

The Impact of EU Law on Hungarian Anti-discrimination Law in Employment

I Introduction

The primary purpose of anti-discrimination law in employment is to provide legal tools to dismantle the harmful stereotypes that are deeply embedded in society, traditionally giving rise to labour market segregation and marginalisation of vulnerable and disadvantaged groups of society. The Hungarian labour market could be characterised by several forms of traditionally existing, overt and covert discriminatory trends before the accession of Hungary to the European Union. Even though Hungarian law, including Hungarian labour law, had enshrined some initial provisions on the prohibition of discrimination before the process of adopting the relevant EU law, European standards in relation to the regulation of equality required the implementation of a set of predominantly new and unknown concepts and legal instruments. The implementation of EU law on equal opportunities in employment significantly redesigned the previously existing national law, rendering it much more differentiated and enriching it with several new instruments. Although the implementation of the relevant EU directives was undertaken even before the accession, a deeper understanding and practical implementation of the union norms are a long-term and still ongoing process. Since most of the fundamental legal concepts of anti-discrimination law had been formulated in Anglo-Saxon legal cultures, and were adopted from there to the *acquis communautaire*, those who consult and apply this set of rules in practice may still have the impression that anti-discrimination law constitutes an albeit not longer so new, but nevertheless a ‘foreign body’ among the traditional constructs of domestic labour law.¹ In addition, the body of EU law on

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¹ See: Dagmar Schiek, Lisa B. Waddington, Mark Bell, *Cases, materials and text on national, supranational and international non-discrimination law* (Hart Publishing 2007, Oxford and Portland, Oregon) 360.

equal treatment in employment is also dynamically evolving and developing, thanks especially to the activity of the Court of Justice of the European Union (hereinafter: CJEU).²

The purpose of this study is to give an overview of the impact of EU law on some specific aspects of equal treatment in Hungarian labour law. In Section II, a short description is given on the main features of relevant EU and national legislation. In Section III the current status of national implementation of EU law is analysed concerning a central instrument of national equality law, i.e. the rules on burden of proof. The main developments of the case law of Hungarian courts is followed up; this was recently summarised and evaluated by the Case Law Analysing Group of the Kúria³ appointed to scrutinise the judicial practice of equal treatment regulation in the field of labour law. In Section IV, it is evaluated how far Hungarian labour law has come in the implementation process over the past 15 years in the analysed fields, and which challenges have to be addressed in the forthcoming 15 years.

II The Main Characteristics of EU and Current Hungarian Employment Equality Law

1 Development of EU Equality Law in Employment

The Treaties establishing the European Communities included only one provision concerning the discrimination of workers: Article 119 of the *Treaty of Rome* exclusively prohibited the gender-based discrimination of employees, and exclusively in terms of pay. Out of this brief rule, the European Community and later the European Union has developed a robust body of law on equal treatment in employment over the past six decades, encompassing more provisions in primary⁴ and secondary law,⁵ supported by a vast number of decisions of the CJEU and various soft law and policy instruments (e.g. action programmes). The CJEU has played a particularly vital role in the extension and development of equality law: formulas, definitions, tests and principles processed by judgements constituted the conceptual basis of later directives,⁶ and represented a consistent trend in the extensive interpretation of the

² This study refers to the predecessor of the CJEU ('European Court of Justice') as 'CJEU' as well.

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

⁴ The key provisions of primary law include the *European Union Charter of Fundamental Rights* (hereinafter: EUCFR), Art. 20 (equality before the law) and 21 (non-discrimination); the *Treaty on the European Union* (hereinafter: TEU), Art. 2, 3(3), 9 as well as the *Treaty on the Functioning of the European Union* (hereinafter: TFEU), Art. 10, 18, 45. See in more detail below in this Section.

⁵ Relevant secondary law includes a number of – from time to time in part recast – directives. For a list of the key documents of secondary law see: European Union Agency of Fundamental Rights, *Handbook on European Non-Discrimination Law* (Publications Office of the European Union 2018, Luxembourg) <<https://fra.europa.eu/en/publication/2018/handbook-european-law-non-discrimination>> accessed on 6 June 2019, 283–284.

⁶ For example the rules on burden of proof and the definition and justification of indirect discrimination were first invented by the CJEU, and were later transposed to the text of directives. (See in more detail in Section III.; Schiek et al. (n 1) 360, 353–354; Sandra Fredman, *Discrimination law* (2nd edn, OUP 2011, Oxford, reprint 2012) 190, 224.

terms of Community/Union law (e.g. regarding protected characteristics,⁷ and the definition of ‘wage’⁸). The increasing number of linkages between EU law and international law⁹ on equality has given new perspectives to the further development of the *acquis*. In consequence, we can consider European law on equality in employment as a continuously evolving and spreading set of standards for Member States (including Hungary), presenting more and more challenges for national law and its practice.¹⁰ Prior to the assessment of certain instruments of Hungarian equality law in employment in the mirror of these standards, it is useful to describe some key characteristics of the relevant union law at present, giving perspectives for the activity of Member States that endeavour to ensure compliance.

a) A mixed pattern of equality concepts

Academic literature employs various typologies of approaches of equality. According to a well-known typology, the set of approaches of equality can be distinguished, including ‘equality of treatment’, ‘equality of results’, ‘equality of opportunities’ and ‘equality as an element of dignity’.¹¹ Initially, the anti-discrimination law of the European Communities took a rather formal

⁷ See in detail: Kajtár Edit, ‘Old limbs, new twigs: From classic to novel forms of protected characteristics in European anti-discrimination law’ (2015) 8 (1–2) *Pécsi Munkajogi Közlemények* 37–51, 40. C-13/94, *P v S and Cornwall County Council*, ECLI:EU:C:1996:170; C-303/06. *S. Coleman v Attridge Law and Steve Law*, ECLI:EU:C:2008:415. (hereinafter: *Coleman judgement*).

⁸ E.g. C-33/89, *Maria Kowalska tegen Freie und Hansestadt Hamburg*, ECLI:EU:C:1990:265; C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, ECLI:EU:C:1990:209; C-12/81, *Eileen Garland v British Rail Engineering Limited*, ECLI:EU:C:1982:44 etc.

⁹ Article 6, paragraph 2 of the *Treaty of Functioning of the European Union* (TFEU) expresses the EU’s destination to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms and acknowledges the common heritage of the Member States in the field of protection of human rights as general principles of EU law.

It should be mentioned that the EU acceded to (Decision 2010/48.) the Convention on the Rights of Persons with Disabilities (CRPD) as one of the key binding human rights document of the UN. As the CJEU affirmed, by this the CRPD became an integral part of the European Union legal order; consequently, the relevant EU law should be interpreted in a manner consistent with that convention. (Joined Cases C-335/11, *HK Danmark*, acting on behalf of *Jette Ring v Dansk almennyttigt Boligselskab* and C-337/11, *HK Danmark*, acting on behalf of *Lone Skouboe Werge v Dansk Arbejdsgiverforening*, acting on behalf of Pro Display A/S; ECLI:EU:C:2013:222)

¹⁰ Further development of the scope of protection against discrimination is a continuous priority of EU legislation, however accompanied by setbacks. In 2008, the European Commission presented a proposal for a Council directive on implementing the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation or religious belief, which aims at extending protection against discrimination through a horizontal approach. However, as unanimity is required in the Council, the draft has remained blocked at that stage since then. In 2014, the European Commission declared its intention to complete the legislation process concerning the proposal. On 16 April 2019, the Commission approved a Communication [COM(2019)186 final] highlighting the gaps in protection and proposing ways of facilitating decision-making in the area of non-discrimination through the use of enhanced qualified majority voting and the ordinary legislative procedure. (Source: <<http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-anti-discrimination-directive>> accessed on 12 June 2019).

¹¹ In the academic literature there are a number of classifications of approaches of equality. A more detailed description of these classifications is presented by Kriszta Kovács [Kovács Kriszta, *Az egyenlőség felé. A hátrányos*

approach of equality ('equality of treatment'), prohibiting wage discrimination against women. This approach is based on the Aristotelian theory of justice, which says that 'likes should be treated alike',¹² and prohibits the less favourable treatment of two similarly situated individuals on grounds of a protected characteristic (prohibition of direct discrimination).¹³ The requirement of equal payment for equal work (or work of equal value) for women, the horizontal direct effect of which was later acknowledged by the CJEU,¹⁴ constituted the earliest and a key intervention by the EC/EU to support women's equality.¹⁵

Nevertheless, in a short time the CJEU had to face the fact that disadvantages suffered by women or other marginalised groups cannot be eliminated effectively via such a formal approach of equality. The other half of Aristotle's justice principle says that 'differents should be treated differently'.¹⁶ Cases where the identical treatment of workers caused a considerably more disadvantageous effect on female than on male workers inspired the CJEU to create the

megkülönböztetés tilalma és a támogató intézkedések (L'Harmattan 2012, Budapest) 30–56. This study relies basically on the typology introduced by Sandra Fredman, identifying the following four approaches.]

– 'Equality of treatment' is predicated on the principle that justice inheres in consistency; hence like should be treated alike. This rather formal approach does not take into account existing distributions of wealth and power, thus it may result in unequal outcomes.

– 'Equality of results': this concept of equality represents a material approach, concentrating on correcting maldistribution in society. Such a principle would require unequal treatment, if necessary to achieve an equal impact.

– 'Equality of opportunities': this notion of equality (representing a material approach as well) focuses on facilitating personal self-fulfilment, by equalising opportunities ['the start line'] for all. This approach may comply with inequality of treatment and inequality of results as well. Unequal treatment might be necessary to equalise the opportunities of all individuals, but once opportunities are equal, different choices and capacities might lead to inequality of results.

– 'Equality as an element of dignity': in terms of this approach, dignity replaces rationality as a trigger for equal rights. As the German Constitutional Court puts it: 'Since all persons are entitled to human dignity and freedom and to that extent are equal, the principle of equal treatment is an obvious postulate for free democracy' [Communist Party, 5 BVerfGE 85 (1956)] [Fredman (n 6) 2–3, 20–21, 23–25].

As Fredman underlines, the choice between different concepts of equality is not one of logic but of values or policy. [Fredman (n 6) 25]. Kriszta Kovács suggests that the Hungarian Constitution (as well as the Hungarian Fundamental Law, replacing the Constitution from 01.01.2012) and the practice of the Constitutional Court predominantly take the stance of 'equality of sources' approach, corresponding notably with the aforementioned category of 'equal opportunities'. This means that the Constitution/Fundamental Law, as interpreted by a large body of decisions of the Constitutional Court, endeavours to distribute the sources on an equal basis to all, giving an opportunity to everyone to establish his/her plan of life. The political community is responsible toward marginalised groups, which gives a justification for the continuous redistributive activity of the State. [See: Kovács (n 11), 50–51, 57, 59, 62; Ronald Dworkin, *Sovereign Virtue. The Theory and Practice of Equality* (Harvard University Press 2000, Cambridge, Mass) 113f, 285–288].

¹² Aristoteles *Nikomakhoszi Etika* (translated by Szabó Miklós, Európa Kiadó 1997, Budapest) V. 6.

¹³ See: Fredman (n 6) 153.

¹⁴ C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56.

¹⁵ Fredman (n 6), 156–157; Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *South African Journal of Human Rights* 214–234.

¹⁶ Aristoteles (n 12) V. 6.

concept of indirect (or hidden) discrimination, giving rise to a more material approach of equality ('equality of results'). In a series of cases, the CJEU worked out those principles that provide adequate direction to achieve a satisfactory balance between the assessment of the individual's merits and the necessity of taking measures in favour of women to achieve equality in practice (positive actions). This stance fits notably within the framework of the approach of 'equality of opportunities'.¹⁷ The most important tenets elaborated by the CJEU were incorporated in the generation of directives of the 2000's.

In the recent case law of the CJEU, the approach of 'equality as an element of dignity' is given increasing emphasis. We find the first emergence of this approach in a judgment of the CJEU as well.¹⁸ Specific discriminatory conducts, such as sexual harassment and harassment, where no comparator is required to establish the discrimination, also reflect this approach.¹⁹

It can therefore be concluded that EU law requires Member States to depart from a mere formal approach of equality, however upholding the limits of substantive equality. Legal instruments such as indirect discrimination and positive actions serve this latter purpose. The approach of EU law stands the closest to the approach of 'equal opportunities', endeavouring to draw an equal start line for all, but leaving the freedom for persons to create their own life plans. In parallel, the human rights character of equality, and its linkages with human dignity are emphasized with increasing force.

b) Fields and means of EU regulation

European anti-discrimination law has been established in an organic way, through a step by step inclusion of new subject matters, new protected characteristics, new definitions and new instruments. As a result, there is still no all-encompassing anti-discrimination secondary law in the EU in terms of protected characteristics or regulated spheres of life.

EU law concerning equality consists of resources of primary and secondary law. In currently effective primary law, the most important rules are the following: according to Article 2 of the *Treaty on the European Union* (hereinafter: TEU), the non-discrimination principle is one of the fundamental values of the Union.²⁰ Article 10 of the *Treaty on the Functioning of the European Union* (hereinafter: TFEU) requires the EU to combat discrimination based on sex,

¹⁷ C-319/03, *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice*, ECLI:EU:C:2004:574; C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*, ECLI:EU:C:1997:533; C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen*, ECLI:EU:C:1995:322; C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, ECLI:EU:C:2000:367; C-158/97, *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, ECLI:EU:C:2000:163; see: Fredman (n 6) 241.

¹⁸ In the *Coleman*-case (n 7) AG Maduro proposed that 'to protect the dignity and the autonomy of persons belonging to those suspect classifications... treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being humans' [cited and commented by Fredman (n 6) 227].

¹⁹ Fredman (n 6) 20–21.

²⁰ Commitment of the EU to combat discrimination is also stipulated in Article 3 paragraph 3 and Article 9 of the TEU.

racial or ethnic origin, religion or belief, disability, age or sexual orientation when defining and implementing its policies and activities. Prohibition of non-discrimination on the basis of nationality is laid out in Articles 18 and 45 of the TFEU. The Charter of Fundamental Rights of the European Union (hereinafter: EUCFR),²¹ as adopted in 2000, was merely a non-binding ‘declaration’ of human rights, inspired by those rights contained in the constitutions of the Member States.²² However, when the *Treaty of Lisbon* entered into force in 2009, it altered the status of the EUCFR to make it a legally binding document with the same legal value as the EU Treaties. As a result, EU institutions are obliged to comply with the EUCFR, as are EU Member States but only when implementing EU law.²³ Under the title ‘Equality’ (Articles 20 to 26), the EUCFR emphasises the importance of the principle of equal treatment in the EU legal order. Article 21 of the EUCFR lays down prohibition of discrimination on various grounds (sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation).²⁴

The central concepts of EU secondary legislation on equal treatment are the specific protected characteristics. In the field of employment, there are currently nine protected characteristics covered by anti-discrimination directives constituting the hard core of the EU’s anti-discrimination legislation: gender,²⁵ race and ethnic origin,²⁶ religion and belief, disability, age, sexual orientation,²⁷ part-time work,²⁸ fixed-term work²⁹ and temporary-agency work.³⁰ The catalogue of protected characteristics is exhaustive.³¹ The detailed regulation in

²¹ *Charter of Fundamental Rights of the European Union*, OJ C 202, 7.6.2016, 389–405.

²² See: C-283/83, *Firma A. Racke v Hauptzollamt Mainz*, ECLI:EU:C:1984:344; C-15/95, *EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux*, ECLI:EU:C:1997:196; C-292/97, *Kjell Karlsson and others*, ECLI:EU:C:2000:20.

²³ Article 51 of the EUCFR.

²⁴ Article 21 of the EUCFR. About the nature of this Article, see below in more detail. About the development of primary law on equality: EU Fundamental Rights Agency (n 5) 20–23.

²⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, 23–36 (‘Gender Directive’), Article 1. The ‘Gender directive’ repealed and recast a set of previous directives related to gender-based discrimination in the field of employment.

²⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; OJ L 180, 19.7.2000, 22–26 (‘Race Directive’), Article 1.

²⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, 16–22 (‘Framework Directive’), Article 1.

²⁸ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work, OJ L 14, 20.1.1998, 9–14 (‘Part Time Work Directive’), Annex, Section 1.

²⁹ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, 43–48 (‘Fixed-term Work Directive’), Annex, Section 1.

³⁰ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, 9–14 (‘Temporary Agency Work Directive’), Article 1, 2 and 5.

³¹ The EUCFR extended the list of protected characteristics as will be described below.

relation to the specific protected characteristics are similar but not identical in terms of definition of discriminatory conducts, exemptions and justifications, margin of positive actions etc.

As for the regulated subject matters in the field of employment,³² the main topics of the three overarching anti-discrimination directives (Gender Directive, Race Directive, Framework Directive, hereinafter together: ‘Directives’) are the following: (1) definition of the scope, (2) definition of the most typical discriminatory conducts, (3) margin of positive actions, (4) declaration of the minimum standard characteristic of the directive, (5) requirements of the sanctions and remedies, (6) rules on burden of proof (7) measures targeting effective implementation (dissemination of information, dialogue with social partners and NGOs, prohibition of victimisation). The other three directives each set out only one or two generally formulated sections on the prohibition of discrimination against the employees covered.³³

As is known, directives only require the Member States to achieve specific results, leaving them free choice to determine the measures of implementation.³⁴ In consequence, as a general rule, directives do not have a direct effect, i.e. they cannot be directly referred to by private entities in national lawsuits. So far as a rule of a directive complies with a set of specific conditions (it is unconditional, adequately precise, it grants rights and the deadline for transposition has expired), private entities may refer to the not yet or not properly transposed rules of a directive against the omitting Member State³⁵ (“vertical direct effect”).³⁶ In contrast, as it has been several times reinforced by the CJEU, directives never have horizontal direct effect (i.e. private entities may not refer to the not yet or not properly transposed rules of directives against another private entity).³⁷

Nevertheless, a new opportunity of direct reference to EU law was opened by the CJEU in the *Mangold* judgement, as it established that non-discrimination must be regarded as a general principle of Community law, on the grounds of the various international instruments and in the constitutional traditions common to the Member States. Therefore, the Framework Directive lays down only the general framework for combating discrimination on specific grounds. Consequently, the national court has to guarantee the full effectiveness of the general principle of non-discrimination, by setting aside any provision of national law that may conflict with Community law, even where the period prescribed for transposition of that

³² Race Directive covers other spheres of life as well.

³³ Temporary Agency Work Directive, Article 5; Fixed-term Work Directive, Annex, Article 4; Part Time Work Directive, Annex, Article 4.

³⁴ TFEU, Article 288.

³⁵ The concept of ‘Member State’ implies also a state entity as an employer, so improperly transposed directives may also be referred in a public service employment relationship (C-152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84).

³⁶ C-41/74, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133; C-148/78, Criminal proceedings against Tullio Ratti, ECLI:EU:C:1979:110; C-8/81, *Ursula Becker v Finanzamt Münster-Innenstadt*, ECLI:EU:C:1982:7).

³⁷ *Marshall*-case (n 35); C-188/89, *A. Foster and others v British Gas plc*, ECLI:EU:C:1990:313; C-91/92, *Paola Faccini Dori v Recreb Srl*, ECLI:EU:C:1994:292.

directive has not yet expired, in horizontal lawsuits as well.³⁸ Later, the CJEU several times reiterated this position, supplemented by a reference to Article 21 paragraph 1 of the EUCFR along with the common international law and constitutional traditions of the Member States.³⁹ In its landmark decision (*Association de médiation sociale*-case) the CJEU held that Article 21 Section 1 of the EUCFR, as an EU primary law,⁴⁰ has a horizontal direct effect, i.e. it is sufficient in itself to confer on individuals an individual right that they may invoke as such.⁴¹

It is not yet clear how the direct effect of Article 21 Section 1 of the EUCFR will affect the development and the interpretation of national anti-discrimination laws (including Hungarian statutory and case law), as long as the primary reference of compliance with EU anti-discrimination law should not be the directives but the aforementioned rule of the Charter, providing a more extended list of protected characteristics and a far more generally formulated clause on non-discrimination. The detailed analysis of this question would go far beyond the scope of this study.⁴²

It should also be noted that the CJEU refers to the European Convention on Human Rights (hereinafter: ECHR)⁴³ and the European Social Charter (hereinafter: ESC) as providing guidance for the interpretation of EU law. Both documents are also referred to in the EU

³⁸ In the *Mangold*-case (C-144/04, *Werner Mangold v Rüdiger Helm*, ECLI:EU:C:2005:709), these establishments referred only to age discrimination; however, other protected grounds were also included later (C-144/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, ECLI:EU:C:2011:286)

³⁹ C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG*, ECLI:EU:C:2009:429; C-441/14, *Dansk Industri (DI), agissant pour Ajos A/S v Sucession Karsten Eigil Rasmussen*, ECLI:EU:C:2016:278; C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257; *Römer*-case (n 38); C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, ECLI:EU:C:2014:2.

⁴⁰ It should be noted that other discrimination-related primary law rules have also been declared as having direct effect, for being unconditionally and genuinely precisely formulated, such as the provisions on prohibition on wage discrimination on the grounds of gender [TFEU, Article 157; *Defrenne No I* (n 14); C-149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1978:130 ('Defrenne No. II')]; and on prohibition of discrimination on the grounds of nationality (TFEU, Article 18, 45, 56; C-36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federacion Española Ciclismo*, ECLI:EU:C:1974:140).

⁴¹ *Association de médiation sociale*-case (n 39); Mark Bell, 'The right to equality and non-discrimination' in Tamara Hervey, Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart Publishing 2003, Oxford – Portland Oregon) 91–110, 101.

⁴² For more in detail on the nature and the future role of the EUCFR see: Wolfgang Weiß, 'The EU Human Rights Regime post Lisbon: Turning the CJEU into a Human Rights Court?' in Sonia Morano-Foadi, Lucy Vickers (eds), *Fundamental rights in the EU: a matter for two courts* (Bloomsbury Publishing 2015, London) 69–90; Sybe de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon – An Endeavour for More Harmony' in Sybe de Vries et al. (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013, Oxford) 53–94; Bell (n 41); Mirjam De Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?' (2011) 18 (1–2) *Maastricht Journal of European and Comparative Law* 109–135.

⁴³ C-395/08 and C-396/08, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci*, ECLI:EU:C:2010:329

Treaty framework⁴⁴ and in the EUCFR.⁴⁵ The *Treaty of Lisbon* contains a provision mandating the EU to join the ECHR as a party in its own right and Protocol 14 to the ECHR (on equal treatment) amends it to allow this to happen. It is not yet clear when this would take place and what the future relationship between the CJEU and the European Court of Human Rights (hereinafter: ECtHR) would be.⁴⁶

2 The Structure of Current Hungarian Employment Equality Law

The Hungarian Fundamental Law, which repealed and replaced the previous Constitution⁴⁷ from 1 January 2012 on, preserved the general equality clause of the latter (nonetheless, amended in a few aspects), containing a somewhat broader list of protected grounds (including e.g. disability). Like the previous Constitution, the Fundamental Law still refers to the general prohibition of discrimination, not explicitly referring to the prohibition of indirect discrimination.⁴⁸ However, the Constitutional Court's practice acknowledging the inclusion of indirect discrimination in the general provision is still applicable.⁴⁹ Applicability of the substantive concept of equality is also indicated by the inclusion of paragraphs 4 and 5 of Article XV of the Fundamental Law, which oblige the State to introduce positive actions in order to promote equal chances for specific disadvantaged groups. The Fundamental Law represents more or less the same stance concerning the equality concepts as the former Constitution. It should be noted that the former special reference to equal pay for equal work has not been transposed from the Constitution into the Fundamental Law.

The basic systemic features of Hungarian anti-discrimination field have also not been significantly modified since the status before the accession to the EU.⁵⁰ This means that the

⁴⁴ Article 3 paragraph 1 of the TEU, Article 151 of the TFEU.

⁴⁵ Article 52 paragraph 3 of the EUCFR.

⁴⁶ EU Fundamental Rights Agency (n 5) 17. For reasons of space, the expectable consequences of the future joining of the EU to the ECHR cannot be outlined in detail in this study with regard to the high complexity of this question.

⁴⁷ Act XX of 1949 on the Constitution of the Republic of Hungary (in effect from 20 August 1949 to 31 December 2011).

⁴⁸ Article XV of the Fundamental Law: '(1) Everyone shall be equal before the law. Every person shall have legal capacity.'

(2) Hungary shall guarantee the fundamental rights to everyone without discrimination based on any ground such as race, color, sex, disability, language, religion, political or any other opinion, ethnic or social origin, wealth, birth or any other circumstance whatsoever.

(3) Women and men shall have equal rights.

(4) Hungary shall promote equal opportunities and social convergence by means of introducing special measures.

(5) Hungary shall introduce specific measures to protect families, children, women, the elderly and the disabled.'

⁴⁹ See for example: Decision No. 42/2012. AB, Reasoning [22], [24]–[27], [34]; confirmed by decisions No. 23/2013. AB, No. 3079/2017 AB; Kiss Barnabás, *Az egyenlő bánásmód követelménye az Alkotmánybíróság gyakorlatában*. (Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Acta Universitatis Szegediensis 2005, Szeged) 14–15; Gyórfi Tamás, M. Tóth Balázs, '70/A. § [A diszkrimináció tilalma]', in Jakab András (ed), *Az Alkotmány kommentárja* (Századvég 2009, Budapest) 30–31.

⁵⁰ About the structure of Hungarian equality law in more general terms, within the context of social law see: Gellérné Lukács Éva, 'Szociálpolitika – Az Európai Szociális Alap' in Osztoivits András (ed) *Az Európai Unióról és az Európai*

main instrument for implementing the duties of the State in relation to Article XV of the Fundamental Law is Act CXXV of 2003 on equal treatment and on the enhancement of equal chances (hereinafter: ETA Act), regulating the main subject matters of principle of equality in a uniform manner. These regulations are referred to and supplemented by sectoral acts, including Act I of 2012 on the Labour Code (hereinafter: LC 2012). According to the ETA Act, these sectoral acts shall be interpreted in consistency with this act.⁵¹ Section 12 of the LC 2012 provides a general reference to the ETA Act, adding only a few special rules to the body of antidiscrimination regulation in employment, as follows.

- (1) In connection with employment relationships, such as the remuneration of work, the principle of equal treatment must be strictly observed. Remedying the consequences of any breach of this requirement may not result in any violation of, or harm to, the rights of other employees.
- (2) For the purposes of paragraph (1), ‘wage’ shall mean any remuneration provided directly or indirectly in cash or in kind, based on the employment relationship.
- (3) The equal value of work for the purposes of the principle of equal treatment shall be determined – in particular – based on the nature of the work performed, its quality and quantity, working conditions, the required vocational training, physical or intellectual efforts expended, experience, responsibilities and labour market conditions.

Further, the LC 2012 enshrines a set of other provisions having relevance in respect of anti-discrimination law as well, even though the statutory law does not refer explicitly to the structural linkage between these rules and the Section 12.⁵²

Equal treatment duty has been consistently recognised as a ‘real’ fundamental principle of labour law across academia and in the judiciary.⁵³ Around the beginning of the development of Hungarian anti-discrimination law, there were significant uncertainties in terms of the structural position of the equal treatment principle, resulting in courts becoming somewhat reluctant to accept the prohibition of discrimination as a limitation of the margin of discretion of the employer.⁵⁴ The Resolution of the Labour and Administrative Department of the Kúria No. 4/2017. (XI. 28.) KMK on specific issues of labour law disputes related to equal treatment

Unió működéséről szóló szerződések magyarázata (Complex Kiadó 2011, Budapest) 2325–2378; Gyulavári Tamás, Gellérné Lukács Éva, ‘Szociális politika’ in Kende Tamás, Szűcs Tamás (eds), *Bevezetés az Európai Unió politikáiba* (Complex Kiadó 2011, Budapest) 437–462.

⁵¹ ETA Act, sec. 2.

⁵² For example the Section 51(4) of the LC 2012 provides on the reasonable accommodation duty of the employers, which clearly corresponds with the Article 5 of the Framework Directive; Section 60(1) of the LC prescribes a kind of accommodation duty in respect of pregnant employees and women parenting a child under 1 year of age, also representing a rule protecting women against unfair treatment on the grounds of pregnancy.

⁵³ Gyulavári Tamás (ed), *Munkajog* (3rd edn, ELTE Eötvös Kiadó 2014, Budapest) 72; Halmos Szilvia, ‘Az “egyéb helyzet” alapján történő diszkrimináció a foglalkoztatásban: A magyar gyakorlat elemzése az elmélet, a nemzetközi jog és az alkotmánybírói gyakorlat tükrében’ in Ábrahám Márta (ed), *Mailáth György Tudományos Pályázat 2017: Díjazott dolgozatok* (Országos Bírói Hivatal 2017, Budapest) 603–672, 616–618; Halmos Szilvia, Petrovics Zoltán, *Munkajog*. (NKE KTK 2014, Budapest) 40; Executive Report, 72–74.

⁵⁴ From the case law of former Supreme Court: cases No. BH 1999. 427., BH 1997. 3. 157.

(hereinafter: KMK Resolution), based on an Executive Report (hereinafter: Executive Report)⁵⁵ of the previously referred Case Law Analysis Group of the Kúria, declares (Section 4) that the discriminatory nature of a measure of an employer is to examine precisely where the provision is formally lawful; i.e. does not breach the statutory employment law (e.g. in the event of a dismissal, it meets the formal criteria of fairness, such as clarity, reality and reasonability). This means that, like the prohibition of abuse of rights,⁵⁶ the prohibition of discrimination also constitutes a limitation of exercising the prerogatives of the employer laid down in statutory law. Several judgements demonstrate that courts are consistent in finding that a provision of an employer's act that is formally lawful but violates the equal treatment duty is deemed unlawful (e.g. in the field of singling out persons in the course of implementing redundancies, in dismissing the employee during the trial period without giving reasons, in distributing a bonus for the workers etc.).⁵⁷

The ETA Act, addressing a harshly criticised failure of the previous regulation,⁵⁸ introduced and regulated the conditions of positive actions⁵⁹ and presented a move from the formal to the substantial approach of equality. Accordingly, in the structure of the ETA Act, positive actions are regarded as lawful exceptions to the duty of formal equal treatment. Considering the fact that positive actions always involve differences in treatment on the basis of otherwise protected grounds, applying these measures should be performed with a high degree of diligence in order not to render these actions discriminatory *per se*. Hence, the case law of the CJEU and the Directives detailed the criteria for the lawful introduction of positive actions.⁶⁰ The conditions of positive actions as formulated in the ETA Act are in line with these standards. A recent country report summarises the positive actions enshrined in the statutory law currently in place in Hungary.⁶¹

⁵⁵ Kúria: Az egyenlő bánásmód követelményének megsértésével kapcsolatos munkaügyi bírósági gyakorlat – Összefoglaló vélemény, 2016. <https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemenyn_egenlo_banasmod.pdf> accessed on 12 June 2019.

⁵⁶ LC, sec. 7. General principles of labour law, particularly the prohibition of abuse of rights, have traditionally been construed by the courts as limits of this margin of discretion (See for example the following judgements of the Supreme Court/Kúria: BH 1995. 608., BH 1996. 399., BH 2001. 38. and BH 2002. 242., as well as its following resolutions: MK 95., MK 122.).

⁵⁷ Summary of relevant decisions: Kulisty Mária, 'A bizonyítási eljárás szabályai az egyenlő bánásmód sérelmére hivatkozás esetén' in Kúria, *Az egyenlő bánásmód követelményének megsértésével kapcsolatos munkaügyi bírósági gyakorlat* [Annex of the Executive Report] 2017, 139–141, 144–146.

⁵⁸ Bitskey Botond, Gyulavári Tamás, 'Kell-e [anti]diszkriminációs törvény?' (2003) 58 (1) *Jogtudományi Közlöny* 1-8, 5.

⁵⁹ ETA Act, sec. 11; specifically for employment discrimination: sec. 23.

⁶⁰ Summarised by Schiek et al (n 1), 801–821. The most notable cases of the CJEU see at Section II.1.b.

⁶¹ András K. Kádár, Country report – *Non-discrimination, Hungary 2017* (European Commission, Directorate-General for Justice and Consumers, Publications Office of the European Union 2018, Luxembourg) 101–102.

III Specific Key Achievements of Hungarian Equality Law Since the Accession – Regulation on Burden of Proof

A higher standard of excuse on the side of the employer is an inherent part of the structure of anti-discrimination law. The procedural aspect of this higher standard is represented by the rules on shared or reversed burden of proof. These higher standards can be justified on both doctrinal and practical grounds.

Concerning the doctrinal reasons for shared burden of proof, one should be reminded, as referred in Section II.1.b, that EU anti-discrimination law is primarily structured according to specific protected characteristics. An impulsive extension of protected characteristics can be witnessed since the foundation of the European Communities. The circle of protected characteristics covered by the primary law has an overlap with the catalogue covered by secondary law; nevertheless, EU law has never taken the position that the list of protected characteristics would be open. In contrast, in a number of national laws (e.g. the federal law the US⁶² and Canada⁶³) and some documents of international law (primarily the ECHR)⁶⁴ apply an open list of protected characteristics, ending in the category of ‘other status’ or have no catalogue at all.

The question reasonably arises of why anti-discrimination laws need (and often use) a list of protected characteristics, considering that every arbitrary distinction between people may violate human dignity.

As already referred to in Section I, the primary purpose of anti-discrimination law in employment is to provide legal tools to dismantle and disable harmful stereotypes deeply embedded in society. These stereotypes create unjust hierarchical structures, dividing society into dominant and minority groups according to certain characteristics (gender, race, age, physical and mental ability, religion etc.). General tendencies may be observed, in that members of dominant groups employ hidden ‘scoring systems,’ deeming members of minorities as more risky, of inferior status etc. and underscoring them in societal interactions. This results in outcasting persons bearing these characteristics from the main resources and mainstream spaces of life.⁶⁵ Such scoring stereotypes may and often actually drive the decision-making of

⁶² See: the judgement of US Supreme Court, in the case *United States v Carolene Products Co* 304 US 144, 58 S Ct 778 (1938). [Commented by Sandra Fredman, ‘Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India. European Commission’ (DG for Justice 2012, Luxembourg); <http://ec.europa.eu/justice/discrimination/files/comparative_study_ad_equality_laws_of_us_canada_sa_india_en.pdf> accessed on 12 June 2019, 32]. See further: Krizsán Andrea, ‘Amerikai megközelítés a faji alapú diszkrimináció értelmezésében’ (2000) 3 *Fundamentum* 13–32; Györfi, M. Tóth (n 49) index [70].

⁶³ See the judgement of the Supreme Court of Canada in the case of *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203. Commented by Fredman (n 62) 33.

⁶⁴ Article 14 and the Protocol 12 of the ECHR.

⁶⁵ Cf. for example Tal Z. Zarsky, ‘Understanding Discrimination in the Scored Society’ (2014) 89 (4) *Washington Law Review* 1375–1412, 1375, 1384–1385; Danielle K. Citron., Frank Pasquale, ‘The Scored Society: Due Process for Automated Predictions’ (2014) 89 (1) *Washington Law Review* 1375–1412; Kiss György, *Alapjogok kollíziója a munkajogban* (Justis Tanácsadó Bt. 2010, Pécs) 317.

employees, motivating them to treat persons with particular characteristics in a more disadvantageous way than others.

Anti-discrimination laws identify the aforementioned marginalised groups of society by defining protected characteristics. Relying on the general societal experience that persons with protected characteristics are commonly subject to detrimental treatment on the grounds of this characteristic, it is reasonable to establish the presumption that the precise reason for the suffered detriment was indeed this characteristic. Nevertheless, this presumption is rebuttable: the perpetrator (in employment, the employer) may establish that (1) there was no causation between the protected characteristic and the caused disadvantage or (2) even if there was causation, it was justified by a 'weighty' ground. This scheme legitimises the higher standard of excuse used in anti-discrimination laws against suspected perpetrators, on the one hand in procedural aspects (shared or reversed burden of proof) and, on the other hand, in substantive aspects (narrowly formulated justification grounds and exemptions).⁶⁶

Rules on reversed burden of proof cannot only be justified on the above outlined doctrinal grounds, but for simple practical reasons as well. Since the biasing patterns motivating an employer to decide to underscore any person with a specific protected characteristic often remain undisclosed by the employer, in many cases the victim of discrimination could hardly be able to deliver any evidence to duly support his/her claim.⁶⁷ The general rule on the burden of proof for civil proceedings in the EU (and its Member States) is that a claimant must prove that the action is well-founded. However, proving discrimination in this way can be very difficult in comparison to other civil claims. This is because establishing discrimination requires the claimant to show why a particular (disadvantageous) thing happened to them. This is usually something that will only be known to the defendant(s), and in some cases may not consciously be known even by them.⁶⁸

Under EU law, rules on shared burden of proof emerged first in the jurisprudence of the CJEU. The subject matter of the first landmark case (*Danfoss*)⁶⁹ related to the question of reversed burden of proof was wage (indirect) discrimination. In this case, female workers received lower pay on average than male colleagues, and the pay system that led to this result was completely lacking in transparency.⁷⁰ In the judgement, the CJEU indeed placed the burden of proof on the employer, arguing that otherwise female workers 'would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving

⁶⁶ Halmos (n 53) 612–614. In this study, the system of exemptions and justifications under EU and national law is, for reasons of space, not described.

⁶⁷ See: Kiss (n 65) 22.

⁶⁸ Anne Beale, 'Proving discrimination: the shift of burden of proof and access to evidence' (Cloisters 2018) <http://www.era-comm.eu/oldoku/Adiskri/03_Burden_of_proof/118DV18_Beale_Paper_EN.pdf> accessed on 12 June 2019, 2.

⁶⁹ C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, ECLI:EU:C:1989:383.

⁷⁰ Summarized by Beale (n 68) 4.

that his practice in the matter of wages is not in fact discriminatory'. Apparently, the core of the argumentation of the CJEU was that the use of the ordinary scheme of burden of proof would considerably harm the victim's effective assertion of his/her claim and in a lack of sufficient information and evidence on the background to the employer's (allegedly discriminatory) provision.⁷¹ This formula obviously left unanswered the question of the extent to which it is expected of the victim of discrimination to support his/her claim to reverse the burden of proof on the employer. The CJEU proceeded to a more general statement of principle in the *Enderby* case.⁷² The CJEU stated that the existence of a 'prima facie' case of discrimination casts the burden of proving objective justification onto the employer.⁷³ This line of case law was further developed and refined later on.⁷⁴ The essence of the relevant judgements was ultimately consolidated and included in the Burden of Proof Directive⁷⁵ (covering only sex discrimination cases). Today, the rules on shared burden of proof are included in all three Directives. According to the current formulation of the main rule of the burden of proof in the Directives, 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them, establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'⁷⁶

In practice it means that a two-stage scheme of scrutiny should be applied in terms of a discrimination claim. (1) The claimant has to demonstrate facts that prima facie ('at the first sight') support that he/she become the victim of a discriminatory act of the employer. According to a simple formulation: the claimant is not expected to prove that he/she actually suffered a detriment and the precise reason for this was his/her protected characteristic, but

⁷¹ As the subsequently developed case law clarified, no intention or subjective motivation of the employer is required to establish the discriminatory nature of a specific provision of the employer (See: *Enderby*-judgement [C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, ECLI:EU:C:1993:859] and the attached Advocate General's opinion; *Dekker*-judgement [C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, ECLI:EU:C:1990:383], *Jenkins*-judgement [C-96/80, *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.*, ECLI:EU:C:1981:80]. [Evelyn Ellis, Philippe Watson, *EU Anti-Discrimination Law* (2nd edn, Oxford EU Law Library 2013, Oxford) 163–169].

⁷² See (n 71).

⁷³ See also: C-381/99, *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG*; ECLI:EU:C:2001:171.

⁷⁴ C-400/93, *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S.*, ECLI:EU:C:1995:155; C-297/93, *Rita Grau-Hupka v Stadtgemeinde Bremen*, ECLI:EU:C:1994:406; Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludwig v Kreis Segeberg*, ECLI:EU:C:1994:415.

⁷⁵ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex; OJ L 14, 20.1.1998, 6–8 ('Burden of proof directive').

⁷⁶ Gender Directive, Article 19(2); Race Directive, Article 8; Framework Directive, Article 10.

he/she is only supposed to demonstrate that his/her protected characteristic could be the reason for the detriment suffered. Once the claimant successfully completes this requirement, (2) the employer has to prove that the provision in question was not discriminatory.⁷⁷

Member States are not prevented from introducing rules of evidence that are more favourable to plaintiffs. Preferential rules on burden of proof do not apply to criminal procedures and need not be applied to inquisitorial proceedings.⁷⁸

Under Hungarian law, the reversed burden of proof related to discrimination cases was statutorily defined since the entry into force of the LC 1992, so already at a time when formulating the relevant case law of the CJEU was at a quite early stage. Section 5, paragraph 2 of the LC 1992 laid down that, in the event of a dispute arising in relation to a violation of the prohibition against detrimental discrimination, the employer shall prove that its procedure did not violate those provisions on discrimination. Although the very existence of this rule at this time should be appreciated, the contemporary literature already expressed weighty criticisms. A study suggested that the burden of proof be placed onto the employer once the employee simply alleges a discriminatory harm, which may also give rise to concerns as it might be unfair for the employer's side and may open the way for the successful assertion of completely unsupported claims. Further, it was not clear whether and how an employer may justify differential treatment.⁷⁹

Upon the entry into force of the ETA Act, the regulation on burden of proof was deleted from the LC 1992, and since then the relevant norms can be found in the ETA Act. The current text of Section 19 of the act lays down that

(1) [i]n procedures initiated because of a violation of the principle of equal treatment, the injured party [...] must make it presumable that a) the injured person or group has suffered a disadvantage [...], and b) the injured party or group possessed (or at least as supposed by the other party possessed) a protected characteristic as defined in Section 8 at the time of the injury. (2) If the case described in paragraph (1) has been made presumable, the other party shall prove that a) the facts made presumable by the injured party did not exist, or b) it has observed, or in respect of the relevant relationship was not obliged to observe, the principle of equal treatment. (3) The provisions set out in paragraphs (1)-(2) shall not apply to criminal procedures and to procedures of minor offences.

⁷⁷ See Ambrus Mariann, 'Vizsgálati modell az egyenlő bánásmód megsértésével kapcsolatos ügyekben' in Majtényi Balázs (ed), *Lejtős pálya. Antidiszkrimináció és esélyegyenlőség* (L'Harmattan Kiadó 2009, Budapest) 164; Beale (n 68) 4–6.

⁷⁸ Gender Directive, Article 19(3)(5); Race Directive, Article 8; Framework Directive, Article 10. For more detail of the development of regulation on burden of proof in the EU, see: Ellis, Watson (n 71) 157–163; Ambrus (n 77) 79; Kádár András K., 'A bizonyítási teher megosztásának kérdései' (2006) 10 (4) *Fundamentum* 115–124.

⁷⁹ See: Kardos Gábor, Nacsá Beáta, Gyulavári Tamás, 'A Nemek közötti diszkrimináció értelmezése az Európai Bíróság esetjogában és a magyar bírósági gyakorlatban' in Kardos Gábor (ed), *Törvénykezés és jogérvényesítés a nők elleni diszkrimináció leküzdésére* (Szociális és Családügyi Minisztérium Nőképviselői Titkárság 2000, Budapest 1–18), 16.

The original text of this section used the phrase ‘must prove’ instead of the current phrase of ‘must make it presumable’. The provision was amended by Act CVI of 2006, decreasing the standard of proof required from the claimant, in order to approximate the content of the provision to the requirements of the Directives.

This provision clearly establishes a different scheme of scrutiny from the general rule of burden of proof as stipulated in Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: CCP 2016).⁸⁰ Section 265, paragraph 1 of the CCP 2016 sets out that ‘[u]nless otherwise provided for by an act, facts that are considered material for the case shall be evidenced by the party who harbours an interest that such facts are recognised by the court as true (hereinafter referred to as ‘burden of proof’); moreover, the consequences of failure to provide such evidence or to corroborate said facts shall also fall upon that party.’⁸¹ According to a special rule applicable in labour cases, where the burden of proof is defined by substantive labour law in derogation from the provisions of the act, it is to be interpreted in accordance with substantive law.⁸² As Section 19 of the ETA Act is such a derogating rule, it must obviously be applied instead of the general rule of burden of proof in occupational discrimination cases.

Comparing the national scheme of scrutiny with the one enshrined in the Directives, it can be concluded that the Hungarian system is on the one hand more accurate and on the other hand more favourable for the claimant. The higher degree of accuracy follows from the fact that the Hungarian provision clearly defines which facts should be established by the claimant: exclusively the existence (or the supposed existence by the employer) of a protected characteristic and the occurrence of the detriment. Notably, the claimant is not required at all to support the causation between these two facts. This latter circumstance means that the Hungarian regulation can be assessed as more favourable on the side of the employee than it is prescribed by the Directives, because under the Directives it is not excluded that the national law requires the claimant to support (however, complying with the ‘prima facie’ standard) the causation between the protected characteristic and the detriment. ‘Making any fact presumable’ means, in the Hungarian practice, a sort of proving, which is not expected to reach the standard of complete certainty, but instead it is sufficient if the claimant delivers some evidence that makes his/her allegations credible.⁸³ Briefly formulated: making an allegation presumable is somewhat more than a mere allegation of a fact, but is less than proving it beyond all reasonable doubt.

Once this first stage is successful, the burden of proof is placed on the employer, which may use three options to excuse itself. (1) It may prove that the facts made presumable by the claimant are indeed false (e.g. the claimant did not possess the protected characteristic he/she states).

⁸⁰ The same general rule was applicable under the previous Code of Civil Procedure as well [Act III of 1952 on the Code of Civil Procedure (hereinafter: CCP 1952), sec. 164(1)]. The CCP 2016 took effect in 1 January 2018.

⁸¹ This general rule corresponds with the general rules of burden of proof prevailing in other Member States as well [Beale (n 68) 2].

⁸² CCP 2016, sec. 522(2).

⁸³ Executive Report, 34–35.

It should be stressed that, in relation to the same facts alleged by the claimant, the law requires different standards of proof by the employee (for prima facie support) and the employer (for the excuse). As far as the employer is not able to prove this, (2) it may prove that the duty of equal treatment had been observed. This means that the employer may prove that there was no causation between the protected characteristic and the disadvantage suffered by the claimant. As far as the employer is not able to excuse itself by this, (3) it can prove that, in respect of the relevant relationship, the employer was not obliged to observe the principle of equal treatment. This latter term means that even if there was causation between the protected characteristic and the detriment (or the employer could not successfully rebut it), the employer may refer to an exception or to a ground as stipulated in the ETA Act.⁸⁴

Although this scheme of scrutiny appears to be precise and clear enough at the first sight, a huge uncertainty prevailed concerning its application in the judicial practice for many years. The source of controversies was that the courts interpreted the relation of the general rule of burden of proof in the CCP 1952 and the special rule enshrined in the ETA Act in different ways, particularly in terms of the burden of proof related to the causation between the protected characteristics. There were cases⁸⁵ in which even the Supreme Court/Kúria held that the mere allegation by the claimant of the causation between the protected characteristic and the detriment is not sufficient; he/she should at least make it presumable.⁸⁶ This approach clearly reflects that the courts attempted to apply the general rule of burden of proof (CCP 1952) in parallel with the special rules (ETA Act), instead of applying the *lex specialis derogat legi generali* principle. Later on, the development of case law took a different position and crystallised that, in terms of causation, the burden of proof lies on the employer, i.e. it should be interpreted to the detriment of the employer if it cannot rebut the causation.⁸⁷ The Case Law Analysis Group of the Kúria gave a detailed analysis of the development of the relevant Hungarian case law in the light of the Directives' standards, concluding that, in terms of causation, the employee is only required to make allegations, and the burden of proof is completely placed on the employer.⁸⁸ This position was transposed to the KMK Resolution as well, enhancing the uniform interpretation of the rules on burden of proof for courts for the future.⁸⁹

A study annexed to the Executive Report suggest that the very frequently used defence by the employer, stating that it was not aware of the existence of the protected characteristic of the claimant (e.g. sexual orientation, adherence to a specific nationality or ethnicity) should also be proved by the employer (in the framework of rebutting the causation due to a lack of knowledge of the protected characteristic), and the claimant may not be required to prove (or to make presumable) the awareness of the employer.⁹⁰ In the author's opinion, this approach

⁸⁴ ETA Act, sec. 22 (or in a narrow range of cases: sec. 7).

⁸⁵ E.g. judgment of the Supreme Court No. EBH 2010. 2272.

⁸⁶ A summary of this practice: Kulistry (n 57) 164–165.

⁸⁷ Decisions of the Kúria No. EBH 2015. M.24.; Mfv.I.10.630/2014.

⁸⁸ Executive Report, 56.

⁸⁹ KMK Resolution, sec. 1.

⁹⁰ Kulistry (n 57) 129.

is correct, without prejudice to the mere existence of the protected characteristic being required to be made presumable by the employee, even if it concerns sensitive personal data (e.g. similarly the gender identity or sexual orientation, race, ethnicity, criminal or medical records).⁹¹

IV Conclusions and Agenda for the Next Fifteen Years

In terms of the position of Hungarian equality law in the framework of the typology of different approaches of equality, we can assess that the national body of law reaches further than the formal approach, and contains elements reflecting the approaches of ‘equality of results’, ‘equality of opportunities’ and ‘equality as an element of dignity’. Even though the Constitution and the principles elaborated by the Constitutional Court related to the constitutional understanding of the equality clause gave already indications for the legislature and the jurisdiction to exceed the formal approach of equality in the ’90s, a set of new instruments reflecting the substantive and the dignity-based approach of equality became part of national law as a consequence of implementing EU law (e.g. indirect discrimination and positive actions).

The structural position of equal treatment duty as a ‘real’ fundamental principle of labour law was not at all obvious in the 90s: courts often took the position that if the employer was exercising its prerogatives correctly in a formal sense, the discriminatory nature of this provision cannot be the subject matter of a lawsuit. By now, the trend of judicial practice took a preferential direction: prohibition of discrimination is regarded as a fundamental principle of labour law and, by this, constitutes a genuine limitation of the margin of discretion of employers in exercising their employers’ rights. As a result, any discretionary decision of an employer (e.g. dismissal during the trial period, rewarding the workers, making workers redundant) can be contested if it does not meet the requirements of equal treatment.

The rules on shared or reversed burden of proof lie at the heart of anti-discrimination law. Although the pre-accession national law referred to the reversed burden of proof in discrimination cases, the ETA Act, in correspondence with the Directives, significantly refined and clarified the obligations of the parties. Even though the national rules now comply with the EU standards, they might be assessed as being slightly too generous toward the claimants. The KMK Resolution, in line with the CJEU’s case law and the Directives, gave full clarity on the application of rules on burden of proof, dissolving the previous controversies in the case law.

Looking back over the past 15 years of the development of national anti-discrimination law in employment, we cannot disregard the high value added by relevant EU law to the

⁹¹ For more detail on the burden of proof see: Halmos Szilvia, ‘Bizonyítás az egyenlő bánásmóddal kapcsolatos munkaügyi perekben az új Pp. alapján’ in Pál Lajos, Petrovics Zoltán (eds), *Visegrád 15.0: A XV. Magyar Munkajogi Konferencia szerkesztett előadásai* (Wolters Kluwer 2018, Budapest) 21–71.

domestic achievements. The body of anti-discrimination law indeed was, and perhaps also will continue to be, a 'foreign body' in the eye of Hungarian law practitioners and judges for a long time more. Nevertheless, it can be asserted that it has been and is still worth the effort to gain an increasingly profound understanding of the instrument of EU anti-discrimination Directives and case law, which has so far given many valuable indications for the improvement of national law, and one hopes will do so for its development in the future as well.