



Strasbourg, 22 August 2018

CDL-JU (2018)008
English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**17th meeting of the Joint Council
on Constitutional Justice**

Mini-Conference on

“GENDER, EQUALITY AND DISCRIMINATION”

Lausanne, Switzerland

28 June 2018

**A step forward? The first case in front of the Constitutional Court of
Hungary concerning trans-sexuality**

REPORT BY

Mr László DETRE
Constitutional Court of Hungary

1. The presentation shall draw attention to the situation of gender equality in Hungary in a broader sense. Not only the classical positions of women and men is to be examined, but also the question concerning sexual orientations and other gender issues since this subject caused the most important constitutional debates in the recent years. As the title of the presentation suggests, in one of the latest decisions, the Constitutional Court of Hungary (hereinafter: Court) has also dealt with a question that is not a classical gender concern, but not far from that. The decision itself could be seen as a step forward in the case-law of the Court since it acknowledged *inter alia* a crucial aspect of gender issues. The progress shall be inspected through the case-law of the Court since 2012, when the Fundamental Law of Hungary entered into force.

2. Firstly, it is necessary to examine the major points of the Hungarian legal system concerning gender equality, and naturally, the Fundamental Law is the starting point. The Fundamental Law most importantly declares in Article XV paragraph (3) that women and men shall have equal rights. It is already a development compared to Article 66 paragraph (1) of the former Constitution as it specified that the Republic of Hungary shall ensure the equality of men and women in all civil, political, economic, social and cultural rights. Inspecting Article XV of the Fundamental Law, it should be clearly noted that the regulation which is ordering the full equality between the genders falls within the broader concept of the equality clause of the Fundamental Law. Paragraph (1) of the Article contains the general rule of equality before the law and paragraph (2) guarantees the fundamental rights to everyone without discrimination and in particular without discrimination on grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status. A footnote shall be taken concerning paragraph (2) of Article XV. The Venice Commission in its Opinion 621/2011 – adopted on its 87th Plenary Session –, on the new Constitution of Hungary quoted judgments of the European Court of Human Rights and emphasised that Article XV lacked any mention of the prohibition of discrimination on the ground of sexual orientation, which was common to the majority of the European Constitutions. While Article XV of the Fundamental Law still does not contain explicitly the prohibition of discrimination on such ground, it is up to the Court to evaluate it based on the wording “on any other status” just in line with the practice of the European Court of Human Rights. Besides the basic principles, paragraph (4) and (5) of Article XV are also to be mentioned since these regulations prescribe that Hungary shall promote the achievement of equality of opportunity and social inclusion and by means of separate measures, Hungary shall protect families, children, women, the elderly and persons living with disabilities. To sum up, the Fundamental Law covers from equal treatment to the special declaration of equality of women and men and additionally it imposes an obligation on the State to flourish equality and take special actions to protect women.

3. Additionally to the Fundamental Law, numerous legal regulations and separate acts aim to achieve what the quoted constitutional provisions require.

A) Most importantly, as a general legal framework, Act n. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities is going to be mentioned. It basically orders that anybody – including legal entities – who is under Hungarian jurisdiction shall be treated with equal respect, taking personal interests into consideration equally. The scope of application of the Act is basically the public sphere including working conditions or the actions of public authorities. However, the Act is also applicable among private actors when one stakeholder offers goods and services to the public. Importantly, it is also applicable in labour relations as well. The requirement of equal treatment could be violated by direct or indirect discrimination, harassment or punishment and additionally ordering to commit the above mentioned measurements. According to the Act, discrimination – as it is enrolled in the Fundamental Law – is direct when it is based on – *inter alia* – gender or sexual orientation, maternity or fatherhood. The discrimination is indirect when seemingly the situation complies with the requirement of equal treatment, but in reality one or a group of people – based on a status formulated in the Act (which correspond the Fundamental Law) – suffers greater disadvantages

than others who are in the same situation. The affected person may claim such a violation in a civil or in an administrative judicial.

Additionally, one may submit a request to the Equal Treatment Authority, a government office that shall deliver a legally binding decision, and even impose a fine. The decisions of the authority can be subjected to judicial review like any other decisions of the administrative authorities. In conclusion, the presented Act is to be regarded as a general but also additional tool to guarantee the equal treatment between women and men.

B) Naturally, as in any other European countries, specific rules within various acts that govern great aspect of life bear utmost and prime significance for equal treatment of the genders. Not mentioning all but the most important ones are to be suggested. Act no. I of 2012 on the Labour Code does not explicitly refer to gender equality, but stipulates it in Section 12 in a broader sense. It rules that the requirement of equal treatment shall be kept in labour relations especially concerning equal payment. More broadly, Section 5 declares that the Labour Code shall be interpreted in line with the legal order of Hungary and of the European Union. This essentially means that the general and special equal treatment clause of the Fundamental Law is to be applied in labour relations. Naturally, the Labour Code protects women during maternity as employers may not dismiss them under the 24 weeks maternity leave. The same rule is applicable to women who adopt their children (Sections 65 and 127). Similar regulations can be found in Act no. CXCV of 2011 for the public sphere. Not surprisingly, the other major issue respecting gender equality – in the legal system – is connected to social security and pensions. According to Section 18 of Act no. LXXXI of 1997, the same rules shall be implemented to everybody, if the retirement age is to be calculated (which depends on the date of birth, ranges from 62 to 65 years). However, only women are entitled to full pension before the age specified in Section 18 if they had worked for at least 40 years in work. This has been the cause of constitutional debates which led to a case before the Court.

4. Secondly, the case-law of the Court shall be recalled since the decisions have tackled core issues of gender equality in a broader sense. It is also fair to say that each decision may be regarded as a step forward in the process of tangible measurements aiming at equal treatment between genders.

Decision 43/2012

In 2011, Act no. CCXI of 2011 on the protection of families was adopted. Paragraph (1) and (2) of Section 7 defined family as an emotional and economic relationship which is based on marriage between women and men, on parentage or adoption. The Commissioner for fundamental rights submitted a posterior norm control petition, stating that the introduced definition of family violated *inter alia* paragraph (2) of Article XV (prohibition of discrimination) of the Fundamental Law. The Commissioner acknowledged that Article L) of the Fundamental Law stated that “Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision and the family as the basis of the survival of the nation”. However, the legal system provided legal status for other forms of human relations such as the civil partnership open to same-sex couples as well. Such protection – regardless the gender of the partners – had been stemming from their right to human dignity, therefore the law-maker was obliged to create rules of protection. The Commissioner stated that the definition of the family excluded the civil partnerships out of the protected forms of relationships. In this way it constituted discrimination based on sexual orientation since same-sex couples could only choose civil partnership [paragraph (2) of Article XV of the Fundamental Law “other status”]. In its decision, the Court – on a little bit different grounds – sided with the Commissioner and annulled the challenged regulation. The Court held, *inter alia*, that the law-maker could adopt different rules on marriage and on other forms of relationships since marriage was explicitly protected by the Fundamental Law whilst the protection of the civil partnership derived from the right to human dignity. Nonetheless, the protection of family – in a

sociological sense – was to be applied to other form of long-lasting relationships as well. The law-maker could prefer a certain form of relationship, but it was not allowed to deteriorate other legally acknowledged forms. Moreover, Article L) of the Fundamental Law did not exclude other forms of family life out of the protection, therefore the challenged regulations provided a narrow definition compared to the Fundamental Law.

Decision 17/2014

Again, the Commissioner for fundamental rights had initiated a posterior norm control procedure challenging a provision of the Act. no. I of 2012 on the Labour Code. The challenged regulation stated that women were only protected under maternity – they may not be dismissed – if they informed their employer about their pregnancy. The Commissioner stated that the challenged rule was against, among others, the right to human dignity (Article II of the Fundamental Law) and the right to privacy [paragraph (1) of Article VI of the Fundamental Law]. The Court partly acknowledged the arguments of the Commissioner and annulled certain elements of the challenged regulation. The Court advocated that pregnancy fell under the inner cycle of privacy of women, thus making obligatory to disclose such information towards the employers constituted an unconstitutional interference and also violated the concerned women's right to human dignity.

Decision 28/2015

A referendum was initiated by a union leader in order to also allow men to retire after 40 years of working, since women had been granted such an advantage. The Curia – the supreme court of Hungary – overruled the decision of the National Election Committee and allowed the referendum. The initiators started to collect the necessary 200 000 signatures, whilst private citizens and organisations filed a special complaint to the Court. The petitioners stated that granting men with the same benefits as women regarding retirement conditions would violate paragraph (5) of Article XV of the Fundamental Law that declared: "By means of separate measures, Hungary shall protect [...] women". The Court ruled in favour of the petitioners. It stated that in line with the provisions of the Fundamental Law, women were entitled to preferential care and protection. Such a notion meant that women, compared to men, shall be granted with better retirement conditions. Additionally, the Court held that the subject of the referendum was to be considered a budgetary issue, which was not allowed to hold according to point c), paragraph (3) of Article 8 of the Fundamental Law.

Decision 3001/2016

The very decision might be considered as an emblematic presentation of different treatment of the genders. However, in this case men suffered from the unlawful discrimination. The petitioner, a club, filed a constitutional complaint against a judgment of the Budapest-Capital Administrative and Labour Court and against the applied provisions of the Act no. CXXV of 2003 on equal treatment and the promotion of equal opportunities. Previously, an individual – a man – had filed a complaint against the petitioner to the Equal Treatment Authority claiming the club's entrance policy. According to that, women could enter for free, but men had to pay an entrance fee. The Authority ruled that the club violated the obligation of the equal treatment with a direct discrimination based on the gender. The Authority also held that a general authorisation for the private sector to disadvantage men claiming that it was necessary in the interest of women could not have been derived from the positive discrimination clauses concerning women of the Fundamental Law. The Budapest-Capital Administrative and Labour Court reviewed the decision of the Authority and declared its procedure lawful. The petitioner club claimed in its constitutional complaint that the Administrative Court violated – among others – its right to property [paragraph (1) of Article XIII of the Fundamental Law] since it could not dispose of the club, namely providing benefits to a certain group on its own interests, as it wished.

The Court declined the petitioner's request. Relying on its well-founded case-law, the Court advocated that property may only be expropriated exceptionally, in the public interest and in the cases and ways provided for by an Act, subject to full, unconditional and immediate compensation. However, certain aspects of property – such as disposing over it – could be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content. Having said that, the Court pointed out that the prohibition of discrimination was to be applied, even though indirectly, among private actors as well. Since achieving social equality was a constitutionally justified goal, the applied regulations and their interpretations by the Authority and the Administrative Court aimed at prevailing the people's right to human dignity through the prohibition of discrimination on the grounds of gender, the restriction of the club's right to property was proportionate. The case is also important because the Court stipulated the idea that fundamental rights could be applied between private actors (*Drittwirkung*).

Decision 6/2018

In advance: the Court *ex officio* declared an omission on the part of the law-maker violating the prohibition of discrimination clause [paragraph (2) of Article XV] and of human dignity clause (Article II) of the Fundamental Law since the law-maker had not yet regulated the name-changing procedures concerning the lawfully settled non-Hungarian citizens.

The petitioner, a transsexual foreign citizen lodged a constitutional complaint claiming to annul a judgment of the Budapest-Capital Administrative and Labor Court. The petitioner had previously been granted refugee status by the Hungarian authorities since he had been pursued in his home country due to his trans-sexuality. The petitioner initiated a procedure at the Immigration and Asylum Office to change his personal data (gender and name) since his official documents did not reflect his true identity. The Office rejected his request stating that there was no such procedure and formal decision on such issues. Changing gender could be proceeded by amending the birth certificate at the competent registrar. The reason of the rejection was that the Office did not have the competence at all and it could not refer the case to a competent authority since the claimant's birth had not been registered in Hungary.

The petitioner challenged the decision of the Office at the Administrative Court. The Administrative Court rejected his claim stating that only Hungarian citizens were entitled to certify the alternation of their gender by the registrar who had the competence to alter the birth certificate. The procedure was not regulated, but it was based on a custom: according to this procedure, the Ministry of Human Capacities gave permission – based on three medical statements – to the registrar to alter the data in the Hungarian birth certificate. The Administrative Court added that the procedure of changing the name was basically the legal foundation of the alteration of the gender. The Administrative Court also pointed out that there was no legal regulation that defied the competent authority respecting the alteration of the gender. As regards the present case, since the petitioner was not a Hungarian citizen, he did not have Hungarian birth certificate; therefore the above presented custom was not applicable.

In his constitutional complaint, the petitioner stated that the Administrative Court violated his right to human dignity (Article II of the Fundamental Law); right to private life [paragraph (1) of Article VI of the Fundamental Law] and the prohibition of discrimination [paragraph (2) of Article XV of the Fundamental Law]. He claimed that the right to a name stems from the right to human dignity, which was also applicable respecting transsexuals. He advocated that there was no reason to call for the necessity of the birth certificate, since he was registered in the personal data and address registry. Thus, his gender and name could have been changed through these data. The right to human dignity and to private life belonged not only to Hungarian citizens, but they were universal human rights, therefore the decision of the Administrative Court constituted a violation of the prohibition of discrimination based on national origin.

Firstly, the Court rejected the petitioner's complaint against the judicial decision since the Administrative court – in lack of applicable legal regulation – could not have come to another conclusion.

However, the Court stated the following: Concerning the prohibition of discrimination, the Court formulated that it shall be applied in situations when the individual's personal, unchangeable status, his or her identity was at stake. In the Court's point of view, only the inner core of human dignity was to be considered inviolable, its additional elements could be restricted according to the necessity and proportionality test. In the Court's case-law the right to a name, representing the individual's identity was an absolute one. However, altering the name could be treated differently and it could be subjected to restrictions. In the field of regulating the methods how to change one's name, the State enjoyed a wide margin of appreciation. The Court quoted its previous decision from 2008 and formulated that transsexuals' right to change their name was to be considered as a fundamental right. As such, it was based on the right to the personal integrity and on the equal human dignity. Altering the name in connection with altering the gender was a special case and since it was attached to the individual's personality, it fell under the absolute sphere of the name rights. In conclusion, everybody was entitled to have a name which reflected his or her gender.

During its procedures, the Court examined and took into consideration the practice of the European Court of Human Rights and the Federal Constitutional Court of Germany. The Court quoted several judgments of the Strasbourg Court, such as *Rees v. the United Kingdom*; *Christine Goodwin v. the United Kingdom* or *Sheffield v. the United Kingdom*. The Court also cited Resolution 2048 (2015) of the Parliamentary Assembly of the Council of Europe on Discrimination against transgender people in Europe and a judgment of the Court of Justice: *P. v S. & Cornwall County Council*.

In conclusion, the Court formulated that the lawfully recognised refugees shall have – with exceptions regulated in the Act no. LXXX of 2007 on refugee status – the same rights as Hungarian citizens. The alteration of the name, and its special case, the alteration of the gender was open only to Hungarian citizens, thus the lack of the same rules applicable to lawfully recognised refugees constituted a discrimination based on national origin [paragraph (2) of Article XV of the Fundamental Law] and it was also against the right to human dignity (Article II of the Fundamental Law). Therefore, the Court *ex officio* declared an omission on the part of the law-maker and called it upon to adopt proper regulation by 31 December 2018 that was in line with the Fundamental Law.

5. As it was presented, the Hungarian legal system provided constitutional, general and special rules to achieve equal treatment of the genders. The quoted decisions of the Court show that if there is turmoil between the treatment of the different genders, the prohibition of discrimination, the right to human dignity and the special protection for women enshrined in the Fundamental Law are to be quoted. The case-law of the Court also suggests that the constitutional protection of the notion of the gender equality shall be regarded satisfactory. Moreover, the Court has extended the fundamental rights protection to same-sex couples and the latest decision suggests that also to transsexuals under the broad interpretation of gender issues. The latest case of the Court is to be considered as a step forward. The reason is that it is the very first time that the Court fully acknowledged that the change in gender of the individual stems from his or her right to human dignity and the State shall create rules that facilitate its official recognition.