ideas for the purposes of further development of Hungarian equality law.

The following main criticisms were revealed in the contemporary academic literature.

2.2.1. Unclear position of prohibition of discrimination in the traditional structure of labour law

As referred above, even though some provisions on the prohibition of discrimination was already enshrined in the LC 1967, their structural position in the body of labour law was not clear. The relevant section was located in the Part III („The employment relationship"), regulating the questions of establishing, modification and termination of employment relationship. Nonetheless, the judicial practice recognised and acknowledged the inherent relationship between the prohibition of discrimination and the prohibition of abuse of rights. Prohibition of abuse of rights[47] was (and is) one of the earliest and most significant general principle of Hungarian labour law, which has been located in the chapter on fundamental rules of the labour codes.[48] The Supreme Court held in a decision

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43 Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union – White Paper. COM (95) 163, 10 May 1995 (downloaded from: http://aei.pitt.edu/white_papers.html), 6., 16.; See: Bitskey–Gyulavári (2003) op. cit. 3.

44 The Secretariat of Equal Opportunities functioned as a department of the Ministery of Labour from 1996 to 2000. The activities of the secretariat included the preparation to and the implementation of the legal harmonisation of EC anti-discrimination law. (Resource: Egyenlő Esélyek Titkársága (author is not indicated). *Fundamentum,* 1998/4. 153–154.)

45 Monor City Court, case No. 3.P.21.321/1997.

46 An issue of a leading human rights periodical (*Fundamentum,* vol. 2., 1998/4.) dedicated a special attention to this topic and gave opportunity to publish a number of relevant studies, such as: Gyulavári, T.: Egy próbaper története. In op. cit. 155–158.; Kárpáti, J. – Fábián, G. – Tabányi, P.: A monori városi bíróság ítélete egy diszkriminációs álláshirdetésről. In op. cit. 75–78.; Sonnevend P.: Az alapjogi bíráskodás és korlátai. In op. cit. 79–84.; Kovács K.: Emberi jogaink – magánjogi viszonyokban. In op. cit. 85–90.; Lehoczkyné Kollonay Cs.: Kezdeti lépések a foglalkoztatási diszkrimináció bírósági gyakorlatában. In op. cit. 91–95.

47 Section 2 of the LC 1967.

48 Section 2 of the LC 1967 (Part I. „Fundamental Rules"), Section 4 of the LS 1992 (Part I. „Introductory Provisions"), Section 7 of the LC 2012 (Part I. General Provisions – Chapter 4. Fundamental Requirements of Conduct).

in 1991 that breaching of the prohibition of discrimination should be considered as the breach of prohibition of abuse of rights, and the consequences of this latter shall be applied.[49]

This approach was transposed to the era of the LC 1992. As the official reasons of the amending law of the LC 1992 of 2001 remarks: the sanctioning of discriminatory acts of the employers were possible even before the amendment, through the application of the provisions on abuse of rights.[50] The academic literature also supported this interpretation.[51] Since 1992 the statutory norm on prohibition of discrimination is located among the general provisions of the respective LCs.[52]

However, in this period the courts were somewhat moderate in terms of the acknowledgement the general principle nature of the prohibition of discrimination, as well as in the framework of prohibition of abuse of rights. Labour law judicial practice widely respects the margin of discretion of employers when exercising their prerogatives: at the decision on the hiring, remuneration, restructuring the organisation, rewarding the employees, implementing of redundancies, determining disciplinary consequences etc. Nevertheless, general principles of labour law, particularly the prohibition of abuse of rights have been construed by the courts as limits of this margin of discretion. This approach was clearly manifested in a series of judgements and resolutions of the Supreme Court in terms of prohibition of abuse of rights.[53] By contrast, the Supreme Court was reluctant to apply this approach to the prohibition of discrimination. In the judgement published under No. BH1999. 427, the Supreme Court held that the decision on granting of a specific bonus lies in the margin of discretion of the employer, therefore the ban on discrimination cannot be successfully referred to contest it. A similar position was taken by the Supreme Court in the judgement published at No. BH 1997/3/157.

A leading resolution of the then Labour Law Department of Supreme Court No. MK 95, providing the fundamental guidelines for the adjudication of the lawfulness of the justification of a dismissal referred that even if the justification of a dismissal is formally correct (clear, real and reasonable), the termination may fall within the prohibition of abuse of rights (as a general principle), which renders the termination unlawful. In terms of restructuring of the employer's organisation, as a ground of dismissal, the resolution clearly stated that the court is not authorised to examine the desirability of this ground, only the reality (i.e. the factual carrying out of the restructuring). However, the prohibition of discrimination was treated alike: it was not considered as constituting a limit of the margin of discretion of the employer in terms of dismissals. The Supreme Court, in its judgement No.

49 BH1991. 213.

50 Official reasons attached to the section 3 of the amending law.

51 Nacsa (2000) op. cit. 191. (with reference to: Román, L.: *Munkajog (Elméleti alapvetés)*. Budapest, Tankönyvkiadó, 1989. 85–86.); Lehoczkyné Kollonay (1998) op. cit. 92–93.

52 LC 1992, sec. 5; LC 2012, sec. 12.

53 For example a the following judgements: BH1995. 608., BH1996. 399., BH2001. 38., BH2002. 242., and the following resolutions of the Supreme Court/Kúria: MK 95., MK 122.

BH1999. 424 established that, if the redundancy proves to be real and reasonable, the examination of the discriminatory nature of a dismissal executed in the framework of a redundancy is not viable.[54]

Some pieces of the contemporaneous academic literature harshly criticised the judicial practice and claimed that the courts should apply the prohibition of discrimination as a „real" general principle, referring to it as a limitation of the margin of decision in the course of exercising employers' prerogatives.[55] It was also suggested that the labour law practice should also correspond the interpretation principles elaborated by the Constitutional Court and the CJEU.[56]

2.2.2. Shortages of regulation of wage equality

In the 1990s, the labour courts had to settle a series of disputes concerning specific payments granted above the contracted wage of the employees stating that they were excluded from the payment in question in consequence of discrimination.[57] As referred above, these claims were in general dismissed with reference to the circumstance that the decision on remuneration falls within the margin of discretion of the employer. The other cause of the dismissal was that Hungarian courts did not acknowlegde extra pay elements as „wage" in terms of the prohibition of wage discrimination provided on in the section 5 of the LC 1992.[58] In the academic literature[59] it was highlighted that the CJEU accepts a broad construction of definition of pay in terms of wage equality, establishing that the concept of „pay" in terms of equal pay requirement covers all the benefits received by the employee from the employer in respect of the employment relationship, even being granted after retirement.[60]

In addition to the shortages of the definition of „pay", the statutory law was also criticised for not regulating the criteria of determining the terms of „work of equal value". It was suggested that these criteria, such as the assessment of the profile of the job, the necessary qualification, physical and mental efforts, the responsibility, the working conditions should be specified in the law. The Regulation of the Minister of Labour Affairs No. „6/1992. (VI. 27.) MüM" on the intersectoral classification of employees defined classification groups for physical and intellectual workers, providing indication for the establishment of wage groups as well. As a study suggested, this classification was also worth to

54 Beáta Nacsa analyses the briefly referred judgements in Nacsa (2000) op. cit. 196–205.

55 Lehoczkyné Kollonay (1998) op. cit. 92–93. Nacsa (2000) op. cit. As Nacsa remarks, the judicial practice under the era of the LC 1967 was more consistent with the proper understanding of the general principle nature of the prohibition of discrimination: the Supreme Court concluded that a decision on granting of a specific bonus can be revised in the light of the prohibition of discrimination [No. BH1991. 213; Nacsa (2000) op. cit. 202.].

56 Nacsa (2000) op. cit. 196.

57 Kardos et al. (2000) op. cit. 13.

58 See in particular: judgement of the Supreme Court no. BH1998/449. The case law is analysed at Nacsa (2000) op. cit. 209.

59 Ibid, 201., 209.

60 See: C-12/81. Eileen Garland v British Rail Engineering Limited, ECLI:EU:C:1982:44; C-262/88. Douglas Harvey Barber v Guardian Royal Exchange Assurance Group, ECLI:EU:C:1990:209 ("*Barber*-case").

review in the light of gender equality, because particularly the classification of physical work showed a tendency to prefer male workers, conserving traditionally existing wage inequalities.[61] It is notable that the contemporary literature failed to outline that the precise and correct regulation of criteria of work of equal value was a tool of constitution of homogeneous groups of workers for comparison of wage differences in the course of establishment of direct or indirect discrimination; while these criteria should not be considered as justification grounds to excuse discrimination.

Derived from the amendment of LC 1992,[62] a new section 142/A was inserted to the act, as follows.

(1) In respect of the remuneration of employees for the same work or for work to which equal value is attributed no discrimination shall be allowed on any grounds (principle of equal pay).

(2) The principle of equal treatment shall be based on the nature of work, its quality and quantity, working conditions, vocational training, physical and intellectual efforts, experience and responsibilities.

(3) For the purposes of Subsection (1) 'wage' shall mean any remuneration provided to the employee directly or indirectly in cash or kind based on his/her employment.

(4) The wages of employees – whether based on the nature or category of the work or on performance – shall be determined without any discrimination among the employees (Section 5).

2.2.3. Shortages of the structure of exemptions and justification

Even if a protected characteristic played a role in disadvantageous distinction against the protected person, this distinction should be not considered as discriminatory, provided that the actor can demonstrate a „good reason" for the distinction. It has been a longstanding debate whether and how direct or indirect discrimination may be justified. National anti-discrimination laws as well as international documents and EU norms take different position in this question. Besides justification, anti-discrimination laws often introduce specific exemptions applying to several forms of discrimination, which can also be referred by the employer so as to excuse the disadvantages caused to the protected persons.[63]

Since the LC 1967 did not explicitly refer to any justification of or exemption to the prohibition of discrimination, it was imposed to the courts to develop the possible ways of justification. The Labour Law Department of the Supreme Court accepted a very progressive resolution in 1977 to define some justification grounds (No. MK 97). At the time of introduction of the LC 1992, the resolution was

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61 Gyulavári–Kardos (2000) op. cit. 30. The same general concern emerges in international academic literature [Fredman (2011) op. cit. 157.].

62 As amended by the Act XVI of 2001, sec. 16.

63 About this question see in more detail in the next part of this series of articles. See: Fredman (2011) op. cit. 190–196.; Schiek et al. (2007) op. cit. 271–276.; C. P. O'Cinneide – K. Liu: The Framework Equality Directive – Directive 2000/78/EC. In: M. Schlachter (ed.): *EU Labour Law: A Commentary*. Kluwer Law International, 2014. 91., 93–94.

partly modified, gaining the following text: „Any distinction directly justified by the characteristics or the nature of the job shall not be considered as discriminatory, particularly any distinction based on all relevant and legitimate terms and conditions in terms of occupation."[64] The LC 1992 already enshrined two brief references to the justification of or exemptions to discrimination: (1) „any other circumstance [than the listed protected grounds] unconnected with the employment" could be a lawful ground for distinction; as well as (2) „a distinction following unequivocally from the character or nature of the work did not qualify as discrimination". (Apparently, this latter formula partly echoed the concept of the MK 97).[65]

Studies highlighted more problems of this system of justification. The justification ground „any other circumstance unconnected with the employment" proved to be too vague and broad.[66] As a study suggested, it could open a way to justify all discriminatory practice for example based on customers' preference,[67] which could in an undesirable manner reinforce discriminatory bias existing in the society. The examination of the reasoning of relevant judgements of the Supreme Court allows conclusions to be drawn that the courts considered sufficient if the employer demonstrated a „reasonable ground".[68]

The academic literature suggested that the labour courts' practice could also rely on the practice of the Hungarian Constitutional Court, which had already constructed a precise set of tests for justification of discrimination by that time, as described under Section 2.1.[69] By the beginning of the new millennium, labour courts actually appeared to interpret the justification grounds provided in Section 5 LC 1992 in consistence with the constitutional tests above, in particular applying the test for outruling arbitrary distinctions.[70] The mentioned studies also referred to the case law of the CJEU, which also elaborated a firm and differentiated system of justification, which could also deliver guidelines for a precise interpretation of the Hungarian law.[71] However, there is no trace in published court decisions to adopt these guidelines in this period.

64 B. Nacsa: *Country report – Gender equality. How are EU rules transposed into national law? Hungary – Reporting period 1 January 2017 – 31 December 2017.* European Commission, DG for Justice and Consumers, Luxembourg: Publications Office of the European Union, 2018. (https://www.equalitylaw.eu/country/hungary), 11–12.

65 The essential content of the text was not altered by the amendment of Section 5 in 2001.

66 Kardos et al. (2000) op. cit. 12., 16.; Nacsa (2000) op. cit. 213.

67 Nacsa (2000) op. cit. 213.

68 BH1998. 610., BH2001. 593.

69 Kardos et al. (2000) op. cit. 12.; Nacsa (2000) op. cit. 213.

70 See BH2003. 86.

71 Kardos et al. (2000) op. cit. 12.; Nacsa (2000) op. cit. 213.

2.2.4. No instruments of collective assertion of rights

Studies claimed that instruments of collective assertion of rights, such as for example tools of class action, as widely accepted by Western-European and Anglo-Saxon countries, or *action popularis* are missing from Hungarian law. As discriminatory practices often result in not only individual, but also collective harms (e.g. an employer's policy having discriminatory effect on marginalized groups; inaccessible buildings and facilities of the employer etc.), it can be easily justified that law enforcement on a collective basis should be promoted by law. Further, fear from victimisation of persons suffered any discrimination in many cases creates a considerable impediment of seeking legal remedies. Collective actions can ensure anonymity for individual victims, and relief their burdens of proceeding. For the same reasons, the establishment of an authority or a body specialised for discrimination cases (with advisory, representation etc. functions) was also recommended.[72]

2.2.5. No effective sanctions and remedies

Prior to the amendment of the LC 1992 in 2001, a number of authors had called for the introduction of any regulation on the sanctions of discriminatory conduct. One of the most concern-inspiring lesson of the above referred test case was that the court could only declare the unlawfulness of the disputed job post, but could not apply any sanctions,[73] although the Constitution also claimed that the State punished the discrimination severely.[74] Studies suggested that the Hungarian courts should also respect the relevant practice of the CJEU demanding that EU Member States should envisage dissuasive, proportionate and effective sanctions for breaching the prohibition of discrimination.[75] A proposal was also made as well to adopt the remedies granted by the U.S. courts for discrimination cases, considering that, while EU law requires the Member States only to introduce a mechanism of financial compensation for the victims of discrimination, the Civil Rights Act 1964. (U.S.) provides that the employment relationship, the establishment of which had been refused by the employer on a discriminatory ground, can be established by the court.[76]

Some authors attempted to encourage the courts to interpret the already existing regulation in a way to guarantee effective remedies for victims of discrimination. The implication of the prohibition

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72 See Gyulavári–Kardos (2000) op. cit. 26.; Lehoczkyné Kollonay (1998) op. cit. 92–93., Gyulavári (1998) op. cit. 156.; Nacsa (2000) op. cit. 192., 194.

73 Gyulavári (1998) op. cit. 156.; Kardos et al. (2000) op. cit. 14–15.

74 Constitution, Artice 70/A. §; Bitskey–Gyulavári (2003) op. cit. 1.

75 Gyulavári–Kardos (2000) op. cit. 25. (referring to the judgement of the CJEU Case 14/83. Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, ECLI:EU:C:1984:153 – hereinafter: *Von Colson* judgement)

76 Civil Rights Act 1964. Title VII. 706 § g); Lehoczkyné Kollonay (1998) op. cit. 92–93. with reference to the decision of the Supreme Court No. BH1992. 610., illustrating that the courts were reluctant to accept this interpretation.

of discrimination to the MK 95 as a further general principle (along with the prohibition of abuse of rights), the breaching of which can render a formally correct dismissal unlawful, could open the plaintiff the remedies of unlawful dismissals in cases of discriminatory terminations of employment relationships. Similarly, the interpretation of Section 5 of the LC 1992 as a subcategory of prohibition of abuse of rights could give rise to the application of all consequences of breaching this latter for victims of discrimination with special regard to the provision[77] that the detrimental consequences of abuse of rights shall be appropriately redressed.[78]

The amendment as of 2001 supplemented the text of Section 5 of the LC 1992 by the rule envisaging proper remedies for discriminatory harms, adding that this remedy shall not prejudice other workers' rights. Still, the law did not specify which sanctions and remedies could be applied by the courts for specific forms of discrimination.

2.3. Call for a single anti-discrimination act

In respect of the above described shortages of employment anti-discrimination law, the amendment as of 2001 could not satisfy all the regulation needs. However, employment was only one sectors of law where anti-discrimination provisions proved to be inadequate and inefficient to tackle structural inequalities in the society.[79] The Constitution was the only legal norm regulating the prohibition of discrimination in a uniform manner, besides, a series of sectoral statutory norms stipulated provisions on the prohibition of discrimination.[80] In the first years of the new millennium, the adoption of the Framework Directive and the Race Directive gave new indications for the reform of Hungarian anti-discrimination law in multiple sectors of law. The question was no more whether, only how to implement this reform.

Professionals continued a lively debate on the desirable manner of codification of anti-discrimination law.[81] The Constitutional Court dismissed an initiative, according to which the legislature omitted its obligations derived from the Constitution by having not established a uniform and single anti-discrimination act. It stated, that the legislature is authorised to opt whether to enact a uniform code, or maintain the system of sector-based regulation.[82] Various options were available and promoted by various authors to determine the model of the new regulation: (1) the enactment of a single anti-

77 LC 1992 sec. 4(3).

78 Nacsa (2000) op. cit. 215.; Lehoczkyné Kollonay (1998) op. cit. 92–93.

79 Indeed, as a study remarks, the non-discrimination regulation of Hungarian labour law was the most developed field of domestic anti-discrimination law in terms of statutory norms as well as case law compared to other sectors of law [Kiss (2005) op. cit. 3.].

80 Kiss (2005) op. cit. 3.

81 See: Gyulavári (1998) op. cit. 157.; Bitskey–Gyulavári (2003) op. cit. 4–7.

82 Decision No. 45/2000 AB; Kiss (2005) op. cit. 14–15.; Bitskey–Gyulavári (2003) op. cit. 3.

discrimination code; (2) the enactment of a single anti-discrimination code completed by special provisions for specific protected groups; (3) the enactment of sectoral codes in terms of specific protected groups; (4) maintaining the existing structure of regulation with the development of the existing law. Advocates of the uniform regulation (promoting the (1) or the (2) alternatives) stressed that a single act could support the clarity and consistency of the regulation, the establishment of a uniform conceptual basis of the national anti-discrimination law and the elimination of problems arising from regulation redundancy.[83] Beyond the debate on the ideal model, a set of substantial requirements were also identified in terms of the reform, including that the reformed anti-discrimination law should (a) comply with relevant EC-law (in particular the two new directives), (b) comply with the Constitution and the practice of the Constitutional Court, (c) comply with the general principles of all concerned sectors of law, (d) be clear and effective in terms of accountability and be capable to actually affect the interactions in the society; (e) offer pragmatic and effective tools for law enforcement; (f) reach beyond the formal equality and support the material equal opportunities of marginalised groups.[84]

Ultimately, the model no. (2) was manifested in legislation: from its entry into force in January 2004, the ETA Act as a single anti-discrimination act, complemented by an implementing regulation[85] and a set of sectoral laws constituted the body of national anti-discrimination law. The ETA Act was designed to provide the compliance with seven EC directives on equality, including the two directives of 2000.[86] The ETA Act gave a uniform regulation on the scope of equal treatment duty, as well as defined the main discriminatory conducts in a uniform manner, including the provisions on exemptions and justification grounds. The most fundamental procedural rules (notably the provision on burden of proof and means of collective assertion of rights) as well as the rules on the Equal Treatment Authority (hereinafter: ETA) as a new established administrative equality body[87] were also included in the new code. For the five fields of life, where discriminatory harms are most prevalent, including employment and occupation, the ETA Act included each one chapter of special rules. In parallel the pre-existing relevant norms of sectoral laws were reduced, keeping a reference to the new act. This pattern was followed in labour law as well: as amended, the text of Section 5 of the LC 1992

83 Bitskey–Gyulavári (2003) op. cit. 4., 7.

84 Ibid. 7.

85 Government Decree No. 362/2004. (XII.26.) on the detailed rules of procedure of the Equal Treatment Authority

86 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; OJ L 39, 14.2.1976, 40–42 ("Gender Employment Equality Directive");
Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; OJ L 6, 10. 01. 1979, 24–25.;
Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; OJ L 225, 12. 08. 1986, 40–42.;
Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood; OJ L 359, 19. 12. 1986, 56–58.; Burden of Proof Directive; Framework Directive, Race Directive.

87 The ETA is an administrative authority set up at the same time with the entry into force of the ETA Act, in order to function as an equality body (as envisaged by the Race Directive) designed to control the enforcement of rights and duties arising from the ETA Act via exercising of a wide range of public powers.

(along with statutory employment law regulating various sectors of public service) was formulated as follows:

> „(1) In connection with employment relations the principle of equal treatment must be strictly observed.
>
> (2) Any consequences of the breach of the principle of equal treatment shall be properly remedied; the remedy shall not result in any violation of or harm to, the rights of another worker."

The text of the Section of 142/A was also slightly amended, in particular with respect to the new terminology („equal treatment" instead of „[prohibition of] discrimination").

All other questions of equal treatment in employment were hereafter governed by the ETA Act.

In Part II, the main sources and characteristics of equality-related EU law are going to be briefly described. It is evaluated, to what extent these features are mirrored by current Hungarian law on equality in employment, after 15 years of process of implementation. A few specific area of implementation are also analysed compared with the standards of EU law.