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# BUSINESS AND HUMAN RIGHTS IN HUNGARY

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## EXECUTIVE SUMMARY

1. Corporations breach human rights, when they act as employers or as provider of services. The most common human right violation by businesses is discrimination against employees and consumers. As a consequence, the fight against discrimination is of high priority in Hungarian human rights legislation.

2. The material provisions on human rights are divided to two parts: constitutional rules and specific Acts on human rights.. The main gap in these laws is the lack of exercisable provisions, and the general legal knowledge on using them.

3. There are several procedural, practical problems arising in the course of legal enforcement of human rights, such as the problem of actio popularis and the definition of direct and indirect discrimination, the uncertainties about juridical interpretation of the Constitution, and the reverse of the burden of proof.

4. There are sanctions in the disposal of the offended, in extra-judicial and legal action proceedings equally. In a civil action, the complainant can rely on the instruments of the personal rights' protection, and can apply for financial and non-financial compensation. The existing sanction system is not very effective indeed, it has no preventive effect, therefore it's development is very important in the future.

5. Hungarian case-law clearly demonstrates the complexity and confusing nature of the rules in force. As an effect the case law is very slow to develop. The fact, that the citizens are afraid of the publicity accompanying these cases, further impedes the development of a coherent case-law. Still the previously closed test cases provide very useful experiences for the legislators to improve the rules of the procedure and material law.

6. European Community law harmonisation will effect certain Hungarian Acts dealing with human rights, but will not mean a fundamental change in the legal system, and it is a great challenge for the entire Hungarian legal system, including human rights legislation.

## INTRODUCTION

7. This paper is an attempt to explore the foundations of Hungarian human rights legislation and problems of its practical realization. This topic covers a wide range of human rights laws, thus it is impossible to discuss here all laws and problems. Consequently, I tried to give an overall picture of Hungarian human rights legislation, at the same time focusing on the most crucial problems of Hungarian human rights law.

8. In the first chapter, I tried to identify the typical forms of human rights violations and the most important fields of current Hungarian human rights law. In the second chapter, I strived for providing a brief summary on human rights related summary of the Constitution and the most significant Acts in this respect. Chapter 3 and 4 constitutes the main body of my paper, including a detailed analysis of the difficulties arising from the gaps of material and procedural rules.

9. The problems of legal enforcement and sanctioning deserved a separate chapter, as a consequence of its importance concerning the practical implementation of the effected rights. Chapter 5 contains a general overview of Hungarian human rights case-law, focusing on particular doctrines of judicial interpretation. The last chapter had been addressed to the effect of EC law harmonisation on Hungarian efforts to improve human rights law.

## TYPOLOGY OF HUMAN RIGHTS VIOLATIONS IN HUNGARY

10. The first issue of our study is the **nature of the human rights violations** by businesses in Hungary. Basically, there are two major types of human rights violations.

### Corporations are employers

11. First, businesses in Hungary rather often infringe human rights of their employees, when they act **as employers**. Hungarian businesses commit human rights violations in all phases of employment relationships. The **most common aspects of employment**, when employers breach employees human rights, are as follows:

12. **Discriminatory advertisements:** someone is excluded from applying for a particular job, as the advertisement tells you, that they are looking for male candidates, persons below the age of 35 years, or "white, non-alcoholic mason".

13. **Access to employment:** companies refuse applications of persons belonging to particular social groups such as women, roma persons etc.

14. **Working conditions:** access to vocational training, promotion and working conditions are worse for certain employees. For example, women are excluded from vocational trainings, or the female part-time workers' pay is less, than male full time employees'.

15. **Termination of employment:** various discriminatory practices have been experienced regarding redundancy unfavourably for groups at disadvantage.

### Corporations are providing services

16. Secondly, businesses may also breach human rights, when they **provide services** for consumers. The most common situation in this respect is, when a company refuses certain service from an individual, based on his personal characteristics, especially the race or ethnic origin of the given individual. It often happens recently in Hungary, that an employee of a restaurant or bar tells someone, with or without any reasoning, that he can not enter the place run by the company. The Hungarian roma population suffers the most from this illegal, discriminatory practice and its consequences.

17. Respect of human rights is a basic principle of the Hungarian legal system. Therefore, there are profuse regulations on basic human rights. On the one hand, the fundamental Hungarian Acts contain provisions guaranteeing the use of these rights. There are separate acts on freedom of association, freedom of assembly, freedom of religion, right to strike etc. These Acts include detailed rules on the practical use and enforcement of these rights. On the other hand, these codes also deal with the most common breach of these rights, namely discrimination. Discrimination has been one of the most important challenges of Hungarian law during the last decade. There are certain social groups at disadvantage, endangered by a wide range of discriminatory practices. The most affected social groups are:

- the **roma population**,
- other **ethnic groups** (especially the arabs and other groups of "foreigners" etc.),
- **women**,
- **disabled people**,
- **elderly**.

18. As a consequence, the fight against discrimination has become a high priority of human rights legislation in Hungary. This allegation is sustained by the fact, that both legislative work and case-law address the possible ways of fighting against discrimination. Thus, in my paper I will also put special emphasis on the legal instruments against discriminatory practices of businesses.

19. Beyond discrimination, businesses may also harm human life, breaching right to life due to the use of their technologies, contaminating the environment. There has also been cases showing, that the protection of environmental rights form a rapidly developing part of Hungarian legislation as well as litigation.

## HUNGARIAN PROVISIONS CONCERNING HUMAN RIGHTS VIOLATIONS

### Constitutional rules

20. The Hungarian Constitution considers human rights, as the most important pillar of a democratic society. Thus, there are elaborated rules to guarantee unalienable human rights for all individuals, without any discrimination. The Constitution determines the most important rights and the safeguarding institutions. Article 66-70. of Act XX. of 1949 on the Constitution of the Republic of Hungary, contains the basic rules on human rights. These provisions form a human rights catalogue and also describe the meaning of each human rights.

21. In order to give an example of the constitutional regulation of human rights, I attached the constitutional provisions on equal treatment.

> "70/A (1) All persons in the territory of the Republic of Hungary are entitled to human and citizen rights without any discrimination, i.e. on the basis of race, colour, gender, language, religion, political or

other opinion, national or social origin, existential welfare, birth or other circumstances.

(2) Any discrimination as per Paragraph (1) is strictly punishable by law.
(3) The Republic of Hungary promotes the realization of equality before the law by taking measures aimed at correcting unequal opportunities.

70/B (1) In the Republic of Hungary everybody has a right to work and to the free choice of work and occupation.

(2) Everybody has a right to equal pay for equal work without any discrimination.

(3) Every worker has the right to an income which corresponds to the quantity and quality of the performed work.

(4) Everybody has a right to rest, leisure and regular paid time off."

22. Human right laws have to be safeguarded by a network of institutions. As for the **legislation,** there is a Parliamentary Committee on Human rights, religion and minorities. The other safeguard of human rights is the **Constitutional Court**, which has to deal with all complaints submitted by any person or organisation. Any limitation of fundamental human rights has to be based on another constitutional right and can only be based on especially outstanding reasons. According to the Constitutional Court's practice, whether an act or behaviour violates someone's constitutional or personality rights, should always be assessed on an individual basis after careful investigation of the particular case, comparing the interests of the persons involved. Some of the Constitutional Court's decisions are summarised in the annexes.

**Acts on the protection of human rights**

23. Apart from the Constitution, several Acts declare and guarantee human rights in the Hungarian legal system. It is not possible to analyse every single law protecting human rights, therefore we will concentrate on the most important and most elaborated laws, having significant affect on Hungarian human rights law.

*Labour law*

24. The above-mentioned constitutional rules on anti-discrimination are reinforced and explained more explicitly in Article 5. §. of the Labour Code:

(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 employees interests or activities connected therewith,) as well as any other circumstances unconnected with employment. Discrimination following unequivocally from the character of the work does not qualify as detrimental discrimination.

25. This is a fundamental principle of Hungarian labour law, which contains the widest possible prohibition of discriminatory practices in relation to employment. Nevertheless, the wording of this paragraph is too broad and vague, without real help for judges and solicitors applying it. The introduction of a much more specific and concrete text would be desirable in the future. This would mean the prohibition and definition of both direct and indirect discrimination, separate rules on different types of discriminatory practices etc. Evidently, the current anti-discrimination rule does **not use the expression of 'indirect discrimination'**. It is necessary to **amend the Labour Code** in this respect to give a clear definition on indirect discrimination due to EC law requirements (Article 2. §. (2) of Council Directive 97/80), what have to be

complied with by 2002.

*Civil law*

26. Article 76. § of the Civil Code deals with human rights violations:

> The violation of personality rights is: especially any discrimination of individuals on the basis of their sex, race, ethnic origin or religion, further, the violation of their spiritual freedom, the unlawful restriction of their personal freedom and harm against their physical integrity and health, or offence against their honesty and human dignity.

27. These rules may be invoked, in case the situation is not covered by labour law provisions. The sanctions of civil law are analysed in the chapter dealing with enforcement mechanisms.

*Act on the rights of people with disability*

28. The Act passed in 1998 on the rights of people with disability (Equal Opportunities Act) is one of the most important legal instruments in the human rights field. The Equal Opportunities Act is the first specialised law on the rights of a particular group of people with special disadvantages. This Act has strengthened the endeavours of other groups - such as women and roma people etc. - to receive similar legal protection in the future by passing an Act on their rights too. This pressure on legislation from human rights movements have been increased since passing the Equal Opportunities Act by the Hungarian Parliament. The Act serves principally **the following two aims***:*

> First, it must make the rights guaranteed in the Constitution for all Hungarian citizens **exercisable for disabled persons**. In particular: the right to human dignity (§ 54), to freedom (§ 55), to equality of rights (§ 70/A), to free choice of workplace (§ 70/B), to social security (§ 70/E), to free movement and free choice of place of residence (§ 58), and to culture (§ 70/F).

29. The methods for achieving this aim, are the following:

- formulation of a ban on discrimination against disabled persons,
- making violation of this ban sanctionable,
- defining the actual content of the rights,
- defining the scope of positive discrimination,
- defining the supports in kind (provision of services, provision of aids, range of placement solutions) and for individuals, accessibility procedures, methods,
- definition of financial supports serving to equalise opportunities.

30. The last three points concretely serve the obligation set out in the Constitution that: "The Republic of Hungary also assists the realization of equality of rights with measures aimed at eliminating inequality of opportunity" (§ 70/A (3)), while the first three serve the contents of § 70/A (2): the law strictly punishes any form of negative discrimination against persons.

31. Th second aim of the Equal Opportunities Act is to **shape a new attitude** relating to people with a disability, what may have an influence on other areas too. The essence is, that disabled persons should not be a passive (tolerating) object of support, but should be encouraged to strive for active self-sufficiency and social integration.

*Sex discrimination law*

32. Sex discrimination law is a rapidly developing part of Hungarian human rights law, what is partly due to the adaptation of **EC equal treatment law**. This law is closely connected with labour law. Therefore, equal treatment of men and women is dominantly regulated by labour law provisions. Unlike the Act on the rights of disabled people, the equal treatment provisions are not found in a separate Act, but they are dispersed in several Acts. However, passing a separate Act on equal opportunities would be desirable to give detailed and exercisable rules on this constitutional principle.

33. Equal pay for equal work is the most important legal principle in this field. Two separate laws govern the public administration and public service:

- Act on Public Employees[1],
- Act on Civil Servants[2].

34. Both laws have established a wage tariff system, although of slightly different nature. In case of public employees the law sets the minimum salary for each bracket, while for civil servants it is the law, that fixes the actual salary. This means, that if public institutions employing public employees, for instance in the area of health or education etc., can financially afford it, they can pay higher salaries than ensured by law. Due to the lack of financial resources this is not widespread practice. As for civil servants the system is more rigid. There is only limited space for individual bargaining (no wage differences). The basic wage tariff system is neutral, as wage brackets are based on the employees' educational, professional background, the position held and the length of service.

35. The implementation of the equal pay principle is hindered by the lack of specific provisions, such as the definition of equal work and the definition of pay. There is only the rather vague anti-discrimination clause in article 5 of the Labour Code, the exclusive basis for legal action. This shows the weakness of human rights legislation in this field. Furthermore, even this rule is very rarely used in legal procedures, due to the lack of legal actions. The improvement of these regulations on equal treatment, especially on the equal pay principle, is an inevitable precondition for our EU accession, as this is the cornerstone of European Community law.

*Right to life and environmental protection*

36. The usage of various chemicals in the industry and agriculture and the modern industrial production processes increasingly endanger the human environment. In the Hungarian legal system, all crimes are embodied in the Criminal Code, so environmental crimes are regulated also in this Code. Damaging environment, the only disposition punishing environmental crimes, is regulated among offences against Public Health. It may be committed by the person, who spoils, deteriorates or destroys an object under protection of the natural environment. It is an aggravating circumstance if the damage gives rise to danger to human life, when the punishment is deprivation of liberty of up to five years.[3] The further implications of committing environmental offences, are discussed later in the chapter on accountability in Hungarian criminal law.

[1] Act XXXIII. of 1992
[2] Act XXIII. of 1992
[3] BITTÓ Márta - FÜLÖP Sándor: *Crimes against the environment in the Hungarian criminal law.* Acta Juridica Hungarica, 1992/3-4. p.159.

### Gaps in Hungarian human rights law

37. The material provisions describe the exact meaning of every human right. These material provisions are divided to two parts: constitutional rules and specific Acts on human rights. The constitutional rules are similar to the articles of the Western European countries Constitutions. There is a wide range of human rights regulated in the Hungarian Constitution, consequently the constitutional guarantees of human rights are appropriate and satisfactory.

38. The main problem can be found in the lower level of the legal system. The second level of legislation is the sequence of Acts, with relevance to human rights. This part of the Hungarian legal system is not so satisfactory as the constitutional level. There are considerable differences between the Acts on particular rights or areas of law. For example, the Act on the rights of people with disability is a revolutionary law, on the other hand, there are still other areas (such as discrimination against the roma), where one can find hardly any rules to rely on. The main gap in these laws is the lack of exercisable provisions, and the general legal knowledge on using them. Material human right provisions are uneven and not easily applicable, therefore further legislative steps are necessary in the short term.

## PROVISIONS IN HUNGARIAN LAW FOR HOLDING LEGAL PERSONS ACCOUNTABLE

### Accountability in civil law

39. For the responsibility by civil law of legal entities are uniformly the orders of the Civil Code to enforce, which settles the question in a reassuring way. Consequently, if the employee does harm to a third person in connection with his/her employment relationship, than the employer assumes the responsibility towards this damaged third person. Exceptions from this rule can only be made by law. Thus to make the employer's responsibility ascertainable, the responsibility of the employee for the damage must be examined according to the rules of the general civil law that apply on causing damage. In that case the employer's responsibility occurs only if:

    - The person, who caused damage is his/her employee.
    - The given employee is responsible for the damage.
    - The causing of the damage is connected with the employment relationship.

40. The employee can not undertake the responsibility from the employer, consequently any agreement shifting the responsibility from the employer to the employee is null and void. The employer's responsibility for the employee also includes instances, in which the employee causes damage to a third person with an activity not comprised in his/her field of work or expressly forbidden by the employer. According to Hungarian case-law[4] establishing the employer's responsibility, the relation between the activity causing the damage and the employment relationship of the given employee is of primary importance.

41. As we have already proven, the question of accountability by Hungarian civil law is completely regulated, and these laws order, that for the illegitimate conduct of a legal entity's employee, the employer assumes the full and exclusive responsibility by her/himself. On the other hand, no steps can be taken against the employee because of his/her illegitimate conduct, if the behaviour of causing damage is related with his/her employment relationship. The key term is "employment relationship". In Hungarian law the employment relationship is considered as "valid", if the employer is entitled with very wide instructional rights, and the employee's performance of work is "regular", "personal" etc. Moreover, the employer doesn't have to be a

[4] BH 1987/1., 14

legal entity to establish its responsibility, it may be an organisation without legal entity.

42. According to Hungarian law, the full responsibility simply passes from the employee to the employer, hence the only obstacle of enforcing the law is the case, when the affected legal entity becomes bankrupt, and so unable to stand for its debts deriving from the damage. This risk indeed occurs in several cases, especially at enterprises with a small capital. In a case of bankruptcy, the damaged party often gets into a desperate situation, because owing to the lingering of the Hungarian legal system, it can take years until a valid sentence is passed and implemented. By the 3, 4 or even 5 years, when the legal procedure is over, there is no one left to enforce the valid sentence. That is why the most important task in this sphere is to achieve, that the legal procedures end within a reasonable period of time, and it comes to an enforcement as soon as possible. The European Convention on Human Rights and its enforcement procedures (European Commission and Court on Human Rights) will surely push the Hungarian legal system in this direction to meet this requirement too.

43. These laws concern the multinational firms operating in Hungary as well, since they pursue their activities through firm(s) founded in the country in accordance with the Hungarian Company Act. From the point of view of the current Hungarian legislation, it is not significant either, whether the affected company is a private company, or a public company. The Constitutional Court has declared the text of the Civil Code 348. §, article (2) anti-constitutional and therefore void, because it contained separate laws for the responsibility of the so called "private employers". In the socialist legal system the category "private employers" affected those, who were managing with "non-common properties", meaning not with the resources of the state, former socialist co-operatives, associations or foundations etc. As a result of the privatisation of "common properties", these circumscribes became senseless and anti-constitutional.

**Accountability in criminal law**

44. Following the practice of the Continental Law, our Criminal law can not handle the enterprises or other groups with or without legal personality as liable for a crime. This would not only fit to history of our criminal law, but also to the whole legal structure. Evidently, the prevailing opinion in Hungary today is, that legal entities can not bear criminal responsibility. That means, only the perpetrator person of the crime, or the one who had issued orders to it, respectively participated in it, are to be held responsible by criminal law, but the employer corporation itself not. Our legal system belongs to the Roman-German family of legal systems, which is based on the principle of "societas delinquere non potest".

45. The practice indeed shows, that since 1988, the coming into force of Act VI. of 1988 on business corporations (Hungarian Company Act), there has been a huge account of business corporations founded, and the number of crimes and abuses committed by them had also considerably increased from year to year. This perception is reflected by the draft law elaborated by the Ministry of Justice in 1999, which would initiate the culpability/punishability of legal entities by modifying the Penal Code. Moreover, the majority of the academic society argues for legal entities being held responsible by criminal law, so a new regulation of the subject will most probably be passed within a short term.

**LEGAL OBSTACLES INHIBITING ACTION AGAINST CORPORATIONS**

46. Unfortunately, as often the discrimination appears in our everyday life, as few are the actions launched against it. Let us examine, what are the obstacles of the effective legal action against the offenders of human rights. There are several procedural, practical problems arising in the

course of legal enforcement of human rights. The legal problems, analysed in this paper, are as follows:

- actio popularis,
- indirect discrimination,
- juridical interpretation of the Constitution,
- burden of proof,
- positive discrimination,
- costs of accessing jurisdiction.

**Actio popularis**

47. The legal remedy is secured by the Hungarian law, that anyone can resort to law, who feels his/her human rights were breached. In case of offending human rights, the most evident and regular legal relief is to file a lawsuit. From a procedural point of view, the real problem is, that group action (actio popularis) is not permitted concerning most of the human rights abuses. For cases like, there should be "**actio popularis**" to apply. This means, if the interests of the society are offended, one person or organisation can bring an action - or start a process resulting in different punitive sanctions - against the offender, referring to public interests, or to one endangered group of the society.

48. The procedural rules in force until 1995, had given the public prosecutor the possibility to launch a legal action in order to protect 'important interests of the State or the society'[5]. However, in 1994 the Constitutional Court limited this possibility to the case, when the *"person entitled to sue is not capable to do so for any kind of reasons"*.[6] Therefore, presently the public prosecutor can not sue in human rights cases. The reason for this limitation was indicated by the Constitutional Court in the right of each person for self-determination and of personal autonomy of action. The current procedural rules offer the possibility of filing a lawsuit merely to those persons, whose right or rightful interest was damaged by a given act of the State or the employer.

49. Discrimination indeed affects many times not only individuals, but people belonging to one social group, for example as a discriminative job advertisement affects the female applicants or the whole circle of the elderly._In many cases, this results in the incapacity of citizens and organisations to file a lawsuit referring to the discriminatory nature of the measures of businesses (e.g. advertisements) breaching the rights of those employees. This is exactly the case concerning a discriminatory advertisement excluding persons, who belong to the "undesirable" sex, resp. are "too old", namely older than a specified age (generally 30 or 35 years).

50. The institution of the "actio popularis" (group action) was settled in the recent past (it is valid since the 1st of January, 2000) in the frame of modifying the law about the rights of the disabled[7]. In the field of protecting the rights of the disabled, the legal development is more advanced, than for instance in the field of sex equality or the discrimination against the Roma. That is the reason, why several legal institutions and solutions are already at the disposal of the disabled, which are still unavailable for other groups. This situation is in fact discriminative, and the legislation should extend these rights - including the right of the actio popularis - over the other affected groups.

[5] Article 2/A.§.(1) of Act III. of 1954.
[6] Constitutional Court Decision 1./1994. (I.7.)
[7] Act XXVI. of 1998

51. Article 25. § (6) says that *"against the offender of the legally provided rights of the enabled, the National Council for Disabled, and the national representants of the interests of the disabled can launch an action to enforce the rights of the disabled, even if the identity of the offended disabled is not exactly to define".*

52. According to the quoted regulation, the possibility is open for the National Council for Disabled to act in the name or interest of the disabled in every case of human rights violations in practice or in a unique grievance, even if the identity of the offended is not concretely definable.

**Indirect discrimination**

53. Among the obstacles of effective legal enforcement, emerges the concept of discrimination. There has been uncertainty in the national laws of the EU Member States about the exact meaning of discrimination, especially in terms of indirect discrimination. Furthermore, the Member States case-law on indirect discrimination could not really develop due to the lack of such a definition. Therefore, it is necessary to define indirect discrimination in order to enable judges to decide, whether the given measure was discrimination or not.

54. This situation was supposed to change by adopting a directive. Council directive 97/80/EEC requires the Member States not only to prohibit indirect discrimination, but it becomes their equally important obligation to define the meaning of indirect discrimination.

55. European Community law makes a difference between direct and indirect discrimination, but only in the field of equal treatment of men and women. In accordance with EC law, **indirect discrimination shall exist**, where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

56. The most obvious example for indirect discrimination is application requirements of the employers. In the course of this, the employer lays claims against the applicants, which can be fulfilled only by one certain (preferred) group of people, and hereby automatically excludes others from application.

57. In Hungarian law, the Labour Code regulates the prohibition of discrimination:

> (1) In relation to the employment relationship it is forbidden to apply discrimination between employees on the grounds of sex, age, nationality, race, origin, religion, political conviction, membership in employee organisations or activities connected therewith, as well as any other circumstances not connected with the employment relationship. Discrimination based unequivocally on the character or nature of the work does not qualify as detrimental discrimination.

58. Article 5 of the Labour Code prohibits only disadvantageous distinction, but it does not define its concept. This is valid both for direct and indirect discrimination. It results from the formulation "*it is forbidden to apply discrimination*", that both direct and indirect discrimination is prohibited. Clarifying the exact meaning of indirect discrimination will remarkably contribute to the development of the case-law. The oncoming modification of the Labour Code is going to define exactly the concept of indirect discrimination. Still, it is recommendable to think it over, if it would be reasonable to insert a definition of indirect discrimination into other laws, especially into the Civil Code and the Act on vocational training.

59. Although, several decisions of the Constitutional Court there have been passed on the prohibition of sex discrimination, none of these decisions affected the concept of indirect discrimination yet.

**Juridical interpretation of the Constitution**

60. The constitutional rules mentioned in the introduction deserve a special attention in this respect. However, there is a debate dividing the experts of Constitutional law, whether it is acceptable for the Court to base its judgement directly on a constitutional rule. The opponents of this concept voice their doubts concerning the interpretation of the Constitution by a court "weaker", than the Constitutional Court. This problem has been raised in connection with each Hungarian human rights case, which clearly demonstrates, that the laws do not serve as sufficient legal basis for judgements in such cases, which forces the judges to base their decision on a constitutional rule in order to preserve the legal order.

**Burden of proof**

61. Besides the concept of indirect discrimination, Council directive 97/80/EEC also dealt with the reverse of the burden of proof. The reverse of the burden of proof means, that in legal procedures connected with discrimination, it is always the defendant's - the employer's - burden to prove the facts, that he/she did not apply distinction against the complainant - the employee -, and not the aggrieved party's obligation. According to the general rules, the party referring to a fact in the litigation, has to prove it. If the general rules were to apply in discriminatory cases, than the aggrieved employee should prove, that the employer breached his/her rights.

62. This would be rather difficult and burdensome for employees in most cases. It is necessary to reverse the burden of proof in cases of discrimination, because overwhelmingly the defendant employer disposes of written or other evidences about the circumstances of discrimination, what brings the complainant into an absurd situation. The reverse of the burden of proof forces and makes the employer "interested" in revealing all the dates, facts and circumstances in his/her disposal, since this is the only way he/she can avoid responsibility. The aim of reversing of the burden of proof is, to ease the situation of the party claiming for legal remedy.

63. In Hungarian law, the following rule of article 5 (2) of the Labour Code is to apply:

> (2) In case of a dispute arising from the violation of the prohibition of detrimental discrimination, the employer shall prove that his/her action did not violate the provisions laid down in paragraph (1).

64. Article 5 (2) of the Labour Code completely fulfils the requirements of the Council directive about the reverse of the burden proof. The employees can announce in every situation, included in the employers jurisdiction, that he/she suffered discrimination from the employer, and in a legal procedure, the employer would have to prove, that he/she did not discriminate against the employee.

65. Though, this law seems to be rather simple, however it sets the judiciary before a serious consideration problem. On the one hand, there is a danger, that the judge does not accept even the well-based excuses of the employer. On the other hand, the danger sets in, that he magistrate accepts the shallow, excuse of the employer based merely on generalities.

66. According to the Civil Procedure Code[8], judges ascertain the state of affairs by comparing the presentation of the parties with the evidences occurred during the procedure. The judge appraises the evidences in their complexity, and judges them by his/her conviction. Thus in the civil law the judiciary has to hold the responsibility for examining the evidences.

67. Most of the practical problems will occur around the following question: what kind of evidences

[8] Article 206. § (1) of Act III. of 1952

are acceptable for the excuse of the employer? There are still no sentences being passed concerning the "objective justification" of the employer.

68. The burden of proof is also reversed in case of a labour inspection. In case of discrimination, the burden of proof is also reversed in the course of labour inspection.

69. There are two problems connected with labour inspection. On the one hand, the labour inspectors can only examine discrimination on the request or complaint of the affected employee (examination based on a complaint), but they can not perform an examination on their own initiative (examination based on their authority). In the interest of an effective legal remedy, the possibility should be ascertained, that the inspectors could examine cases of alleged discrimination on their own initiative.

70. On the other hand, labour inspectors have authority to intervene, if there is an employment relationship between the employer and the employee. Consequently, the illegal refusal of an employment relationship does not belong to the authority of the labour inspectorate. With this solution, a significant part of discriminatory cases, are not contained in the authority of the labour inspectors, which fact incredibly decreases the effectiveness and the preventing power of this extra-judicial remedy. Therefore, it is necessary to expand the jurisdiction of the labour inspectors.

71. It should be examined, which further laws need to be modified to reverse the burden of proof in every case connected with human rights violations.

**Positive discrimination**

72. In Hungarian and European law equally, there are great debates about the so- called "positive discriminatory" regulations, which favour one definite group at disadvantage.

73. On the one hand, "**negative" discrimination** means the violation of human dignity and the causation of material or immaterial damage in case of individuals or social groups. On the other hand, **positive discrimination** is the provision of concessions or additional rights in the interest of ensuring equality of opportunities.

74. The Hungarian Labour Code permits the distinction between employees, as follows:

> Article 5 (3) The employer shall ensure without discrimination, exclusively on the basis of the period of employment, professional skills, experience and performance, the opportunity to be promoted to a higher position for the employee.
>
> (4) Rules on employment relationship may, for a specified circle of employees and in connection with the employment relationship, provide for the obligation to give preference on equal terms.

75. According to the judicial interpretation of article 5 (3) of the Labour Code, the basis of this preference can not be a characteristic - for instance the sex of the employee - for which reason discrimination is also prohibited. Article 5 (4) assures the possibility, that the legislation can initiate such positively discriminative regulations. These regulations would for instance prescribe the obligation of ensuring preference for female applicants in case of equally fulfilling the requirements. Consequently, regulations for the preference of women or the roma would not meet any difficulties in Hungarian law.

**Costs of accessing jurisdiction**

76. The costs of access to civil, labour court jurisdiction is a 6% fee of the total amount of claims, but at least 5,000 HUF (20 USD), maximum 750,000 HUF (2500 USD). The party initiating the procedure has to pay the fee at the beginning of the process. There are the following allowances available for the parties concerning the fee:

- reduced fee,
- personal exempt of the fee,
- casual exempt of the fee,
- right for retrospective reimbursement of the fee.

77. In case of a **reduced fee**, only 10% of the fee is to reimburse. This possibility indeed excludes the cases connected with the infringement of human rights. The victims of human rights violation are not entitled to claim to a **personal exempt of the fee** either.

78. The **right for retrospective reimbursement of the fee** gives the right to the enabled persons to be exempted from the preliminary payment of the fee, if the fee would result in a disproportionate debit in relation to their financial situation. The parties due is - regardless of their income and financial relations - the right for retrospective reimbursement of the fee in some cases, which are connected with the violation of human rights. These are:

- in a labour lawsuit, if it was taken to court because of the intentional or serious contributory negligence of the employer;
- in a civil lawsuit connected with the protection of personality rights;
- in a damage suit for doing harm in the administrational jurisdiction;
- in a lawsuit started for the enforcement of a claim for compensation against the State in connection with a penal process;

79. Expanding the exemptions from the fee to the processes related with human rights violations would surely contribute to increase the effectiveness of the legal procedure.

80. Still the determinant part of costs of the legal procedure is not the fee, but the attorney's costs, what is at least 300-500 USD. This amount is the average Hungarian monthly income, hence in many cases this is overburdening the offended party. In this aspect the civil organisations can help with providing free legal aid and often free legal representation in court procedures for the ones in need.

81. More and more of the human rights NGOs, founded in the past few years, become specialized in the representation of definite groups at disadvantage, e.g. roma persons, women, disabled, refugees etc. Consequently, they are able for an increasing quality of legal aid, and the affected circle of persons becomes more aware, to where they can apply for professional help. The government sphere provides professional and financial support for this process.

**LEGAL ENFORCEMENT AND SANCTIONS**

82. The problems arising from legal enforcement and sanctioning are examined in this chapter. At first, legal remedies are guaranteed by the Constitution:

> Article 70/K § Claims deriving from infringement of fundamental rights and objections to state administrative decisions in regard to compliance with duties may be brought to the Courts.

83. The first possibility is to litigate. All persons, who consider themselves wronged in their human rights, may submit a claim to the judiciary based on Article 5.§.(1) of the Labour Code. Also, the possibility of filing a lawsuit is open, based on Articles 75.§. and 76.§.. of the Civil Code. The lawsuit can be started with bringing an action to the authorized Court, i. e. in cases connected with employment to the Labour Court, in other cases to the competent Civil Court of first instance.

**Objective sanctions**

84. The Civil Code assures the legal remedy of the personality rights violations with several special kind of legal sanctions. These are partly objective, reparative sanctions, partly subjective aspects equally considering material sanctions, included in the Civil Code. Among the sanctions of civil law, first we set the instruments of personality rights protection forth.

85. There is a possibility to apply for the **objective personality protection instruments**, if the personality right violence is ascertainable, and there is a causal connection between the infringement and the offending conduct. The following four types of legal consequences are to enforce against those, who breached human rights or contributed to it.

86. Among the objective sanctions, the **establishment by the Court of the infringement of the right**. According to the legislators, this can be suitable to prevent the offender and the other people from similar infringements in the future. Moreover, it can contribute to provide compensation for the offended.

87. To **oblige the offender to stop the infringement**, i. e. the **banning of the offender from further violation of rights** can be an equally important instrument to put an end to the aggrieviance. This claim can be applied, if the consequences caused by the conduct of the offender are still valid to the time of passing the sentence. This is also reasonable and practical, if it is predictable, that the offender will continue his/her activity considered as illegal.

88. The **compensation** makes moral amends. The offender expresses his/her regret, and intention of "compensation". This compensation may take place orally or written, including or excluding publicity. It has to be kept in sight by choosing the manner or the circle of publicity, that these factors ascertain that by chance all those, who noticed the infringement are informed about the compensation. The Court has to order the content of the compensation, so it has to be included in the sentence.

89. The entitled person can claim for the **termination of the derogatory situation**, for the reconstruction of the state before the aggrievance ("in integrum restitutio") from the side of the offender or on the offender's expenses, resp. for the annihilation of the consequences, resulting from the infringement.

**Subjective sanctions**

90. The Complainant may claim for the compensation of **material or immaterial damages**. According to the Civil Code, the person responsible for the damages has to re-establish the original state of affairs ("*in integrum restitutio"*), or if this is not possible, he is bound to pay for both material and immaterial damages. Thus, there is a possibility for unlimited compensation in proven cases of human rights violations and/or victimisation in relation to cases of human rights.

91. 1. There is a possibility for **material compensation**, if the personality rights violations caused financial damages. The condition of the compensation is the establishment of the offender's responsibility for the damages. If the Court established in its sentence that discrimination occurred, the employee can claim for instance for his/her income and other allowances cancelled because of the dismissal. As far as the wealth of the employee decreased because of the derogatory act of the employer (e. g. dismissal), the employer can be forced to a compensation of these losses. Still, the measure of the financial damages must be proven by the Complainant.

92. According to the Civil Code, a person is responsible for damages, if:

- there has been an unlawful conduct,
- there is material damage,
- there is a "cause and effect" relationship between this unlawful conduct and the damage, moreover
- the person causing the damage is culpable.

93. 2. In the course of an **non-material compensation,** all damages of the Complainant resulting from the derogatory circumstances should be compensated. The conditions of establishing an immaterial compensation are as follows:

- there has been an unlawful conduct,
- there is a "cause and effect" relationship between the unlawful conduct and the damage,
- the person causing the damage is culpable,
- the conduct causing the damage **violates personality rights, but does not cause material damage.**

94. The offended party can claim for a non-material compensation, if the discrimination makes his/her social trafficking difficult, or if it results in the serious aggrievance of his/her personality. If an employer is an influential person in the neighbourhood, may dismiss an employee living in a small village on a humiliating manner, after all nobody wants to employ this woman. Her financial situation becomes difficult, still she does not only looses her job, but the case affects her whole lifestyle and her social status in the village, for what she can claim for non-material compensation.

95. The non-material compensation is in fact the compensation for her "injuries". The compensation for non-material damages is not of a reparative nature, meaning that the quantity of the compensation is not exact, since the damages of personal rights cannot be defined numerically. The exact sum of the compensation is defined by the Court based on the examination of all the circumstances of the given case. In the course of this, the manner, the effect, and the consequences of the infringement must be examined, as well as the possible contribution of the affected person to the damage.

96. It results from the above mentioned, that the development of the Hungarian sanction system is indispensable. This is the aim of the draft of a large-scale, comprehensive modification of the personality rights related part of the Civil Code, which will come before the Parliament in 2000. According to the draft, the system of applicable sanctions in case of a personality rights violation would be expanded and seriously strengthened. It is also an important point, that the aim of the non-material compensation is to assure the remedy for the personal damages caused by the personality rights violations, and to provide a non-financial compensation for the offended. Furthermore, the "fine for public interests" is thought to be an effective sanction against the infringements committed in the public media.

**Sanctions in labour law**

97. In cases connected with labour law, there are also some special sanctions available. The most important sanction is, that any agreement on the employment is null and void, as far as it is contrary to the laws on employment relationship. This rule indeed does not provide sufficient protection for the discriminated employees. Applying the authorized rules, the employer would not be at real disadvantage, what fact would hinder him/her in further discriminatory actions.

98. The protection against the repressive dismissals resulting from the enforcement of the employers rights is already settled in Hungarian Labour Law. The prohibition of the "misuse of rights" is a basic rule of the Labour Code. The dismissal revenging for the legal action or complaint of an employee or the termination of the employment relationship on any other pretext is unlawful, therefore void, and is a legal ground for re-establishing the employment relationship.

**Remedies in public administration**

99. The decisions in the public administration are considered as administrative decisions. There is a possibility of judicial review of any administrative decision of these institutions. There are two levels of this administrative procedure, and the case, after passing the decision on the second administrative level, may be brought to court. This is a rather important and effective guarantee for the legal enforcement of human rights.

100. Labour inspection shall extend over prohibition of discrimination provided in article 5 of the Labour Code, and legal provisions related to the employment of women, young persons and of those with changed working abilities.

101. The labour inspector can apply the following sanctions for the ceasing of the offences considered during the inspection:

- to draw the employer's attention to the offence of the rules on the employment,
- to oblige the employer to terminate the offences by a definite period of time,
- to impose a labour fine.

102. The amount of the labour fine may extend from 50,000 HUF (200 USD) to 1 million HUF (about 3500 USD) in the event of the first violation of a legal provision, or 50,000 to 3 million HUF (about 10.000 USD) in the event of a violation of several provisions or repeated violation within 3 years of the decree deposing the previous fine going into effect. For reasons of retentivity (deterrent effect), the fine issued by the Labour Authorities may be very important.

103. The law does not really help the authorities out concerning the amount of the fine. It says only, that the assessment of the amount of the fine should be based on the caused damage, the length of the unlawful behaviour and the number of employees concerned. The possibility of a case-law indicating the sum of the fine in 50.000 HUF, the smallest sum permitted by law, cannot be out-ruled. This might reduce the deterrent effect of the fine close to nothing.

104. The labour inspectorate can proceed as a contraventional authority. The employer, who unlawfully rejects the employment of the employee referring to sex, origin, religion etc. or other circumstances not connected with the employment relationship, can be inflicted with a fine extended to 100,000 HUF.

105. The described rules suggest, that there is also a public administration authority, specialised on

discrimination at the workplace. The fact that - despite of thousands of offences - only three cases have been filed at the Labour Inspectorate in 1998 (all of them were test cases related to job advertisements), demonstrates very spectacularly the problems of the system in force.

106. Besides the above mentioned redresses, there is a possibility to address a complaint to the **Ombudsman,** who is obliged to examine all complaints stating, that there has been a breach of a constitutional (human) right. The ombudsman has also made various examinations by its own initiative on various human rights problems, for example on the effective remedies in case of infringing equal rights by the labour market actors.

## HUNGARIAN HUMAN RIGHTS CASE-LAW

107. It is not only the quality of human rights laws, what is important, but also the day to day application of these rights. Therefore we have to look at the practice too and the effective implementation of human rights at the courts must be a priority. Furthermore, the development of an extensive and meaningful case-law is an essential part of national human rights laws.

108. However, the number of cases concerning human rights violations has been very low both in Hungary and in all countries of Central- and Eastern Europe. As a consequence, the human rights related case-law is rather limited and one-sided.

109. The first reason of the lack of law-suits against human rights abuses is, that the potential plaintiffs are afraid of turning to the courts. They are wary of publicity around these procedures and especially the social, personal consequences of their complaint. Although there are particular legal guarantees against victimisation, however these rules are not able to protect victims from negative consequences of the legal procedure. The most significant effect of these fears is that mostly former employees dare to sue their former employer, if they feel themselves in a strong position, and they are absolutely independent from the defendant company. The typical example of this situation is, when the employment relationship had been terminated and subsequently this employee launches a legal action against his/her former employer.

110. The second reason of the low number of cases in this field, is the lack of expertise and financial resources of the individuals, whose rights were breached. As it was mentioned earlier, there has been a considerable development in this respect during the last few years, mostly due to the activity of human rights NGOs.

111. In the following chapter, let us examine some of the "test cases" on human rights violations.

### Test case on disabled rights

112. Seven physically disabled Hungarian citizens brought a lawsuit against three different financial institutes in Budapest, charging that the operation of the newly constructed buildings functioning on the purpose of a bank, violates the personality rights of the plaintiffs. On the basis of expert opinion, the legal expert established, that concerning the entrances of the buildings, they are not suitable for allowing access to the defendant public institutions by the plaintiffs, who are physically disabled and use wheelchairs for the most part.

113. The **Court of the first instance** brought a valid ruling, declaring this situation being discriminative, therefore violating the personal rights of the plaintiffs. The Court stressed, that the construction of the entrances in such a manner is also contrary to the provisions of the National Building Rules.

114. The **Court of the second instance** affirmed the ruling of the Court of the first instance in a valid ruling. It pointed out, that the plaintiffs, as physically disabled persons, in a manner precisely attributable to this cause, are excluded from the possibility of availing themselves of the services of the defendant institutions, what was repeatedly qualified as discrimination.

115. The **Supreme Court** maintained the valid ruling in its sentence, announced on 2 June 1995. In its justification it referred to the fact, that Section 76 of the Civil Code qualifies any discrimination against private persons as violation of personality rights, keeping in mind Section 70/A (1) of the Constitution and Section 8 (1) of the Civil Code.

**Test case on discriminatory advertisements**

116. Up to this moment, in the field of sex discrimination the courts have brought only one judgement. The most popular Hungarian daily paper published the following job advertisement in the autumn of 1997:

> **The: . . . . . Inc. is looking for applicants in the field of an assistant (only male)**
> He can be inexperienced too, with career possibilities in the future.
> **Application's requirements.**
> - academic qualification
> - good organising and negotiating skills
> - advanced communication skills in French
> - between 25-35 years old
> - driver licence

117. A woman older than 35 years, who met all the requirements besides the discriminative ones, filed a lawsuit against the advertising multinational company. In the action, she asked for the statement of the violation of rights, to ban the employer further similar infringements of law and to force the employer to give compensation in the form of another advertisement with the text composed by the plaintiff.

118. The Court established in its sentence **the fact of the grievance**, i.e. that the defendant employer *"did breach the constitutional and civil rights of the Complainant assured by the law for prohibition of detrimental discrimination with its advertisement including terms enabling the appliance only for men between 25-35 years of age".* [9] The court **banned** the Defendant **further infringements** similar to this.

119. The Court referred to the rules of the Constitution and the Civil Code in the reasons of the judgement. At the same time it refused the Complainants' reference to the Labour Code, because according to its standpoint, the action was launched on *"for the utilisation of instruments of the civil rights for personality protection, so the rules of the Labour Code prohibiting discrimination are not directly to apply here".* [10]

120. In my opinion it is not correct to exclude the application of the Labour Code, what is supported by the reasoning too. According to the reasoning, the potential circle of applicants or its members can be affected by discrimination, which is against the law, therefore forbidden. The lawsuit's aim was exactly, that the court establishes the unlawfulness of the discrimination applied to the members of this circle. With an other formulation, discrimination was realised in

[9] Sentence of the Monor First instance Court No. 3.P.21.321/97/13
[10] Sentence of the Monor First instance Court No. 3.P.21.321/97/13

the discriminative statements about the application requirements defined by the employer. Therefore the employer is to blame for the frustration of the possible employment relationship.

121. If the rules of the Labour Code would be valid exclusively for existing employment relationships, than exactly the most common infringements were excluded from the authority of law. It is a generally known fact, that most cases of discrimination appears just before the establishment of an employment relationship, for the disadvantage of the applicants. These people form the circle of unemployed, who does not want to make their - already desperate - situation more difficult with filing a spectacular lawsuit on personality rights against the advertising employers.

122. The Complainant in this case was not in the need of an employment relationship with the Defendant, so she did not ask for the **obligation** of the employer **for establishing an employment relationship.** But could this claim ever meet success? In the Hungarian court practice, there has never been a precedent for a case similar to this. In the case Von Colson, the EC Court established, that Community law does not force EU Member States to the introduction of obligation for establishing an employment relationship as a sanction for the infringement, although EC law does not preclude this possibility either.

123. So far, there were precedents only for launching an action for the prolongation or the renewal of the already existing or earlier existed employment relationship. It is true indeed, that there are instances in the Hungarian legal system for establishing a contract resulting from a sentence, but we can not disregard the circumstance, that the employer's due is to choose from the applicants. It is not sure at all, that the ones excluded from the potential employees by the unlawful advertisement would qualify themselves for the job in a lawful procedure.

124. On grounds of all these, I do think, that expressly without a lawful authorisation, the Hungarian courts can not pass a sentence in a case like this, which would oblige the employer for the establishment of an employment relationship. Since without an unambiguous legal instruction, it is not able to establish, what the employer could be forced to, meaning the content, the term and other conditions of the employment relationship.

125. Instead of the obligation of the establishment of an employment relationship, it would be more expedient to establish a certain degree of **compensation lump**, which could be adjusted to the wage of the other employees working in this field. A more appropriate solution, from a social view would be, if in cases like this, the employer could be forced by the court to some kind of **"public fine"**. According to the recent rules, this is solely available in a libel suit, so the only possible action launched was for the enforcement for compensation.

126. In the above mentioned case the Court stated the violation of rights by the Defendant, and banned the Defendant from further similar violations of law, given the fact, that the repeated occurrence of such violations cannot be excluded in the future. The Court stated, sparking serious professional debate, that the rights of those women are breached too, who does not apply for the job, but could sue the firm based on their constitutional rights. This is an other proof, that the individual offence does not have to be necessarily direct, but it may be indirect too. The conclusion of the Supreme Court was the same in the afore-mentioned case concerning rights of the disabled.

**Establishment of employment relationship**

127. With the support of an NGO, specialized for the protection of roma people infringed in their personality rights, a roma person sued a company, alleging discrimination. The affected roma person contacted a company seeking for a postman in a job advertisement, but he was immediately refused, claiming that the vacancy was already filled. At this time he applied to the NGO, since he had a suspicion of not being employed just because of his origin. Several, non-roma employees of the NGO phoned the firm, which welcomed them, and wanted to employ them immediately. The roma unemployed person launched an action against the firm, asking the Court for the establishment of an employment relationship between himself and the firm, on those conditions, which the firm agreed on with the other applicants.

128. This lawsuit is still in process, but the sentence will answer the question, if the Court itself can establish the employment relationship, when its establishment was frustrated because of the discriminatory measures of the employer.

**Summary**

129. The judgements mentioned above clearly demonstrate the complexity and confusing nature of the rules in force. As an effect, the case law is very slow to develop. The fact that the citizens whose rights were breached are afraid of the publicity accompanying these kinds of cases further impedes the development of coherent case law. Among the reasons of this fear we can also mention the general problems of the Courts of Justice in Hungary: the length of the judicial process and the problems of the implementation of judgements.

130. Hungarian case-law clearly demonstrate the complexity and confusing nature of the rules in force. As an effect the case law is very slow to develop. The fact, that the citizens are afraid of the publicity accompanying these cases, further impedes the development of a coherent case-law. Among the reasons of this fear we can also mention the general problems of the Courts of Justice in Hungary: the length of the judicial process and the problems of the implementation of judgements.

131. This problem is generally true for all countries in Central and Eastern Europe. For example the only sex discrimination case, which ever reached a Central or Eastern European court, is the above mentioned advertisement case at the Monor Court.

## EUROPEAN COMMUNITY LAW HARMONISATION

132. The accession to the European Union is a great challenge for the entire Hungarian legal system, including human rights legislation. Hungary has started legal harmonisation work in the mid 90's and strengthened its endeavours after April 1998, when the first phases of the official negotiation process, the so-called acquis screening started.

133. It is the Hungarian Government's firm conviction, that the entire European Community law ("acquis communautaire") will have to be and will be adapted by the Hungarian legislation by January 1 2002. This date (January 1 2002) is the assumed/theoretical date of Hungary joining the EU. Therefore, this is the deadline for the Hungarian administration and Parliament to finish the work of harmonisation, excluding the community laws with a derogation. Derogation is a transitional period with a final deadline, negotiated and agreed upon by both parties.

134. During the negotiations, the entire body of European Community law is divided into 31

chapters, reflecting the structure of EC law and the European Commission's policy. Thus, the human rights related community laws are spread over these 31 chapters. Consequently, it would be almost impossible to give an overview of all Hungarian and EC legal instruments effected by legal harmonisation.

135. This process will result in remarkable change in the wording and many of the legal institutions of Hungarian human rights law. On the other hand, legal harmonisation will also considerably change the legal environment and implementation of these rights. Harmonisation and EC law definitely contributes to the approximation of the Hungarian legal system to European standards and practices.

136. Hungarian law is already partly in compliance with EC law. There is a government decree specifying the necessary legal steps and the exact directive, Hungarian Acts to be modified in 2000-2001. There is also a National Program on the adoption of the acquis, describing all national legal, infrastructural, human resource development etc. measures promoting the adoption of the acquis communautaire by the Hungarian administration. The most important field of EC human rights law to be adapted is equal treatment for men and women. EC equal treatment law means the adoption of 8 directives. Four of these directives will have to be harmonised by July 2001. The modification of the Labour Code, harmonising these directives will be introduced to the Parliament by the end of 2000.

137. Summerisingly, legal harmonisation will effect certain Hungarian Acts dealing with human rights, but will not mean a fundamental change in the legal system.

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**ANNEX I**

***Decisions of the Constitutional Court concerning equal opportunities of men and women***

Constitutional Court Decision 32/1997 (V. 16)

The claimant has considered the first sentence of paragraph 39(9) of Law 1975/II contrary to the Constitution because it gave the possibility for women of early retirement five years before retiring age, while for men this possibility was open at the age of sixty, two years later. The same law excluded those men who are not single fathers from the reduction of the mandatory work period dependant on the number of children. The claimant considered this provision being contrary to paragraph 66 (1) of the Constitution.

The Court pointed out in its judgement relating to the termination of the obligation of military service for women that it is not contrary to paragraph 70/A(1) of the Constitution if the law takes into consideration gender specificities. Therefore taking into consideration certain specificities of gender, the possibilities for early retirement are open earlier for women, is not against the Constitution. Also, it should be kept in mind that retiring age of women has been raised a lot sharply than the one of men. In the interest of the society, provided that the reasons for discrimination are not unconstitutional, if we cannot establish the narrow concept of equality, positive discrimination can be acceptable.[9/1991. (25 IV). C.C. Decision] Since the elevation of the retiring age means the end of the favourable position, that women has occupied in this field, it is conceivable, that the introduction of the changes, for the time being, provides easier circumstances of early retirement for women.

From the point of view, childraising men and women have equal rights and responsibilities. As a result, the rights and responsibilities, connected to the fulfilment of childraising responsibility have to be equal for the two different sexes. Therefore, it is unconstitutional that in the case of the reduction of mandatory work period the rights of men are regulated differently.

Constitutional Court Decision 7/19 (18. III. )

Article 66.§. (1) and (3) empower the legislation to defend the rights of women by positive discrimination. This positive discrimination is based on the anatomical differences between sexes. The special biological and physical circumstances of giving birth and the reduced physical power of women might lead of injuries that men can evict, because of their different anatomical characteristics.

Taken into consideration these factors, it is constitutionally well founded to apply the principle of positive discrimination in the case of early retirement. However, it is unconstitutional to forbid early retirement to those men who are working under the same conditions as their female counterparts if the circumstances that serve as basis for the early retirement are affecting both. The lawmaker had probably in mind the textile mills where the majority of employees are women. It is not to be left out of consideration that nowadays men penetrate a lots of fields of work that are traditionally considered 'feminine' like nurse or kindergarten teacher. This process works the other way around too. Therefore the notion of predominantly feminine or masculine field of work has to be re-examined.

The given law does not discriminate between sexes in the case of textile mills. This means that both men and women are exposed to the same health hazards while performing their day-to-day duties. In this case the higher endurance and the bigger physical power of men cannot form the base of negative discrimination since the health hazards are affecting them just as much as they are effecting their co-workers of the other sex. Therefore the discrimination against men resulting in worse terms for early retirement is unconstitutional, namely it is in conflict with articles 66.§.(1) and 70/A.§.(1) of the Constitution.

**ANNEX II**

**Brief summary of the ruling of the Constitutional Court on discrimination against persons living with disability**

The Constitutional Court of the Republic of Hungary issued among its Constitutional Court Rulings the following ruling No. 553/B/1994 AB on 23 June 1997 in Budapest.

The petition submitted by the President of the National Federation of Associations of the Physically Disabled requesting that the amended Government Regulation concerning travel concessions for persons with a serious physical disability be subsequently declared unconstitutional and annulled, and the applications submitted calling for a finding of unconstitutionality manifested by default were rejected.

In its detailed justification, the Constitutional Court, among others, pointed out the following:

Section 70/A (1) of the Constitution forbids only discrimination violating the right to human dignity, which in the present case could be found to exist only if there were default by the state, that is, in the case of the entire absence of regulations ensuring social welfare concessions.

In this way the travel concessions for the physically disabled persons cannot be classified among the fundamental rights, and consequently the regulation at the level of a Government Regulation cannot be qualified as unconstitutional either.

Equality of opportunity for the various disadvantaged social groups cannot be ensured through particular regulations or state measures, but through a system of regulations and state measures. It does not follow from Section 70/A (3) of the Constitution that the provision of equality before the law means identical and equal support for the various disadvantaged groups.