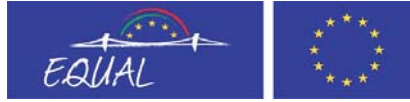




UNIÓN EUROPEA
Fondo Social Europeo



ESF-EQUAL II

Access²Work



THE LEGAL APPROACH
TO DISCRIMINATION



Final Documents of Access to Work Project

Final Documents of



THE LEGAL APPROACH TO DISCRIMINATION

2008

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The prohibition of discrimination is a fundamental institution of the protection of human rights. It is an independent human right, but also a projection of other human rights. Observing either human dignity or the freedom of speech, it is a conceptual element of both, as equally due to everyone – irrespective of sex, race, skin colour, disability etc.¹

In a constitutional state of democracy it is necessary for the state to apply its whole set of means available in the course of taking steps against discrimination. It is important for the state – apart from combating prejudices, educating and social communication – to employ the means of legal regulation, too. In order to end discrimination the law-maker can apply two possible techniques. Firstly, he/she may prohibit negative discrimination with anti-discriminational acts, secondly, he/she may apply favouring measures of positive discrimination.

¹ Report on the activity of the parliamentary commissioner for the rights of national and ethnic minorities, 1999.

I. International legal regulation of prohibiting discrimination

By these days the prohibition of discrimination is included in all significant international documents and legal systems of the democratic countries. The most significant international documents are The International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the International Convention on the Elimination of all Forms of Racial Discrimination of 21 December 1965, New York, and The European Convention for the Protection of Human Rights and Fundamental Freedoms. Naturally, from Hungary's point of view it is principally the main points of the European Union's regulation that deserve a brief review.

The European Union, as a community is founded on the principles of liberty, democracy, respect for human rights, unconditional complying with the fundamental freedoms and the rule of law. The bodies of the Union have declared in numerous documents, that equality before the law, protection against discrimination for all persons, respecting and promoting the rights of minorities are essential conditions in a well-functioning democracy. (The present review does not aim at providing a comprehensive picture on the actions of the European Community against discrimination, only presenting the most significant norms and events.)

In 1997 the Treaty of Amsterdam supplemented the Treaty on European Union with a new article. Article 13 on the application of „appropriate measures” supplied the Council with a wide range of licences „prohibiting discrimination on grounds of sex, race, ethnic origin, religion or ideological conviction, physical condition, age or sexual orientation.” Subsequent to the signing of the Amsterdam Treaty the European Union Commission extensively consulted with the civil society, Member States and bodies of the Union, such as the European Parliament on the implementation of Article 13. As a result of the debates, the Commission announced its package of measures on the implementation of the directions of Article 13 as soon as November 1999. The fact that the plan of measures was approved in less than six months after Article 13 had come into force, truly indicates the level of significance the Commission attributed to combating discrimination. The Commission worked out two directives for the implementation of the new article, which were approved by the Council several months later. The first element of the legislative procedure initiated by the Council was Council Directive 2000/43/EC „Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin”. The directive placed the Member States under great obligations to be met until 19 July, 2003 within their own legal systems. The

subsequent element of the package of measures was Council Directive 2000/78/EC „Establishing a general framework for equal treatment in employment and occupation”. This general framework regulating occupational discrimination concerns all bases of discrimination listed in Article 13, except for the sex and racial discriminations.

In the course of implementing the two directives above, Member States first had to decide, whether to supplement their existing legal norms with new regulations or to form totally new laws and statutes. Certainly, a decision always depends on numerous factors, namely the existing legislative frameworks, the rules of the law-making procedure as well as political factors. One has to consider what positive and negative opinions a new code of anti-discrimination might evoke in society against the government. It must be stressed that the two anti-discriminational directives determine only the minimal requirements for Member States, therefore Member States could decide without restriction, whether to ensure the persons concerned in discrimination a protection of higher level than the norms of the Community. The European Commission has initiated a lawsuit at the European Court against four states (Austria, Germany, Luxemburg and Finland) for failing to incorporate the directives into their legal systems.

II. Regulations prohibiting discrimination in the Hungarian law

The Constitution of the Republic of Hungary prohibits negative discrimination. Act No. 70/A does not apply a closed listing, but brings a list of examples for the forms of differentiation serving as bases of negative discrimination.

Up to 2003, with regard to the legal regulation of negative discrimination the Hungarian legislator basically followed the concept of prohibition by the codes of the material sector as well as the procedural acts. The point of the model is that the legislator regulated the articles prohibiting negative discrimination within the acts of particular sectors separately, in different ways and to different extents. Considering the former regulation, the Labour Code represented an example to be followed with regard to the depth of the regulation. However, the sectoral regulation concerning equal treatment did not form a consistent system, the effective regulation lacked a consistent use of notions, it did not ensure appropriate means to take steps to counter breaches of the law, thus the legal text was divided, occasionally even controversial, which made it difficult to apply in practice.

The concept built on sectoral regulation was first disrupted by Act No. 21 of 1998 on Ensuring Equal Opportunity for Disabled People by establishing the special regulations of distinguishing one of the disadvantaged groups.

The Parliament, „acknowledging every person’s right to live as a person of equal dignity, intending to provide effective legal aid to those suffering from negative discrimination, declaring that the promotion of equal opportunities is principally the duty of the State, having regard to Articles 54 (1) and 70/A of the Constitution, the international obligations of the Republic and the legal acts of the European Union”, enacted Act No. 125 of 2003 on Equal Treatment and the Promotion of Equal Opportunities.

Act No. 125 of 2003 on Equal Treatment and the Promotion of Equal Opportunities (Etact)

The act under consideration „intends to regulate within one act the fundamental rules related to equal treatment and equal opportunities. The act also discusses the sectoral issues of the requirement of equal treatment, and accordingly deals with negative discrimination in employment, social protection, healthcare, education, dwelling as well as in the course of trading goods or using services.

Before Etact came into existence, the application of anti-discriminative regulations of the sectoral laws was made very difficult for the laws did not apply the same notions. Act No. 125 of 2003 on Equal Treatment and the Promotion of Equal Opportunities defines the most significant notions related to negative discrimination, such as the notions of direct and indirect negative discrimination.

„Article 8. Provisions that result in a person or a group is treated less favourably than another person or group in a comparable situation because of his/her sex, racial origin, colour, nationality, national or ethnic origin, mother tongue, disability, state of health, religious or ideological conviction, political or other opinion, family status, motherhood (pregnancy) or fatherhood, sexual orientation, sexual identity, age, social origin, financial status, the part-time nature or definite term of the employment relationship or other relationship related to employment, the membership of an organisation representing employees' interests, other status, attribute or characteristic (hereinafter collectively: characteristics) are considered direct discrimination.

Article 9. Provisions that are not considered direct negative discrimination and apparently comply with the principle of equal treatment but put any persons or groups having characteristics defined in Article 8 at a considerably larger disadvantage compared with other persons or groups in a similar situation are considered indirect negative discrimination. The point of indirect negative discrimination is that the discrimination is based on an apparently neutral condition, yet it affects persons having a protected characteristic in significantly larger number. In such cases, in order to be exempted from the breach of the condition the certain provision has to pass the test of rationality with regard to persons having a protected characteristic.”

Etact also records unambiguous provisions with respect to *personal scope*, making an inventory of the organizations compelled to observe the principle of equal treatment in their legal relationships, and in the event of breaching it, procedures can be initiated against them. These organizations include the following: all bodies of state and local

governments, armed forces and policing bodies, organisations performing public services, educational institutions, institutions providing social care and child protection services, institutions providing cultural services, entities providing health care, voluntary mutual insurance funds, private pension funds, parties and every other budgetary organ. „In addition to the entities listed, in the relevant relationships of the private sector the principle of equal treatment shall be observed, as it follows: in employment relationships the employer, self-employed persons and legal entities receiving state aid, those who provide services or sell goods open to customers and those who make a proposal to persons not previously selected to enter into contract or invite such persons for tender in respect of the particular relationship. The scope of the Act does not extend to family law relationships, relationships between relatives, relationships directly connected with the activities of religious life of legal entities of the churches, social organisations, relationships between the members of legal entities and organisations without a legal entity and relationships related to membership, as in such relationships the authorities have no competence.

Observing cases not falling in the scope of Etact, it is also important to mention the institution of favouring, in other words *positive discrimination*. If disadvantaged, discriminated groups are formally treated equal in every event and are ensured the same rights as the majority, their disadvantage will be conserved and their advancement will not be promoted. In order to decrease or end their disadvantage deriving from their state, positive measures are necessary, which is principally the duty of the state. Accordingly, Article 11 (1) declares: „The measure aimed at the elimination of inequality of opportunities based on an objective assessment of an expressly identified social group is not considered a breach of the principle of equal treatment.”

The explanation of Etact declares that „measures promoting equal opportunities formally violate the principle of equal treatment for putting persons at larger advantage compared to other persons.” According to the Constitutional Court, however, „the prohibition of discrimination does not assume that every discrimination, including a discrimination that ultimately aims at a larger social equality, is prohibited. When a social objective – which does not conflict with the Constitution – or constitutional right can be enforced only if equality (in the narrow sense of the word) is not accomplished, then such positive discrimination cannot be characterized as anti-constitutional.

The regulation of prohibiting discrimination in employment

Regulating the prohibition of negative discrimination in employment and the labour market appeared relatively early in both domestic and foreign legal systems. (Presumably the interest of the state and society plays a role, too, namely that the support of disadvantaged, discriminated groups is extremely costly, therefore their successful integration to the labour market is also a significant economic interest.)

Reviewing the regulation of the European Union earlier, we saw that the Community formed a separate directive related to discrimination in employment (Council Directive 2000/78/EC).

As it was also mentioned above, before Etact came into effect the most advanced anti-discriminative sectoral regulation in Hungary was included in the Labour Code. (This law was the first to establish a provision on indirect negative discrimination, to apply the reversing of the burden of proof etc.)

Article 70/B of the Constitution of the Republic of Hungary declares: „(1) In the Republic of Hungary everyone has the right to work, to the free choice of employment and occupation. (2) Everyone without any discrimination has the right to equal pay for equal work.”

Chapter 3 of Act No. 125 of 2003 on Equal Treatment and the Promotion of Equal Opportunities contains a regulation of the principle of equal treatment related to particular fields, including the field of employment. „Article 21. It is considered a particular violation of the principle of equal treatment if the employer inflicts direct or indirect negative discrimination upon an employee, especially when the following provisions are made or applied in:

- a) access to employment, especially in public job advertisements, hiring, and in the conditions of employment;
- b) a provision made before the establishment of the employment relationship or other relationship related to employment, related to the procedure facilitating the establishment of such a relationship;
- c) establishing and terminating the employment relationship or other relationship related to employment;
- d) relation to any training before or during the work;
- e) determining and providing working conditions;

- f) establishing and providing benefits due on the basis of the employment relationship or other relationship related to work, especially in establishing and providing wages;
- g) relation to membership or participation in employees' organisations;
- h) the promotion system;
- i) the enforcement of liability for damages or disciplinary liability.

Special circumstances do occur, when it is justified for the employer to differentiate between employees on the basis of their situation, characteristics, attributes, therefore the law makes exceptions, defining the events when the principle of equal treatment is not violated.

- a) „a) the discrimination is proportional, justified by the characteristic or nature of the work and is based on all relevant and legitimate terms and conditions, or
- b) the discrimination arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.”

Apart from Etact the Labour Code naturally also declares the principle of equal treatment. „Article 5 (1) The principle of equal treatment must be observed with respect to employment relationships. (2) The consequences of violating the principle of equal treatment must be treated appropriately, and it cannot entail the violation or impairing of the rights of other employees.”

Forums of remedy

When judging the legal system of a country or the effectiveness of a regulation, it is a primary question, how the rights and legal institutions are protected, what means and forums are available for the person suffering the violation to enforce his/her rights.

Article 70/K of the Constitution declares a distinguished right regarding remedy: „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.”

Regulating negative discrimination our Constitution briefly records in connection with right enforcement that „negative discrimination is severely punished by the law.” The obvious conclusion of the short definition is that the Constitution makes it the legislator’s task and duty to work out the forums of remedy and an effective system of sanctions regarding negative discrimination.

Although the act on equal treatment formed a consistent and coherent regulation of material law with respect to negative discrimination, the available forums of remedy and the system of sanctions are still various and ramifying. For the violation of the principle of equal treatment – apart from Etact – a great number of sectoral laws provide authority to various bodies of public service. The most significant forums of remedy are the following:

- Equal Treatment Authority
- Labour Inspectorate
- Consumer Inspectorate
- Offence Authority
- Parliament commissioners (ombudsmen)
- Court

Equal Treatment Authority

Etact records that enforcing the principle of equal treatment is regulated by the Equal Treatment Authority as a body of public service with a nationwide authority (on the Equal Treatment Authority and detailed rules of its procedure see Governmental Decree 362/2004. (XII.26.)). „In the event of violating the principle of equal treatment, based on an application from the party whose rights have been violated or in cases defined herein, the Authority shall conduct ex officio an investigation to establish whether the principle of equal treatment has been violated. If the violation of the principle of equal treatment is proved by the investigation, it shall apply a legal consequence determined in the act. To protect the rights of persons and groups whose rights have been violated, the Authority may apply the right of claim enforcement in the public interest, and initiate a lawsuit in the field of labour or personality protection law. During the investigation the persons or entities under investigation must prove that they complied with the principle of equal treatment or they were not compelled to observe it with respect to the certain relationship. If the Authority establishes that the principle of equal treatment has been violated, it may:

- order that the situation constituting a violation of law be eliminated,
- prohibit the further continuation of the conduct constituting a violation of law,
- publish its decision establishing the violation of law,
- impose a fine from fifty thousand to six million Forints,
- apply a legal consequence determined in a special act.” (On the Authority: www.egyenlobanasmod.hu)

III. Knowledge of the act

In order that employees shall be able to use their rights, they must be aware of them. In the Member States of the European Union the anti-discrimination campaign between 2003 and 2007 had that purpose, too. In 2004 the campaign focused on discrimination at workplaces, since according to researches most Europeans believe that a person's ethnic origin, religion, disability or age can be a barrier at employment in spite of the same qualification. The campaign applied numerous means of communication to deliver its message to the target audience (authorities, trade unions, organizations of the employers, civil organisations, media), besides, the potential victims of discrimination were supplied with sufficient information. The European „umbrella campaign” was accompanied with various happenings, seminars, forums etc. National actions – tailored to local demands – were established by national workshops. The workshops included civil organizations, representatives of ministries and social partner organizations, as the campaign was focused on discrimination at workplaces. (European campaign „For diversity. Against discrimination.”)

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