

Valéria Kiss

Consumer segregation in the ‘public’ private sphere

*Equal treatment requirements in Hungary, especially the access to goods
and services marketed by private service providers*

PhD dissertation theses

Supervisor:

Zoltán Fleck PhD

professor, head of department

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I. A short summary of the research project

The subject of my thesis is the enforcement of the requirement of equal treatment in access to goods and services. This topic, although it is only a small slice of life situations affected by anti-discrimination law, is in itself a very diverse one, as there are different typical problems for different vulnerable groups. This can include the issue of accessibility in the private sector, the exclusion of persons belonging to ethnic minorities from some entertainment venues and shops, and gender-related and age-based discrimination regarding certain financial services.

The sociological significance of non-discrimination in the provision of services and the distribution of goods lies in the fact that the prohibition of this kind of discrimination is perhaps where anti-discrimination law gets the closest to the everyday life of individuals. There are services that are linked to significant life events and decisions, but my interest was raised by the bagatell, everyday aspects of consumption discrimination. Here one can assess the possibilities of overcoming the systemic discrimination in our behavior and culture with the means of law. This is why I have excluded access to financial services from the sociological analysis, as these matters are not considered to be commonplace, are significant to consumers, and on the providers' side the discriminatory decision and behaviour is evidence-based and rational, at least seemingly. In my dissertation I deal in detail with the issues of anti-segregation based on ethnicity and the issues of accessibility.

The dogmatic significance of the research question lies in the fact that the prohibition of discrimination in private law relations seems irreconcilable with the principles of private law such as freedom of contract or freedom to dispose of property.¹ This makes the question significant from a legal dogmatic and legal theory point of view. From a theoretical point of view, the prohibition of discrimination in the public sector is not problematic, it is a constitutional, human rights principle arising from the basic requirements of justice that the state itself and its institutions are prohibited to discriminate against its citizens and other persons. However, intervening in the private sphere for the same purposes raises many more questions: is it possible for the state to intervene, what principles and proof justify this intervention, is such regulation effective or under what conditions can it be effective.

¹ MENYHÁRD Attila (2006) Diszkrimináció-tilalom és polgári jog. [Prohibition of discrimination and Civil Law] *Polgári Jogi Kodifikáció*. No. 3., p. 8

The key to this topic is the question of enforcing human rights in the private sphere. There are a number of similar regulatory areas, such as labor law, 'interventions' in family relationships (eg in the case of domestic violence), consumer protection.

I consider it important to analyze the ideological nature of the principles of private law and human rights in my dissertation. In my view, the prohibition of discrimination in private law as a formless, undeveloped area shows the clash of liberal and emancipatory-paternalistic argument, which is typical of all the above-mentioned areas of law. Therefore, in the legal theory analysis, I rely heavily on the findings of critical legal theory.

II. A brief description of the analyses and research performed, methodology

The thesis consists of three pillars. In the first part I examine the theoretical issues related to the topic, in the second part I analyze the legal regulation and the forum system, while in the third part I carry out the socio-juridical analysis of the above mentioned topics. In the first and second part I use the traditional methods of legal dogmatic and jurisprudence research, and I approach the question through the analysis of narrative life history interviews in the legal sociological study.

In the first part, I outline the critical social and legal theory background on which the analyses in my thesis are based. In this section I deal with the concept of discrimination and the importance of consumption in postmodern societies. Key issues in this section are the critique of the doctrine of contractual freedom and the analysis of the specific justice problems raised by discrimination law.

The second part focuses on Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities. This part contains a contextual analysis of the relevant rules of the Act and the operation of the Equal Treatment Authority (ETA). I look at the Hungarian rules in the context of EU law and the functioning of ETA in the context of the forum system available to complainants. In my thesis, I analyzed the development of the Authority's activities in the years since its establishment based on the data published by ETA. I compared these data with the picture from the Authority's regulation. Pursuant to Directive 2000/43/EC on Racial Equality, the Member States of the European Union had to set up similar bodies, so I also compared the regulation and practice of ETA with those prevalent in the EU.

This section also lays the foundation for the third, in which I investigated two typical cases of consumer segregation in the public sphere, the denial of service due to the consumer's Roma origin, and the lack of accessibility. In this part of the dissertation I performed a second analysis of narrative life history interviews conducted in a previous research. I sought to find out how the

experiences of discrimination appear in the life history of Roma and disabled interviewees, especially the extent to which they reflect the discrimination they have experienced in everyday life. I have compared these findings with the data provided by ETA on the number of cases dealt with by the Authority and the published ETA case law in these areas. In order to get a fuller picture of the jurisprudence, I also included an analysis of publicly available court judgments in the analysis.

III. Short summary of scientific results, utilization, possibilities of utilization

One of the results of the dissertation is the presentation of a less well-known and applied law theory approach in Hungary and a critical analysis of the doctrine of contractual freedom.

Critical legal theory

In the analysis of the doctrine of freedom of contract, I primarily try to utilize the viewpoint of critical legal theory, but since it is not a well-known legal theoretical approach in Hungary, it is also necessary to present the critical legal theory itself.

Critical legal studies (CLS) emerged in the United States from the left-wing movements of the 1960s, 70s, such as the Black Civil Rights Movement and the antiwar protests related to the Vietnam War. The beginning of the CLS movement is traditionally linked to the Conference on Critical Legal Studies, which took place in 1977.² The roots of CLS are twofold. On the one hand, it is strongly linked to the legal realist school, which in the 20s and 30s radically renewed the legal theory in the United States. On the other hand the left-wing social theory sources, especially the views of Marx, Gramsci, Lukács and Frankfurt school members. In addition, postmodern social theory had a significant impact on CLS scholars.

The CLS is a diverse trend whose followers do not form a school in the traditional sense, but their position is the same on some fundamental issues.³ One such common point is the idea of undetermined legal decisions. There are two sources of this indeterminacy. On the one hand, the rules in force are in many cases contradictory, unclear, contain gaps. Critics, like legal realists, argue for the extreme uncertainty of law, that is, law is always contradictory, even in simple cases.

The specificity of legal reasoning is that equally strong legal arguments can be raised by the

² CHAYES, Abram – FISHER, William – HORWITZ, Morton – MICHELMANN, Frank – MINOW, Martha – NESSON, Charles – RAKOFF, Todd (n. d.): Critical Legal Studies Movement. *The Bridge* (Retrieved December 27, 2018 from <https://cyber.harvard.edu/bridge/CriticalTheory/critical2.htm>)

³ WACKS, Raymond (2006) *Philosophy of Law. A Very Short Introduction*. Oxford University Press, p. 96.

opposing parties, and the law itself does not provide an indication of which argument is stronger, which one should be adopted. Another reason for indeterminacy is as Duncan Kennedy in his widely cited article⁴ explains that law consists not only of (contradictory) rules, but is a system of rules and principles. In the legal arguments used in American private law disputes, Kennedy identifies two clearly distinct and contradictory underlying sets of principles. One is the reference to the rules, which is justified by the need for legal certainty, predictability, and thus the courts can support decisions that follow previous precedents. The other is the reference to principles ("standards"), which is justified by the requirement of fairness and justice, and by which courts can make use of an exception to the rules.⁵ Kennedy's argument is based on the intertwining of the form and content of the argument, and drives the indeterminacy to the fundamental contradiction of individualistic and altruistic values.

The criticism of the neutrality of legal reasoning is another important foundation of CLS. Kennedy's article is not only about applying the indeterminate thesis, but is also a good example of CLS supporters rejecting the separation of content and form. Political conflicts and power conflicts in society are indeed translated into the specific language of legal argumentation, but legal reasoning as a form is only seemingly neutral and autonomous, in fact preserving its political character. This thesis is called CLS's anti-formalism by Wacks.⁶

The members of the critical legal theory movement agree that law is inherently political, a thesis dubbed in the phrase „law is politics”. The thesis of indeterminacy may be somewhat misleading as CLS scholars do not claim that the decisions of individual courts or authorities are random and unpredictable.⁷ On the contrary: it is very predictable that the interpretation of the law adopted by the court in question, the decisions of the law enforcement authorities, will benefit those who are already in a privileged position: those with greater economic and political power and, in the case of later critical trends derived from CLS, members of some privileged social groups: men, whites, heterosexuals, or able-bodied and mentally healthy people. One of the basics of the critical examination of the legal system is to assess how the perspective of privileged groups becomes the neutral point of view, the norm in the operation of law. The purpose of CLS research is to explore these structural injustices and to uncover how the apparently neutral legal system contributes to

⁴ KENNEDY, Duncan (1976) Form and Substance in Private Law Adjudication. *Harvard Law Review*, Vol. 89 p. 1685–1778.

⁵ KENNEDY: Form and Substance ... p. 1702-1710.

⁶ WACKS: *Philosophy of Law* ... p. 96.

⁷ CHAYES et al.: Critical Legal Studies Movement

maintaining social injustices. It involves examining how law counteracts political contradictions, contributes to making the various forms of oppression self-evident to those involved, oppressors and oppressed alike. In the description of this phenomenon, CLS researchers relied on Western Marxist foundations, such as Gramsci's concept of hegemony,⁸ interpreted law as a manifestation of hegemonic consciousness, and Georg Lukács's and the Frankfurt School scholars' analysis of reification.⁹

Freedom of contract and non-discrimination

The prohibition of discrimination regarding the access to services restricts the providers freedom of contract because it excludes certain aspects from the scope of discretion. The purpose of this is to increase the contractual freedom of persons belonging to vulnerable groups to the level where they can access services under the same conditions as others. In other words, it is a freedom-limiting principle from the viewpoint of the service provider, while practically increasing freedom for the consumers, as they can take advantage of services that would otherwise not be provided or would be more expensive for them than for others. However, since this merely means that personal traits that are not relevant regarding the service in question cannot be taken into account, this does not create any privilege over others.

The cases of paternalist restriction of contractual freedom must be separated from the enforcement of the antidiscrimination principle, since it does not limit the self-harm of the individual. But it is still a limitation of the freedom of contract, and the reasons for the intervention are clearly moral which needs justification. At present, the concept of social justice in the Member States of the European Union states that the refusal to provide services based on characteristics such as gender, age, ethnical or racial background, sexuality, disability or religion is morally unacceptable, violates human dignity, and therefore the contractual freedom of service providers does not cover these aspects, the prohibition of discrimination limits the freedom of partner choice.

⁸ In Gramsci's interpretation of hegemony, it is „[t]he »spontaneous« consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group". The hegemonic function in Gramsci's interpretation was linked to civil society ("private" organizations), while the political society or state (and the related legal system), was a force that “»legally« enforces discipline on those groups who do not »consent« either actively or passively”. (GRAMSCI, Antonio (1971): *Selections from the Prison Notebooks*. [Edited and translated by Quintin Hoare and Geoffrey Nowell Smith] International Publishers, p. 12.

⁹ LUKÁCS, Georg (1972): *History and Class Consciousness. Studies in Marxist Dialectics*. [Translated by Rodney Livingstone] The MIT Press, HORKHEIMER, Max – ADORNO, Theodor W. (2002): *Dialectic of Enlightenment. Philosophical Fragments*. [Translated by Edmund Jephcott] Stanford University Press

According to Kennedy's typology,¹⁰ enforcing the requirement of equal treatment is a case of limiting contractual freedom for distributive reasons. Consumers would like to enter into a contract, but they usually do not have the opportunity to do so, the typical consequence of discrimination is the lack of contract, rarely they can contract on worse terms. The solution to the first situation is the imposition of a contractual obligation, in which case if the parties cannot conclude the contract, the court may establish the contract and determine its content. This solution, however, can only be applied in exceptional cases, the obligation to contract may be prescribed by law (Section 6: 71 of the Civil Code). And for the second situation, the solution for those affected is that the discriminatory clause is considered void (Section 6: 114 of the Civil Code).

In the cases examined in the thesis, according to the terminology of the Civil Code, consumer contracts are (not) concluded. The Section 8: 1 of the Civil Code states that the consumer is a natural person acting outside his trade, self-employment or business, while the undertaking is a person acting in the course of his trade, profession or business. Consumer contract is a contract between a consumer and a business.

Cases of obligatory contracts are defined by law. This issue is regulated in the Chapter XIII. of the Civil Code. Cases of obligatory contracts in market economy conditions are considered exceptional, as it is phrased in Commentary of the Civil Code: "Under market economy conditions, the obligation to contract is primarily required in areas where the balance of demand and supply and therefore healthy competition between market participants is amiss due to the lack of economic conditions."¹¹ Besides the efficiency argument distributive reasons also appear in the field of compulsory liability insurance. The Section 6:72 of the Civil Code states that in the event of abuse of a dominant position by one of the parties, the other party may require the court to establish the contract between them. However, beyond market monopolies, complainants may not expect such protection. As Attila Menyhárd explained in his paper, apart from the cases of market exclusion, if the victims of discrimination can obtain the goods or can access the service elsewhere, there is no particular point in making the contract obligatory. "If the injured person can choose a different solution (because it is not a monopoly position but a market situation), then he / she is not expected to enter into a contract with the person who refused to enter into the contract once, so she can hardly expect a willingness to cooperate."¹² According to Menyhárd's analysis, the restriction of

¹⁰ KENNEDY, Duncan (1982) Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power. *Maryland Law Review*, Vol. 41. évf. No. 4. p. 563–658.

¹¹ VÉKÁS Lajos – GÁRDOS Péter (eds.) (2014) *Kommentár a Polgári törvénykönyvről szóló 2013.évi V. törvényhez*. [Commentary of the Act V of 2013 on the Civil Code] Wolters Kluwer

¹² MENYHÁRD: Diszkrimináció-tilalom ..., p. 14.

contractual freedom due to the prohibition of discrimination has two cases where the restriction can be solved by traditional legal institutions. In addition to the solution to the above-mentioned cases of market monopoly, the distinction between private and public offering can be considered a legitimate reason for limiting the freedom of contract without problems: „This argument is based on the assumption that if [someone] [...] is publicly offering the service for everyone or anyone he can not differentiate between those who accept this offer.”¹³ With this in mind, it would be necessary to amend the regulation in the Act CXXV of 2003 and impose obligation to contract in the cases regulated by the Sections 5 (a) and (b).

According to Menyhárd, beyond these cases, it is justifiable to restrict contractual freedom by referring to the prohibition of discrimination if it entails the exclusion of those concerned in the market, ie if they cannot obtain the goods or services from elsewhere. However, in Menyhárd's argument, there is a warning about the dangers of market interference: "the norms of private law tailored for two-person relationships can be used to express and enforce social goals, but long-term effects can no longer be coordinated and costs cannot be deployed."¹⁴ This critique emphasizes that the elimination of discrimination is a complex social and legal issue, and only solutions that take into account the complexity of the situation can be successful. However, considering the importance of the social problem, it is by no means a good idea to abstain from intervention.

As for the market exclusion test, although it offers an elegant solution to the situation, it entails questions that the author does not answer. What does it mean to be able to obtain goods or services elsewhere? In the example of Menyhárd, if one of the shops refuses the consumer, but he can move to the next one, there is no market exclusion. If the quality and price of the goods or services are similar, we could add. What is the difference in terms of market exclusion? If the discriminated person does not have a problem with the higher price or the worse quality, the smaller choice, then there is no market exclusion? How much discomfort should the complainant tolerate, how much more should he travel, how much more money and time should they spend than others to get the „same” service? And above all: how can we justify that these costs should be deployed to the member of a social group which already suffers from economic and cultural injustice instead of the business which behaves in a discriminatory way?

In addition, the market exclusion test is a variant of the centuries-old „separate but equal” principle, and similar arguments can be raised against its application here, as suggested by the United States Supreme Court in 1954 in *Brown*. In short: separate is never equal. In a society such as ours,

¹³ MENYHÁRD: *Diszkrimináció-tilalom ...*, p. 11.

¹⁴ MENYHÁRD: *Diszkrimináció-tilalom ...*, p. 13.

characterized by hierarchy and oppression between groups, in which the intergroup relations are defined by differences of political and economic power, segregation involves the expression of the lower order of the one group, their humiliation. The law cannot legitimize these situations by arguing that it is difficult to make a regulation that would be a good solution on the long run. The problem cannot be simplified to a market question, but it is also difficult to answer the market question, as I tried to show the above dilemmas.

Discriminatory contract terms are in violation of the law, since both the Civil Code and the special regulations such as the Act 125 of 2003 prohibit discrimination and poses the requirement of equal treatment. According to the general rule of the Civil Code contracts which contravene the law are null and void if the law does not impose other legal consequences. In determining whether the entire contract is invalid or only the discriminatory clause, the rules of partial nullity are applicable (Section 6: 114 of the Civil Code). If the consumer contract contains a discriminatory clause, partial invalidity may be used, which states that if the ground of invalidity concerns a specific part of the contract, the legal consequences of the invalidity shall apply to that part of the contract. According to Section 6: 114 (2) of the Civil Code, in the case of consumer contracts, the whole contract is only terminated due to partial invalidity if the contract cannot be performed without the invalid part.

If the terms of the contract distinguish between consumer groups on the basis of a protected characteristics, it should be examined in the light of the Act 125 of 2003 whether this clause is discriminatory, that is to say, whether it is possible to justify the prima facie discriminatory term. If the case does not entail restriction enjoyment of a fundamental right of the complainant the general reason for justification that the discriminatory term has, according to objective consideration, a reasonable cause relating to the legal relationship in question (Section 7 (2) (b) of the Act 125 of 2013). The possibility of referring to a reasonable cause opens up a broad field of interpretation for law enforcers, one of the weakest points of the law. This is also evident in this area. Stereotypes about differences between consumer groups may also be accepted by the authorities in some cases as reasonable causes for discrimination. But one must take into account that there are significant examples in which statistically verifiable differences linked to vulnerable characteristics affect the provided service.¹⁵ In the two cases discussed in detail in my dissertation, namely the refusal to serve the Roma people and the issues of accessibility, it is often raised as a reasonable cause for discrimination that the clearance of physical and other obstacles would be costly or that the presence of Roma consumers would deter others and eventually would lead to the closure of the

¹⁵ In some cases, the law itself prohibits taking into account such differences, eg. unisex insurance premiums are required by Section 30/A of Act 125 of 2003.

shop or entertainment venue. Obviously, if the authorities or courts accept this reasoning, it makes impossible in the long run to eliminate discrimination in these areas. However, if we do not accept real, verifiable costs in a particular case, how do we justify this in a consistent way? The application of the rule of justification becomes completely uncertain in the case law. Therefore it would be advisable to define the general cause of justification more precisely in the Act 125 of 2003.

Equal Treatment Authority

The Equal Treatment Authority was established in 2004 and started its operation on 1 February 2005. The date is telling: the establishment of the Authority, as well as the adoption of the anti-discrimination code, was linked to Hungary's accession to the EU, the implementation of the anti-discrimination directives as part of the *acquis communautaire*. Article 13 of the Racial Equality Directive¹⁶ requires Member States to designate a body „for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin". As regards the competence of these bodies, compliance with the Directive does not require the establishment of an independent body, but it must be ensured that the national body responsible for the promotion of the fight against racial discrimination can conduct independent surveys and enjoy independence in publishing its reports and recommendations; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination. The Employment Framework Directive¹⁷ does not contain a similar provision, but Article 12 of the Goods and Services Directive¹⁸ does, and it allowed Member States to transpose this provision until 21 December 2007. In order to comply with the directives, therefore, equality bodies had to be set up across Europe. Of course, human rights bodies have already existed in many Member States, so they could meet the implementation requirements by modifying their powers and adapting them to the requirements of the directives.

Following these provisions, Member States have a considerable margin of appreciation in determining the legal status and powers of these bodies, thus creating a diverse institutional network. But still, the mere existence of a European network of these bodies allows for continuous

¹⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

¹⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

¹⁸ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

cooperation, exchange of experience and comparative research. The European Network of Equality Bodies is the Equinet, which provides a framework for communication between bodies, organizes training and research.¹⁹

In different Member States, these bodies operate in a variety of forms and powers, as described above. Most Member States have exceeded the requirements of the Racial Equality Directive and have set up a body that deals not only with victims of racism but also with other minority groups. Although there are advantages to this solution, it also raises problems. Most of the institutions responsible for promoting equal treatment in Europe are more or less suffering from the fact that funding and staff numbers are not proportionate to the number and diversity of tasks. One of the possible consequences of this is that the organization may not be able to meet the procedural deadlines prescribed for it. With this, one of the main advantages of the assistance provided by these institutions is lost compared to lengthy court proceedings. Another possible solution is deliberate or random cherry-picking, which results in a different level of legal protection for similar offenses, which is in itself discriminatory.

There are currently 46 such bodies in 34 countries in Europe (in addition to the EU Member States, Norway and Iceland, as well as some candidate countries, including Albania, Montenegro and Serbia, have already established bodies in line with the directives). The competence of the Hungarian authority is exceptionally wide. In addition to the 19 protected characteristics specified in Section 8 of Act 125 of 2003, any other situation or individual attribute may be covered. The authority and courts can continuously, dynamically expand the range of protected characteristics according to the context of the case and the changes perceived in society. In most countries where an equality body operates, the scope of the protected characteristics covered by its competence is much narrower and cannot be extended by that body itself. With such a broad scope, the above-mentioned problems (lack of adequate funding and staff) can become particularly burning.

There are two main types of bodies responsible for promoting equal treatment: tribunal-type and promotion-type. The powers of the former type of bodies include conducting inquiries in discrimination complaints and deciding the cases, while promoting institutions provide legal advice and representation to victims of discrimination to successfully bring their case to the appropriate forum and receive legal satisfaction there. Supporting bodies also have an important role to play in assisting obligors, such as employers and service providers, conducting research,

¹⁹ See <http://www.equineteurope.org/-About-us->

issuing recommendations, organizing general and group-specific campaigns to raise awareness of the importance of equal treatment and the prevalence of discrimination.²⁰

The Hungarian regulation did not choose between the two models. The Equal Treatment Authority, in a rather unconventional manner, according to the statutory regulations, possesses powers specific to both types of organs, according to the Sections 14 (1) and 18 (1) of the Act 125 of 2003. With the above mentioned range of protected characteristics which is also very wide in European comparison, this generous regulation raises further concerns. In this case, however, not only a quantitative problem may arise, but also that the full exercise of powers would result in a role conflict. It is clear that tribunal and promotion-type bodies need to develop a very different profile towards complainants, obligors and courts.

In the first case, it has to consider the argument of both parties impartially and thoroughly, before making a decision. In the case of promotion-type bodies, the institution should clearly be on the side of the complainants, the presumed victims, and that the pre-screening of the cases should be as loose as possible, in order to bring as many cases as possible to the relevant decision-making forum and the equality body should act proactively to find cases. In addition to the obvious difference, the relationship between tribunal-type and promotion-type bodies and the courts and other authorities, and their position in the public law system is completely different in legal and sociological terms. Promotion-type bodies do not compete with the courts, but above all "deliver" cases to them. Finally, while tribunal-type bodies primarily inform the public institutions, employers, service providers and other actors in the private sector about the non-discrimination requirements through their case-law, promotion-type bodies can approach obligors more casually and directly.

The abundance of powers is, of course, a fundamentally positive feature of Hungarian regulation, and it would certainly be possible to reconcile the broad powers of the Hungarian authority if sufficient financial resources and staff of sufficient number and variety were available. However, ETA does not have enough resources to fill the space opened to it by the law, and as a result, refrains from the promotional role from the start of its operation, does not represent victims before courts and focuses on the performance of tribunal-type functions. It would be possible but the Authority does not carry out either individual or comprehensive investigations on its own initiative in the public sector, it is more reactive than initiating.

²⁰ AMMER, Margit – CROWLEY, Niall – LIEGL, Barbara – HOLZLEITHNER, Elisabeth – WLADASCH, Katrin – YESILKAGIT, Kutsal (2010) *Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC*. Human European Consultancy – Ludwig Boltzmann Institute of Human Rights, p. 8, and CHOPIN, Isabelle – GERMAINE, Catharina (2016) *A comparative analysis of non-discrimination law in Europe 2016. The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey compared*. Luxembourg: Publications Office of the European Union, p. 108-114

Although this “self-restraint” is rational and, moreover, given that the responsibilities defined by the legislator are not in line with the provided resources, it is necessary, yet unlawful, given that the exercise of powers by the authority is the responsibility. This is not at all unique among the institutions responsible for promoting equal treatment in Europe. According to a report published in 2010, most institutions suffers from a lack of resources, at least according to their own perception, but there are extreme cases in which it is obvious that resources are not in line with the tasks.²¹ However, in the case of ETA, as is evident, this is not the only problem: the legislator has also given the specific powers of the tribunal-type and promotion-type bodies, which is an inherent role conflict. Of course, it would be the legislator's job to resolve this. Based on the experience of the operation so far, it would not be useless to reconsider the role of ETA in the Hungarian legal system. In addition, the Authority could manage the relatively scarce resources if it acted on a clear and transparent strategy.²² In addition to clarifying whether there is a need for a tribunal-type body in the Hungarian legal system, or rather for one that effectively helps victims in enforcing their fundamental rights before the courts, it is also an important question how the Authority can handle all its responsibilities and help complainants from protected groups with very different vulnerabilities with the same high professional standards.

Analysis of ETA case-law²³

The number of complaints received by the Authority in the first years rose steadily between 2005 and 2007, then fluctuated around 1000-1500 per year. This relatively high figure fell to around 800

²¹ The staff of the Slovenian equality body consisted of one civil servant, while the Estonian, Latvian, and Luxembourg staff consisted of two members in 2010. The report mentions Hungary as a less extreme example, saying: "the Equal Treatment Authority does not have the resources to conduct any other activities besides investigating individual cases". (AMMER et al.: Study on Equality Bodies ... p. 124.). At the same time, it was not entirely true even in 2010: the Authority was able only to investigate the individual cases from the sources received from the Hungarian budget for the complainants who turned to it, but from EU funds (TÁMOP – 5.5.5 / 08/1 Combating Discrimination - Social Awareness Raising and Strengthening Authority Work) between 2009 and 2014 has expanded its scope of activity by conducting research, building up a network of county rapporteurs, training for the authority's staff and improving communication and visibility. (Equal Treatment Authority: TÁMOP project. Project materials are available at http://www.egylobanasmod.hu/hu/tamop_projekt.)

²² The importance of strategy-making was also highlighted in the FRA's 2010 report on national human rights institutions: “In order to make the best use of their resources, NHRIs often establish strategic plans that focus their work on human rights that are considered to have been overlooked or inadequately enforced.” Fundamental Rights Agency (2010) *National Human Rights Institutions in the EU Member States. Strengthening the fundamental rights architecture in the EU I*. Publications Office of the European Union, p. 53-54. or see AMMER et al.: Study on Equality Bodies ... p. 70.

²³ The practice of the Authority is reviewed on the basis of the reports it publishes, which can be found on the ETA website (<http://www.egylobanasmod.hu/hu/eves-tajekoztato>). The website of the authority is informative and has developed a lot in recent years, but the published statistical data are inconsistent and sometimes contradictory, which is not explained by the reports. Shortcomings in data collection result from this.

in 2014, but rose again in 2017. In 2012, according to the published report, a lot of complaints were received, but this peak is not explained. Overall, the number of complaints increases slightly during the period under review. When evaluating the data, we have to pay attention to the fact that ETA is a new institution whose public reputation was built up during the period under review. Based on representative surveys conducted by the Authority in 2010 and 2013, the visibility of the institution increased significantly between 2010 and 2013. “In the autumn of 2010, three out of ten people in the Hungarian adult population had heard of the existence of the Equal Treatment Authority (ETA). Two and a half years later, in the spring of 2013, their share rose to 46 percent, which can be seen as a significant change.”²⁴ Growth is significant, but it can not be attributed to those who are most vulnerable and less able to reach ETA, but especially to high-educated, high-educated respondents in the capital city. The awareness of the Authority among people living in small settlements, the elderly and those with lower education, has increased, but not to such an extent.

The low awareness of the institution may also prevent complainants from initiating proceedings in discrimination cases, but there are many other factors to this decision. The ETA itself filters a significant part of complaints. The proportion of cases closed with providing information and referral to other authorities that is, without substantive investigation remains high year by year. According to published data, in the period 2005–2011, the number of cases in which the authority closed the case with information letters was around 40%, and between 2013 and 2017 this rate increased to around 70%. This is a very significant change. On the basis of the available research data, the awareness of the Authority and the legal background has increased between 2010 and 2013, and although no similar surveys have been conducted in later years, the Authority's reports also suggest that year after year, there has been an increase in awareness. In the following years, the Authority confines itself to releasing statistical data in its reports, without analyzing the experiences, impressions of their evolution, and, in addition to the aforementioned research, no further surveys have been carried out on this subject. It is possible that this trend has stopped, but the increase in the proportion of unfounded complaints can also be interpreted as the filtering role of the Authority has been strengthened, and this is may also have been perceived by the complainants.

²⁴ NEMÉNYI Mária – FERENCZ Zoltán – LAKI Ildikó – SÁGVÁRI Bence – TAKÁCS Judit – TARDOS Katalin –TIBORI Tímea (2013) *Az egyenlő bánásmóddal kapcsolatos jogtudatosság növekedésének elemzése 2010–2013 között – fókuszban a nők, a romák, a fogyatékos és az LMBT-emberek, Egyenlő Bánásmód Hatóság TÁMOP-5.5.5/08/1 projekt.* [Analyzing the growth in awareness of right to non-discrimination between 2010–2013 - focus on women, Roma, disabled and LGBT people, Equal Treatment Authority TÁMOP-5.5.5 / 08/1 project.] Egyenlő Bánásmód Hatóság (Retrieved on 8 January 2019 from http://egyenlobanasmod.hu/sites/default/files/kiadvany/EBH_7_kiadvany_Final_20130619.pdf webhelyről.), p. 70.

This is also supported by the fact that the number of complaints received has decreased significantly in the meantime.

In the first 12 years of the Authority's operation, the number of decisions finding violations has been relatively evenly around 30 per year, leading to a negative decision of around 100. This is the second major step in filtering by ETA. Comparing this with the number of incoming complaints and the low number of complaints the ETA accepts, it further reinforces the picture outlined above that the Authority strongly filters incoming complaints, and this practice can be discouraging overall for possible complainants and diminish their trust in the institution. The high number of terminating decisions due to the inactivity of the complainant or because he or she expressly requests termination of the investigation also supports this interpretation of the data. Both cases indicate that the complainant has, in the meantime, either lost hope in meaningful assistance from the procedure and/or otherwise resolved the case. Although in these cases it may be conceivable that the involvement of the Authority has contributed to satisfactorily settling the relationship between the parties and the complainant, the high number of discontinued procedures is more likely to indicate a disruption in the functioning of the authority. Most of the incoming complaints are considered unfounded. Comparing the number of proceedings initiated and the number of rejection decisions shows that, in line with its institutional objective, ETA is trying to investigate all cases where there is a possibility of discrimination. The fact that there are so few judgments in which it finds violation can be attributed to a low level of legal awareness.

The relatively high number of settlements compared to the decisions is also two-faced data. In the interpretation of the Authority, reaching settlement is perhaps the most successful conclusion of the case, as the complainants, with the assistance of the Authority, have found a solution that is satisfactory for both parties, and the party subject to the proceedings has made commitments that are acceptable to the complainant. Considering also how cumbersome, if not impossible, the enforcement of the Authority's decisions on infringement, since the Authority does not have the means to monitor and enforce the implementation of its decisions, settlements are even more desirable. The best way to ensure that there is a meaningful change in the case is probably through „mediation” between the parties. Settlement requires the complainant's agreement, leaves the complainant's right of disposal in the case concerning him.

At the same time, the relationship between the parties in many discrimination cases is highly hierarchical, meaning not just the specific relationship of the parties, but mainly the broader social context that can be described as patriarchal, racist, as described above, in which the oppression of minority groups by a predominant majority continues. In such a situation, the possibility of reaching

a settlement and, in particular, the authority's explicit endeavor to reach a settlement, further weakens the position of the complainants, both in the procedure and in terms of the terms of settlement available. In the complainants, the impression may be that the Authority is tampering with the damage to them and does not provide effective protection when it encourages them to agree with the person who caused the injury. Therefore, it is difficult to say in general terms whether a settlement is a good or a bad tool in combating discrimination. It can be added that in cases where the complainant and obligor have been balanced, it may be worthwhile to resort to this tool, since the benefits described above will prevail. This is most true of cases brought to the authority when, recalling the typology of Galanter,²⁵ there are repeat players facing each other, typically in cases that have been initiated on the basis of public interest claims, or where both parties are unpracticed „one-shooters" and their social status is close to each other.

Overall, the analysis of ETA's practice shows that, in order to fulfill the institutional role of specialized legal protection, it would be necessary to increase its visibility among the most vulnerable groups and consciously seek to reduce the double filtering process. Only around 3% of the complaints received by the Authority have led to an violation decision in recent years, the Authority should aim to raise this proportion through analysing and adressing the causes of such low efficiency.

The Equal Treatment Authority's decisions on discrimination in the provision of services are examined between 2005 and 2017 in the thesis. Since its inception, the Authority has published on its website anonymously the cases it considers relevant. One of the aims of this is to inform the stakeholders of the Authority's established case-law, this selection can not only address the victims, potential complainants, but also the obligors, lay people, the media, and the professional audience. Throughout its decade-long operation, ETA is continuously shaping its profile, seeking its place in the Hungarian human rights scene, and the image created by the published legal cases plays an important role in this.

The number of published decisions on access to goods and services has risen sharply in the first years and has reached a much lower level since 2010, although in 2017 only 10 cases were published by the Authority. The exceptionally high numbers of 2008 and 2009 are partly explained by the fact that this year a non-governmental organization representing the interests of visually impaired people has initiated proceedings against several pharmaceutical companies because they

²⁵ Marc Galanter (1974) Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change. *Law & Society Review*, Vol. 9, No. 1, Litigation and Dispute Processing: Part One (Autumn, 1974), p. 95–160.

did not send Braille version copies of the product information provided by the manufacturer despite their request. A total of 19 such cases were initiated before ETA.

The decrease in the number of published cases can be justified by the fact that after the initial period, the case law of ETA does not raise many issues that are worth publishing. In order to judge this, it is worth taking into account the development of the Authority's caseload in the past few years. The evolution of the number of cases published may show that the practice of the Authority has stabilized in this field in recent years, with fewer decisions that ETA deems worth publishing. In addition, the ETA do not publish rejected complaints anymore. The reason for this may be that, as the knowledge of antidiscrimination law and the ETA's procedure grows, there are fewer typical legal cases that the authority considers necessary to share in this circle. What is still visible is the increase in the number of agreements. 2013 was the first year in which the Authority published more agreements than violation decisions regarding access to services, but for the time being it seems to be a lasting trend. This is in line with the conscious effort repeatedly made by the authority in the reports, which prefers reaching agreements, even against decisions finding violation, but the settlement is a two-armed weapon in the fight against discrimination, and it is not clear that this endeavor should be evaluated as a positive one.

Regarding the distribution according to the protected characteristics, in the 77 cases of service discrimination violations published by the ETA the grounds of age, disability and Roma origin constitute the three most numerous groups from year to year. This suggests that the authority perceives access to services and goods for these groups as a persistently important problem. Overall, around a quarter of the cases related to Roma origin, age and disability, respectively.

Three typical issues arise from legal cases and reports published by ETA in access to goods and services: exclusion of Roma people from entertainment venues and other public spaces, lack of accessibility and age barriers in access to financial services.

In the dissertation I analyze the first two types of cases in more detail,²⁶ relying on the practice of ETA and the courts. In the analysis of jurisprudence, I also discuss the social background of the phenomenon and the legal experience of those involved.²⁷

Refusal to serve Roma consumers

Although there is an increase in legal awareness, the simplest form of discrimination, open service denial (when the service provider simply writes or verbally states that "Roma are not served") appears from time to time in lawsuits published by ETA. There are cases where the obligor is aware of the prohibition of discrimination, therefore tries to improvise. In addition, typical strategies for denial of service are outlined in the case law published by ETA. Such is the linking of entry to a membership card or similar, or a reference to "dress code", "face control". Another characteristic reason is the reference to a private event. Even if they manage to get into, Roma buyers', guests' situation will remain uncertain, in line with Anderson's analysis,²⁸ the possibility of attack and humiliation always lingers in these situations. Examples of "gypsy moment" in legal cases published by the authority include:

A Roma lady living in a settlement in Fejér County turned to the Authority because she experienced discrimination in her local grocery store. According to the applicant, the manager of the store, referring to her Roma origin and that "the gypsies steal very often" called on her to present the contents of her bag at the cash desk, in public, and thereby violated the requirement of equal treatment. (ETA/602/2006)

Based on legal cases, racist service providers often use simple, direct tools to create and protect 'white spaces', which are designed to completely exclude Roma. The form of direct discrimination that serves Roma customers on different terms, when providers try to discourage Roma by pricing, are rare.

²⁶ I do not examine the issues of access to financial services in my thesis because it raises specific problems compared to the first two topics. Since my dissertation focuses on the analysis of discrimination that affects everyday life, I have ruled out the age or even gender barriers to equal access to financial services. Regarding these issues see especially Balázs Tókey (2015) *Az egészségbiztosítási szerződés* [The Health Insurance Contract] ELTE Eötvös Kiadó

²⁷ In the course of presenting legal knowledge, strategies and the everyday use of legal arguments I rely on the narrative life story interviews conducted in a research supported by NKFI in the Department of Legal and Social Theory of the ELTE Faculty of Law. The results of this research were published in Zoltán Fleck - Valéria Kiss - Fruzsina Tóth - László Neumann - Anikó Kenéz - Dávid Bajnok: *A jogtudat narratív értelmezése*. [Narrative interpretation of legal consciousness.] ELTE Eötvös Kiadó

²⁸ ANDERSON, Elijah (2015) „The White Space“ *Sociology of Race and Ethnicity*, Vol. 1. No. 1.

The few cases in the judicial practice reflect the above trends.²⁹ Four published judgments can be found in the Judgment Collection. The subject of one case was entering a fitness gym. The Court of First Instance dismissed the applicants' action by ruling that the plaintiff's evidence that the small size of the fitness room justified the current system that the gym could only be entered on the basis of a recommendation. The court accepted that this recommendation system was indeed working and could be accepted as an excuse. The Debrecen Court of Appeal ruled in the opposite direction in its second instance decision and granted non-pecuniary damages of 150000 HUF per person to the two claimants.

In another case, which was also preceded by a successful procedure before ETA (ETA/117/2012), the complainants, members of a group of friends, wanted to participate in the celebration after the 2011 Budapest Pride in a nightclub joining the Pride, but they were not allowed:

The defendant operates the [club] entertainment venue. Which is a club that is frequented by the [organization] community. Three of the claimants are of Roma origin, their financial situation and social status have deteriorated, they are members of the [organization] community. On the 17th of June, 2011, they took part in the [parade] 2011 event, and after the parade they wanted to participate in an event organized at the defendant nightclub joining the parade. The applicants arrived at the nightclub at 22:50, but they were not allowed to enter, the staff at the entrance asked for a membership card which the applicants did not have. While they were waiting they saw others entering the club without membership card, and when they complained because of this, the employees referred to dress code and face control. The claimants asked several people for help, including one of the organizers of the parade. There is no reference to face control or dress code on the club's website.

The court found the infringement in the same way as the authority, but only with regard to the three Roma applicants. As in the case of the fourth complainant, the court was not able to establish the Roma origin or other protected characteristic in the case, and the court took the view that it was unable to ascertain why they had refused his entry. It should be noted that the absence of a protected property in itself did not have to lead to rejection in this case. The court could have applied the notion of discrimination by association to judge the case, since the complainant was harmed by the

²⁹ I have used the cases published in the Collection of Court Decisions to review the judicial practice (<https://birosag.hu/birosagi-hatarozatok-gyjtemenye>)

friendly relationship with the persons with the protected characteristic.³⁰ The court awarded the claimants 500,000 HUF non-pecuniary damages.³¹

Accessibility

One of the most important group of service discrimination cases in the first years of the Authority's operation were the above mentioned cases initiated by an association for the representation of the interests of visually impaired persons against 19 pharmaceutical companies and distributors. Most of the complaints led to violation decisions or settlements. Public interest claims in these cases can be especially effective, because the cases of non-accessibility are easy to judge and it is easy to prove that a larger group of people who cannot be precisely defined are at risk (Act 125 of 2003 Section 20 (1)).

The service discrimination cases where the complainant is refused because (service) dogs are not allowed to enter the shops and restaurants are also typical. In addition, there are a number of published cases involving access to spa facilities. Another typical problem is the approach of pharmacies, due to the lack of physical accessibility or reasonable adaptation.

The judicial practice reflects the ETA case-law. For example, in a case, the Metropolitan Court is obligated to pay an enterprise a sum of 500000 HUF for non-pecuniary damage, because the applicant could not enter into the business with his guide dog:

The plaintiff is blind. On October 8, 2009, he attempted to enter the shop with his guide dog for weekend shopping. But the security guard of the shop was on his way and told him that the dog could not be brought into the shop. He did so despite the fact that the plaintiff drew attention to the fact that it was a guide dog, so no restriction could be applied. The plaintiff then contacted the main cashier, who confirmed the ban, so the applicant could not enter the store with his dog this time. As the plaintiff's girlfriend was present at the event, she carried out the necessary shopping, while the plaintiff waited with the guide dog outside the shop.

The court justified the determination of the amount of non-pecuniary damage as follows:

³⁰ The concept of discrimination by association was first applied by the European Court of Justice in *Coleman* (Case C-303/06, *S. Coleman v. Attridge Law and Steve Law*). In that case, the Court held that Directive 2000/78, and in particular Articles 1 and 2 (1) and (3) thereof, must be interpreted as prohibiting harassment not only against workers who are disabled. If it is proved that a worker is being harassed or faces unacceptable behavior and that harassment is based on the disability of the employee's child, whose care is largely carried out by the employee, such behavior violates the prohibition of harassment provided for in Article 2 (3). The concept of radiating discrimination has been applied by the European Court of Justice and the ECtHR in a number of cases such as *Škorjanec v. Croatia*.

³¹ Interestingly, the court justified the relatively high amount of compensation, inter alia, by saying that '... the plaintiffs intended to visit a club that was frequented by a minority community and which community they considered to belong to. They had to be disappointed in this.'

The court took the view that the violation had taken place and that its weight in itself justifies the amount of damage claimed by the applicant. Further evidence of this was found to be unnecessary by the court, as the amount is proportional to the violation. The court points out that violation of personal rights necessarily results in certain non-pecuniary harm to the injured person. This type of damage can never be proved by its full accuracy by its nature. In the present case, the humiliating nature of the infringement, the related publicity and the vulnerability of the plaintiff as a result of his disability is obvious, while taking into account all the circumstances together, the amount claimed is fully substantiated. Nor was there any need for a hearing of witnesses, and even the applicant's personal presentation was not necessary.

In this case, the court assessed the total amount of compensation claimed by the applicant.

Accessibility issues also arise in judicial practice. A major issue in accessing banking services is the accessibility of ATM machines (Fővárosi Bíróság 27.P. 29.062 / 2005/35). In this case, the court found the claim predominantly thorough and awarded both plaintiffs a compensation of 200,000 HUF for the inconvenience suffered and ordered the defendant to provide access to the ATMs.

Judicial practice and the approach of ETA are also characterized by the fact that by striving to investigate complaints thoroughly, these bodies seek to provide legal protection against discrimination. While it may be possible to criticize decisions made in certain cases, the biggest problem is the low number of procedures. In addition, the rules of distributed proof are practically non-existent. The complainants can count on success if they can prove that they have been discriminated against. In the published case one cannot find a case in which the court or Authority has ruled against the service provider because it was not able to falsify the prima facie evidence offered by the complainant. In order to systematically change this situation the Authority should act proactively, assist the complainants, but this is hampered by the concept of quasi-judicial role and scarce resources.

The analysis of judicial and administrative practice can lead to the false conclusion that that such cases occur sporadically. However, sociological research shows that the reality of those involved is radically different. According to Hungarian research data, in 2013, 25% of Roma respondents and 5% of disabled respondents said they had been discriminated against because of their protected characteristics during the 12 months prior to the interview.³² Based on the analysis of life history

³² NEMÉNYI Mária – FERENCZ Zoltán – LAKI Ildikó – SÁGVÁRI Bence – TAKÁCS Judit – TARDOS Katalin –TIBORI Tímea (2013) *Az egyenlő bánásmóddal kapcsolatos jogtudatosság növekedésének elemzése 2010–2013 között – fókuszban a nők, a romák, a fogyatékos és az LMBT-emberek, Egyenlő Bánásmód Hatóság TÁMOP-5.5.5/08/1 projekt.* [Analyzing the growth in awareness of right to non-discrimination between 2010–2013 - focus on women, Roma, disabled and LGBT people, Equal Treatment Authority TÁMOP-5.5.5 / 08/1 project.] Egyenlő Bánásmód Hatóság (Retrieved on 8 January 2019 from http://egyenlobanasmod.hu/sites/default/files/kiadvany/EBH_7_kiadvany_Final_20130619.pdf webhelyről.), p. 31.

interviews, Roma origin and disability are such factors that basically determine life and permeates their everyday relationships and experiences. These experiences sometimes include harsh discriminatory stories, but the analysis of life stories shows that the social functioning of identity-based discrimination remains largely unconscious, natural and unquestionable.

IV. Publications on the topic of the thesis

Kiss, Valéria (2018) Legal consciousness and life story research, Empirical investigation of the concept of 'living law'. Methodological problems of legal consciousness II. *Jogelméleti Szemle*, No. 1, pp. 84-108.

Kiss, Valéria (2018) Researching Living Law (or Legality) with Narrative Life History Interviews: Empirical investigation of the concept of 'living law'. Methodological problems of legal consciousness III., *Jogelméleti Szemle*, No. 2, pp. 117-124.

Fleck, Zoltán; Kiss, Valeria; Toth, Fruzina; Neumann, László; Kenéz, Anikó; Bajnok, Dávid (2017) *A jogtudat narratív értelmezése* [Narrative interpretation of legal consciousness]. BUDAPEST: ELTE Eötvös Kiadó

Kiss, Valéria (2014) Az élő jog koncepciójának empirikus vizsgálata. A jogtudat kutatások módszertani problémái. [Empirical analysis of the concept of living law. Methodological problems of legal research.] In: Fazekas, Marianna (ed.) *Jogi tanulmányok : Jogtudományi előadások az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskoláinak jubileumi konferenciáján : 20 éves a Doktori képzés az ELTE Jogi Karán.* [Legal Studies: Law Studies at the Jubilee Conference of the Graduate Schools of the Faculty of Law of Eötvös Loránd University: 20 Years of Doctoral Studies at the ELTE Faculty of Law.] Budapest: ELTE ÁJK Doktori Iskola,, (2014) pp. 238-248.

Kiss, Valéria (2012) Az „akadálymentesítésen” innen és túl. A közintézmények és a magánszolgáltatók által nyújtott szolgáltatásokhoz való hozzáférés jogszabályi háttere és gyakorlata [Before and Beyond Accessibility. Legal Background and Practice of Access to Services Provided by Public Institutions and Private Service Providers] *LEGAL STUDIES* 2012 pp. 337-348.