ANTI-DISCRIMINATION AND PRIVATE LAW*

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This paper argues that discrimination is a social problem and private law built on market paradigm can only be adequate in a limited way to pursue such aims. Prohibition of discrimination should be limited to cases of monopoly and narrowly interpreted public offers if contracting is at stake. A further reference point in the course of application of the anti-discrimination principle could be the prevention of social exclusion. Private law cannot allocate the social costs of anti-discrimination. As a result, costs are to be borne by certain market players or members of the protected group. In a great bulk of anti-discrimination cases courts try to solve social problems with inadequate means and as a result even if decisions and aims are morally correct, consequences going beyond the relationship of the parties remain unmanageable.

Freedom of contract, right to dispose and anti-discrimination

The freedom of contract and the right of disposition as central element of the legal concept of property are fundamental principles of private law. The collision between these two fundamental principles and the prohibition of discrimination seems to be almost unsolvable. An inherent content of the principle of freedom of contract and the owner's right to dispose is the freedom of the owner or of the party to a contract to decide whom she transfers her property, whom she passes rights to her property, whom she lets into her property and with whom and under what conditions she is willing to contract. This freedom of choice seems to be a minimum level or core content of these principles providing their substance. This is a minimum content of these freedoms and makes their substance – without this the paradigms of private law should be reformulated.

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As cases from the past hundred years present, the traditional market-oriented private law thinking was consequent and rigid in rejecting the claims attempted to limit the freedom of contract or the owner’s right of disposal concerning the choice among possible parties as well as shaping the terms and conditions of the contract on the ground of prohibition or inadmissibility of discrimination. However, the prohibition of adverse discrimination became more and more obviously the inherent part of private law thinking. As a consequence, more and more obvious is the state intervention in private property and in the right of disposal of the owner, adding one more element to the limits of freedom of contract and to the limits of property.

There are different policies that underlie the anti-discrimination principle. This renders more difficult to find the way to solve the collision between freedom of contract and the prohibition of discrimination and to adapt the anti-discrimination principle to the market-oriented nature of civil law. One cannot identify one single, clear-cut aim behind anti-discrimination: it seems to be much more correct to define it as an approach which is very heterogeneous in its theoretical, ideological and policy backgrounds. The anti-discrimination principle transmits the same expectations (not to make unaccepted distinction) towards persons in society in different situations on different grounds but appears in the same cloth (compensation claims, compulsory contracting and invalidity of contracts) as the result of limited measures of private law enforcement. This heterogeneity is already indicated on conceptual level: it is not clear whether in certain cases one should speak about prohibition of discrimination or requirement of equal treatment.

It became clear for today that even if the traditional view of private law rejected the enforcement of prohibition of discrimination in private law relationships and courts dismissed the claims established on discrimination, private law relationships cannot remain untouched by the anti-discrimination principle. Private law theory and practice have to face the problem of enforcing prohibition of discrimination in private law relationships.

Prohibition of discrimination in human rights and in the Constitution

Prohibition of discrimination is present in different aspects of legal relationships and regulation. In competition law context it is part of the prohibition of abuse of dominant market position, it is a principle generally accepted to follow in labour law, a general requirement of tenders’ regulation (such as public procurement) etc. The enforcement of the anti-discrimination principle in private law relationships appears as an aspect of enforcement of constitutional rights and human rights in private law relationship. The discussion, whether constitutional rights should be directly enforced in private law relationships or not is vivid in Hungary[1]and did not yet come to a rest. The prohibition of discrimination can be derived from the protection of human dignity as well but the Constitution of the Hungarian Republic in its § 70/A. subpar. (1) explicitly provides that the Hungarian Republic within its territory guarantees human rights to all persons without any form of discrimination, namely regardless to differences between people according to their race, colour, gender, language, religion, political or other opinion, national or social origin, financial, birth or other situations.

Provision § 70/A. subpar. (1) of the Constitution does not convey the prohibition of discrimination as a general principle of the whole legal system. The Constitution attributes the constitutional anti-discrimination principle a restricted content: it explicitly asserts human rights without discrimination and makes the task of the State to guarantee them. Through the linguistic interpretation of § 70/A. subpar. (1) of the Constitution one could come relatively easily to the consequence that since this provision makes the assurance of human rights the task of the State it does not impose obligation on persons in general, but this is clearly not the case. As the Constitutional Court derives the anti-discrimination principle from the protection of human dignity as well,[2] the scope of prohibition of discrimination shall not be limited to the application of § 70/A. subpar. (1) of the Constitution, but is formulated in a much wider sense. There are two direct consequences of this approach. One of them is that the Constitutional Court has developed in its practice the prohibition of discrimination a general principle which – pointing beyond § 70/A. subpar. (1) of the Constitution – shall be according to this interpretation seen as a general principle being conveyed to the whole legal system.[3] The other direct consequence is that the test of violation of the anti-discrimination principle has been the impairment of human dignity[4] that is, discrimination is unlawful if it violates human dignity. On this ground the Constitutional Court amended the norm in the Civil Code defining cohabitation and extended it to relationships of two people of the same gender as well. The Constitutional Court found that restricting the concept of cohabitation (with the consequence of creating com-

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1 L. Vékás, *Az új polgári törvénykönyv elméleti előkérdései*, Budapest, 2001, 136 ff.

2 9/1990. (IV. 25.) AB hat, ABH 1990, 46.

3 As e.g. T. Győrfi reckons, the anti-discrimination principle sets a formal barrier to the legislator having an overall effect in the legal system as a whole. T Győrfi, *Az alkotmánybíráskodás politikai karaktere*, Budapest, 2001, 133.

4 61/1992. (XI. 20.) AB hat. ABH 1992, 280.

mon ownership) to relationships of man and woman is contrary to the Constitution and shall be repealed.[5] The whole practice of the Constitutional Court concerning anti-discrimination – with more than two hundred decisions – cannot be presented and analysed here. The most important development of this practice was the formulation of prohibition of discrimination as a general requirement valid for the legal system as a whole in the context of protection of human dignity. The Constitutional Court has accepted from the outset the admissibility of positive discrimination and established that discrimination shall be held unconstitutional insofar as there is not any reasonable ground for that, i.e. it is autocratic.[6]

Anti-discrimination in private law

Serious doubts have been expressed in Hungarian as well as in foreign legal literature on enforcing the prohibition of discrimination as constitutional requirement in private law relationships.[7] The problem, however points beyond the problem of direct effect of human and constitutional rights. In certain aspects and for certain situations the prohibition of discrimination has always been the part of private law thinking and practice, which makes a complex and understanding approach necessary. The question is not anymore whether prohibition of discrimination shall be enforced in private law relationships, but where and according to what guidelines shall the boundaries of its effect be drawn. Since the Hungarian Civil Code declares the prohibition of discrimination as an inherent (human) right of the natural person, the problem shall not be put in the context of enforceability of human and constitutional rights in private law relationships. § 76 [originally § 81 (2)] of the Civil Code prohibited discrimination of natural persons from the outset but it has gone through significant changes in 2003 as it has been amended by the § 37 of the Act of CXXV. of 2003 on anti-discrimination and the requirement of equal treatment which came into effect on 27 January 2004 (further referred to as Anti-Discrimination Act).[8] As it stands now, as the result of the amendment, § 76 Civil Code provides that infringement of the requirement of equal treatment, violation of free-

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5 14/1995. (III.13.) AB hat, ABH 1995, 82.

6 *L. Sólyom*, Az alkotmánybíráskodás kezdetei Magyarországon, Budapest, 2001, 410.

7 Vékás, 159.

8 § 76 Civil Code originally declared that discrimination against private persons on the grounds of gender, race, ancestry, national origin, or religion; violation of the freedom of conscience; any unlawful restriction of personal freedom; injury to body or health; contempt for or insult to the honour, integrity, or human dignity of private persons shall be deemed as violations of inherent personality rights.

dom of conscience, unlawful limitation of personal freedom and violation of bodily integrity, health, honour and human dignity shall be deemed as infringement of the inherent (human) rights of the person.

The original idea presented by the principles and proposals for the Anti-discrimination Act was strongly to reduce the enforcement of requirement of equal treatment in private law relationships. The scope of the Act would have been limited to “public” private law relationships which were narrowly but not clearly defined in the principles and proposals. According to this idea enforcing the requirement of equal treatment is the task of the state but not of private individuals. That is why this requirement should not have an impact on private law relationships and should be enforced only against the state if authorities discriminate in procedures for registration or issuing permission.[9] This approach has not been kept as the Anti-discrimination Act has been legislated.

On the contrary, the Act became very open for application in private law relationships. According to § 5 of the Anti-discrimination Act everyone who makes an offer or an invitation for an offer to indefinite persons or sells goods or provides services in premises open for customers shall be obliged to comply with the requirement of equal treatment. The burden of proof is reversed: the person making the invitation for an offer has to prove the compliance with the requirement of equal treatment if the decision was detrimental to the aggrieved person (§ 19 of the Anti-Discrimination Act).

Discrimination as a human rights’ problem became a very current issue of Hungarian private law in the last decade and the Anti-discrimination Act will surely give new impulse to civil organizations as well as individuals to raise claims at the court and to provide support to individuals to do so, even if the possibility has also been provided by the Civil Code in its § 76. The Hungarian Supreme Court made clear already long before having specific legislation on the requirement of equal treatment that the right to non-discrimination as a personality right must be taken seriously and presented its openness and readiness to defend it in private law relationships as well. The Supreme Court decided for the plaintiff and ordered the defendant to pay non-pecuniary damages in a case where the plaintiffs were not allowed into a public house because of their gypsy („roma”) origin;[10] as well as did it in another case, where gypsy children were kept segregated by the school during the graduation parade.[11] The Supreme Court already in 1995 obliged a bank to pay non-pecuniary dam-

[9] For the critic of this idea see L. Farkas /A. K. Kádár /J. Kárpáti, *Néhány megjegyzés az egyenlő bánásmódról szóló törvény koncepciójához,* Fundamentum 2003, no. 2., 121.
[10] EBH 2002. no. 625.
[11] EBH 2001. no. 515.

ages to the physically handicapped plaintiff because he could not get into the building of the bank.[12] These decisions seem to be in line with the general tendencies in European and other jurisdictions.[13] Discrimination became in Hungary – as everywhere in modern industrial societies[14] – a central policy issue that state and private law have to face.

The increasing number of discrimination cases gives the courts a great task, especially in cases where contracting is at stake. Even if – as the first reaction to the problem of enforcement of the anti-discrimination principle in contract law – there has been a very strong criticism[15] expressed in Hungarian legal academic publications we have to accept that the anti-discrimination principle has been a part of our private law and this tendency is partly independent from regulation.

The principle of freedom of contract is a fundamental principle of contract law. It is very hard to provide the proper guidelines which are currently absent in Hungarian court practice how to allow human rights' issues to make their way into private law (as well as contract law) without frustrating the basic paradigms of contract law. This is a great problem still waiting to be solved. One can hear two opposing views nowadays in Hungary. On the one side, there are legal practitioners and scholars who say that human rights have superiority and they have to overwrite the whole private law regulation including contract law so the principles of private law have to find their barriers in human rights. On the other side, there are scholars and practitioners (mainly private lawyers) who

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[12] BH 1995. no. 698. For positive evaluation of the decision see B. Lenkovics /L. Székely, *A személyi jog vázlata*, Budapest 2000, 94.

[13] A. Barak, *Constitutional Human Rights and Private Law* (in D. Friedmann/D. Barak-Erez, *Human Rights in Private Law*, Oxford – Portland, Oregon, 2003) 39; A. Reichman, *Property Rights, Public Policy, and the Limits of the Legal Power to Discriminate* (in D. Friedmann/D. Barak-Erez, *Human Rights in Private Law*, Oxford – Portland, Oregon, 2003) 261 ff.; T. Bezzenberger, *Ethnische Diskriminierung, Gleichheit und Sittenordnung* [AcP 196 (1996) 395] 421.

[14] M. J. Trebilcock, *The Limits of Freedom of Contract*, Cambridge/Massachusets/London, 1993, 190.

[15] L. Vékás argued very strongly against the enforcement of constitutional and human rights in private law, refusing not only the possibility of declaring a contract null and void on the ground of violation of constitutional norms but explicitly rejecting the idea of indirect compulsory contracting derived from the principle of prohibition of discrimination. Vékás, 159. J. Zlinszly reflecting to the principles and proposals for the Anti-discrimination Act argued that the boundaries of application of prohibition of discrimination as a constitutional and human rights principle shall be drawn at the gate of private law. According to his arguments, the prohibition of discrimination shall be deemed as a public law principle which shall be present in the whole legal order but restricted to public law relationships. In the field of private law it cannot collide with private autonomy which is an inherent part of human dignity as well. J. Zlinszky, *Gondolatok és aggályok egy koncepció kapcsán.* Fundamentum 2003, no. 2, 132.

defend the classical principles of private law and argue that enforcing human rights should not overwrite the principle of freedom of contract and cannot be enforced against it – otherwise the inner market-oriented integrity of contract law would be ruined.

As former decisions show, the court practice of market economies was consequent in rejecting the claims established on unacceptability and illegality of discrimination and courts were reluctant to limit the freedom of contract on this ground. The principle of anti-discrimination is, however, more and more obviously an inherent part of private law thinking and private law theory. States seem to be more and more ready to intervene in the private sphere and property and to add one more element to the limits of freedom of contract. The task of contemporary private law theory is to find the correct place of the anti-discrimination principle in private law thinking and there are different factors that render this task even heavier than this would seem to be. One of these factors is that it is very hard to define the content of the anti-discrimination principle on an abstract level and to define the socially accepted values and the policy that underlie this principle. As a principle, the prohibition of discrimination is not to be regarded as an absolute requirement since it describes the position of the individual related to other persons. One can speak about discrimination only in the context of a three-pole structure of relationships, since an individual can treat another equally or unequally only comparing how she treats at least one other individual. The law of equal treatment does not reflect the „absolute intensity" of a conduct of an individual but the relative deviation of an individual's conduct from the conduct of the same individual vis-á-vis another person.[16]

Another factor is that the prohibition of discrimination may gain sense in the context of social groups. One of the main identifiable policies behind the anti-discrimination principle is to avoid discrimination among individuals because of their belonging to a certain social group. Private law regulation and approach is built on an individualistic, bipolar model. The application of the anti-discrimination principle in private law relationships involves the difficulty of applying a rule modelled to a social group context in a bipolar model. Contractual terms and conditions and situations of contracting are to be compared in order to test discrimination.[17] Applying a collective principle in the individualistic model of private law cannot be done without discrepancies.

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16 *Győrfi*, 133.

17 D. Schiek, *Contract Law, Discrimination and European Integration* [in From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law (ed by T. Wilhelmsson/S. Hurri, Ashgate/Dartmouth, 1999) 405 – 433], 421.

A further problem is that it is impossible to establish a hierarchy of principles of freedom of contract and anti-discrimination. The collision cannot be resolved through ranking the two colliding principles because both of them are to be derived from the protection of human dignity. The principle, which provided in English law the ground for refusal of the enforcement of slavery contract on the basis of equality and autonomy with construction of freedom of contract as integral element of human dignity cannot be in other situations subordinated to prohibition of discrimination which is based on the same policy considerations.[18] Establishing an abstract hierarchy of values in the context of collision of freedom of contract and prohibition of discrimination seems to be impossible already on the ground that the same constitutional, moral and human value, the protection of human dignity stands behind both of them.[19]

The anti-discrimination principle is strange to principles of private law built on the market paradigm. While the prohibition of discrimination became an overall generally accepted human rights norm and constitutional requirement, for theory and practice of contract law it is very hard to accept that freedom of contract is limited by such an abstract and vague (in its content) principle. According to the traditional approach competition in the market itself prevents discrimination because competition is able to guarantee the level of equal treatment and justice as far as it is compatible with a plural society. In fact, this does not seem to be true and state intervention seems to be necessary in private law relationships in order to prevent discrimination. Prohibition of discrimination is, however, not as far from and is not as strange to private law as one could think and as it seems to be in theory. Cases of common calling in medieval English common law and in German *Gemeines Recht* show, that prohibition of discrimination was always a general requirement in society towards people pursuing certain activities. Innkeepers, owners of public houses, common carriers etc. under normal circumstances were obliged to provide services without discrimination to anyone who asked for it.[20] Common callings were never seriously questioned in private law theory.

Common (or public) callings were not the only instruments providing requirement of equal treatment in private law. Cases of limiting property rights on similar grounds present this requirement as well. The owners of certain properties (mostly immovable) were not allowed to refuse the access to their property if it involved public interest. Owners of theatres or essential facilities (like

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[18] A detailed analysis provided by T. D. Rakoff, *Enforcement of Employment Contracts and the Anti-Slavery Norm* (in D. Friedmann/D. Barak-Erez, *Human Rights in Private Law*, 283 ff.)

[19] Zlinszky and Lenkovics/Székely (Lenkovics/Székely 94) emphasize that only discrimination incompatible with human dignity shall be held unlawful.

[20] In details see J. Köndgen, *Selbstbindung ohne Vertrag*, Tübingen 1981, 24. ff.

cranes in ports) were burdened with such an obligation. It seems plausible to say that premises of commercial purposes can be held of such nature and in a sense subordinated to public interests. This subordination establishes that no one can be excluded lawfully from using these properties on the ground that she belongs to a certain social group. With other words, if someone utilizes her property for general commercial purposes or the possibility of such utilization goes with the nature of the immovable (like markets, coastal sectors etc.) this makes – at least within the scope of this purpose – the immovable a public place where the right of disposal of the owner is limited by public interest connected to that use. That is why within the scope of the commercial utilization the owner of such an immovable does not have the right to decide whether someone is allowed or not to access the property.[21]

A next clear ground for the way of the anti-discrimination principle into private law is the principle of *neminem leadere*: no one is allowed to use her property in order to cause harm to others. With this traditional private law principle seems to be fully consistent to argue that it is prohibited to use property with the result of violation of another person's human dignity. Refusal of access to commercial property solely on the ground that someone belongs to a certain social group violates the excluded person's right to human dignity.[22]

As these examples show, the thought of anti-discrimination is not as incompatible with the logic of private law as one may think. There have always been relatively well defined cases where private law has limited contractual freedom and the owner's right of disposal through establishing the unlawfulness of excluding certain individuals from access to goods and services. It is remarkable that contemporary court practice – as well in Hungary as in other European jurisdictions – extends the application of the anti-discrimination principle in private law relationships mostly to the same or similar typical cases. A similar – albeit not the same – approach is reflected in the regulation provided by the Anti-discrimination Act in Hungary.

Possible solutions provided by traditional legal instruments

Considering private law and competition law legislation and court practice there are two possible lines of arguments that could make the principle of anti-discrimination acceptable for private law without serious compromises and which could provide the limits of requirement of anti-discrimination or equal

[21] A. Reichmann, *Property Rights, Public Policy, and the Limits of the Legal Power to Discriminate* (in D. Friedmann/D. Barak-Erez, *Human Rights in Private Law*, 261.

[22] Reichmann, 253.

treatment as well. One of the lines of arguments is that discrimination is prohibited in monopoly situation. According to this argument in situations where access to resources is limited and in the market the given demand may be covered only from one or a few number of suppliers it is not permitted for the supplier to allow some party access to the resources while excluding others. This line of argument rests on the correction of market failures and remains within the private law paradigm. Prohibition of discrimination in this context does not rest on belonging to a certain group of people but on correcting market failures. This approach would limit the contractual freedom of suppliers in general and does not focus on social policy of defending groups of people in society. In this context the underlying policy of anti-discrimination is the maintenance of market and elimination of adverse effects of monopoly situation through requiring equal treatment.

The other line of arguments is the differentiation between private and public offers and would say that if someone makes an invitation to offer – by nature of its activity (hotels, taxis, mass transportation vehicles etc.) or by the offer – to an indefinite number of addressees and presents the possibility of contracting to anyone, cannot withdraw this act by going back on his own conduct and is not allowed to discriminate among those who want to make a (legal) offer to him. The basis of this consequence is the general traditional prohibition of *venire contra factum proprium*. This would cover cases of or similar to traditional common callings and could be established – at least partly – through limitation of property rights on the ground of public interests. The two lines of arguments – controlling monopolies and special treatment of public offers – cannot be clearly distinguished and are closely interrelated.

Limiting the prohibition of discrimination to cases of monopoly and public offer would make the anti-discrimination principle compatible with traditional principles of private law, could be applied consequently and would be as well in theory as in practice acceptable within the private law paradigm. This approach would not threaten the paradigm of freedom of contract and could be fitted into the traditional dogmatic structure and logic of private law with its sanctions as well (direct compulsory contracting, claim for damages involving indirect compulsory contracting, invalidity of immoral contracts or contracts against public policy, regulation of the contracting process). In such a system the strength of the requirement of anti-discrimination or equal treatment could be well determined with the more powerful the monopoly of the supplier, more important the demand or more open the offer is, the more obviously shall the contractual freedom of the public offeror or the monopolist be limited. In this matrix the intensity of intervention on the ground of anti-discrimination would depend on the strength of the monopoly and would be in direct ratio with the importance and availability of the barred resources and the grade of openness of the invitation to offer.

This would not, of course mean that prohibition of discrimination or requirement of equal treatment should not be protected as an inherent right of the person in these cases as well. Violation of human dignity shall be sanctioned as infringement of personality (human) rights independently from contracting. If, however, there is not any additional element in the circumstances of the case establishing violation of human rights, the refusal of contracting or denial of access to property or choosing another party itself should not establish unlawful conduct and should not trigger its legal consequences. Even if this test would – according to my opinion – provide a correct approach in the course of application of the anti-discrimination principle for cases of indirect compulsory contracting, it may not be useful in other aspects (e.g. segregation in schools). Moreover, we should not ignore the fact that the scope of § 5 of the Anti-Discrimination Act is obviously wider, since if someone is looking for new tenants in a newspaper advertisement the contracting would fall under the scope of the Act since this shall be deemed as a public offer.

Traditional explanations beyond

Even if we accept – as it is suggested in this Article – that monopoly and the concept of a narrowly interpreted public offer would determine the correct scope of the anti-discrimination principle in contract law, it is obviously useless in other situations, which are not about contracting. The need for a more abstract test is inevitable. The problem is very complex, not only because of the moral content of the anti-discrimination principle but because of difficulties of ranking the two principles in a clear hierarchy as well. The evaluation of individual cases (and the decision of the court) is in a lot of cases intuitive, even if there is a relatively unified approach in comparing jurisdictions. The absence of a correct and reliable theoretical explanation of the anti-discrimination principle makes the distinction between cases uncertain resulting in uncertainty of law. There are different answers provided by different approaches depending on different views of economy and society[23] making the picture even more obscure.

[23] For a summarizing survey of these approaches see S. Fredman, *Discrimination* (*The Oxford Handbook of Legal Studies*, ed by P. Crane/M. Tushnet, Oxford, 2003, 202 – 225).

Attempts to provide a correct explanation seem to emphasize one or more aspects of the problem but fail to be able to give a comprehensive system of arguments. According to Brest, for instance, in anti-discrimination cases a distinction must be made between the result of decisions and the procedure reaching a decision. In the procedure leading to the decision the role of the anti-discrimination principle shall be the prevention of irrational and unfair wrongs where those decisions are to be deemed as irrational and unfair and as such wrongs which express that people belonging to certain social groups are less valuable than others. In this approach even discriminative decisions are to be deemed as lawful if they are rational, i.e. are based on statistically proven predictable behaviour.[24]

The other – from decision making independent – ground for anti-discrimination according to Brest is the principle that harms resulting from decisions based on social status, including non-pecuniary loss from the feeling being stigmatized,[25] should be prevented. This is a logical, transparent and consequent system which seems to be compatible with traditional principles of private law as well insofar it would sanction discrimination as a result only if there is an additional element (at least non-pecuniary loss) while it would sanction discrimination in procedure leading to decision only if the decision cannot be rationally justified. He would, however, keep this system open for cases which don't come under this umbrella but which would result in social disadvantage as cumulative effect of individual decisions. The test provided by him shall be limited by this aspect: the test is applicable insofar the cumulative effect of individual decisions does not lead to disadvantage of a social group and persons belonging to this group. If this would be the case, the decision shall be deemed as discriminative and the result of the decision shall be sanctioned without further considerations.[26] In these cases neither the rationality of the decision, nor the absence of violation of human dignity or absence of non-pecuniary loss would make the decision lawful. If, for instance, someone is prevented from being heard as (s)he applies for a job because of origin or belonging to a certain social group, (s)he does not have to prove that (s)he should have got the job in case of being heard as deprivation of possibility itself is enough ground for making the discrimination illegal.[27]

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[24] P. Brest, *In Defence of the Anti-Discrimination Principle*, Harvard Law Review [1976] 90, 6 ff.

[25] This may come from the refusal of the possibility obtaining certain benefits, like the refusal of being served, exclusion from the possibility of getting a job etc. Brest, 8.

[26] Brest, 10.

[27] Brest, 12.

According to Epstein on the other hand, differences in society should be accepted and deemed as a natural phenomenon. The correct approach of law and society requires the acceptance of these differences.[28] According to him, under market conditions, discrimination cannot bring any disadvantage for any of the minorities in the society, since they can cover their demands from other sources provided by the market as well.[29]

Prevention of social exclusion

In the course of applying the anti-discrimination principle in private law relationships we cannot avoid the determination of the policies underlying the prohibition of discrimination. In absence of this one cannot provide a convincing argument and build up a consequent system for determining the scope of this principle. One possible point of reference is the requirement of social equality but the heterogeneity of definitions and explanations of social equality itself questions the validity of these explanations. A further problem is that since equality shall exclude positive discrimination as well, the requirement of equality undermines the protection of the disadvantaged social group which needs support. We have to accept – at least it seems to be so – that social equality and social justice are concepts which cannot be determined correctly.

From this follows that the policy requiring prevention of discrimination must be sought for in a more direct way. One possible explanation is that prevention of social exclusion and strengthening of social integration are the aims of policy against discrimination. Prevention of social exclusion may be accepted as the policy behind prohibition of discrimination. It also may serve as a good point of reference to determine the scope of anti-discrimination legislation and practice, the allocation of burden of proof and to draw the borders of allowed positive discrimination.[30] According to this approach, discrimination shall be held unlawful if and insofar as it results in social exclusion. In absence of social exclusion discrimination shall be allowed. This argument is in line with the approach which would not hold discrimination unlawful under market conditions, since under market conditions individuals may cover their necessities from other sources so one cannot speak of exclusion. If someone is refused of being served in a shop but can obtain the goods from the neighbouring other

[28] R. A. Epstein, *Forbidden Grounds – The Case Against Employment Discrimination Laws*, Cambridge/Massachusetts/London, 1992, 16.

[29] In labour market, e.g. there is not any ground for sanctioning discrimination if applicants can go to work for another company. Epstein, 32.

[30] H. Collins, *Discrimination, Equality and Social Inclusion*, The Modern Law Review, Vol. 66, January 2003, 16 ff.

shop, there is not any social exclusion because she cannot come to a detrimental situation comparing to others being served at the first shop. Of course, the way of refusal may violate her human dignity which establishes the infringement of personality rights (human rights) and may trigger legal sanctions but this is independent from the fact of the refusal of being served.

It is highly questionable, however, how private law and the interpretation and concretization of open norms can provide good means to realize such a socio-political aim like the prevention of social exclusion. The greatest problem is the unpredictability and unmanageability of further consequences of legislative and judicial intervention. From a moral point of view the decision of the judge declaring segregation in schools unlawful and awarding non-pecuniary damages as a sanction of such behaviour must be held correct. The school itself, however, being under pressure, with the segregation simply fulfils the requirement of the group of certain parents. Failing to meet this requirement may invoke the consequences that parents requiring segregation would take their children to another school which would result in the reduction of the number of pupils in the school. The outcome is the decrease of state support, financial problems and on the long run the closing of the school. In this case the court allocated a high cost to the school (decreasing number of students resulting in decreasing state support) which the school cannot bear and no one takes over. The court cannot solve and the state budget does not manage this problem. In such circumstances the school – and not the society – is paying the price of managing a social problem, except if those who are to be protected by the law take this cost upon themselves. Moreover, the outcome – closing the school – strikes back to those who should be the beneficiaries of the policy.

Private law cannot allocate the (social) costs of anti-discrimination. That is why the costs of enforcing anti-discrimination may be allocated to only certain market players or to those who belong to the protected group of society. In a great bulk of anti-discrimination cases courts try to solve the problem of social segregation with means designed not for this purpose. Even if the aims and the decisions in a great number of cases are morally clearly acceptable, courts are unable to address consequences that surely have their impacts beyond the relationship of the parties. We have to face the problem that the application of private law rules and principles modelled on bipolar relationships may involve pursuing social policies but the effects of such regulation or practice requires further coordination and cost allocation going beyond the scope of private law. Private law can – if at all – be suitable to pursue such policies only in a very limited way. In contract law anti-discrimination policy can be compatible with the market model only insofar as it corrects market failure or if it has been undertaken by the market player not contracting on the basis of discriminative decisions.

Anti-discrimination, monopoly and public offer

One the market failures restricting market mechanisms and competition is monopoly.[31] In cases of monopoly or oligopoly there is a great chance of one-sidedly created market conditions and unequal opportunity. Competition law regulation attempts to create market conditions in spite of monopoly. One main measure of pursuing this goal is the prohibition of discrimination and providing compulsory contracting in cases of superior power in the market. In the focus of competition law regulation is an approach of formal equality where the main aim of the legislator is providing the equal opportunity to enter the market. This is the market approach of anti-discrimination where the aim is not to protect equality of individuals in the society but providing the equal chance of entering the market.[32] The same principle may be applied as reference point in private law in cases of contracting: discrimination shall be prohibited if and insofar as there is not a market, i.e. the goods or services cannot be reasonably obtained from other providers.

The other case for anti-discrimination should be public offer. If the market player expresses its contractual will in a manner not including the possibility of discrimination, other market players (mainly consumers) may rely on that – if they meet the required preconditions – their offer would be accepted and may shape their own decisions according to this reliance. Under such circumstances the refusal of the offer implies that the party inviting to offer acts contrary to its own facts by not accepting the offer. This would undermine reliance in private law relationships generating additional social costs.

That is why this article argues that the application of the anti-discrimination principle should be restricted to cases of monopoly and – narrowly interpreted – public offer in contractual context. Going – as the Hungarian Anti-Discrimination Act does – beyond these limits implies that legislation and/or court practice attempt to pursue an aim which is obviously correct from a moral point of view but for which private law is inadequately designed. This would result in social tensions and unmanageable consequences.

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[31] E.g. R. Cooter/T. Ulen, *Law and Economics*, 3rd ed. Addison-Wesley Longman, 2000, 40.

[32] D. Schiek, *Contract Law, Discrimination and European Intergration* [in *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law*, ed. by T. Wilhelmsson/S. Hurri, Ashgate/Dartmouth, 1999 (405– 433), 421.

SUMMARY

Anti-Discrimination and Private Law

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The prohibition of discrimination is meant to serve a social problem that private law, which is based on market economy, may only address with certain limitations. In the field of contract law the prohibition of discrimination is only compatible with private law inasmuch as it is restricted to monopoly situations and the public invitation of bids. Furthermore, the prohibition of discrimination may operate in the realm of private law as long as it is only applied to prohibit social exclusion while, in cases where the approval of certain contracts is rejected in consideration with certain market conditions, no breach of law is established with reference to anti-discrimination. In cases where discrimination (the violation of the requirement of equal treatment) is prohibited with reference to the violation of a person's privacy, disrespect to human dignity may serve as an appropriate point of reference, and that may be examined independently of the fact whether or not a related contract has been concluded. The application of instruments of private law is not suitable for adequately placing and channelling the costs incurred in the course of prohibiting discrimination. Hence, it follows that the expenses incurred in the course of enforcing the prohibition of discrimination need to be borne by certain market players or, for that matter, members of the social group who are meant to be protected. In some of the anti-discrimination cases the courts attempt to solve social problems that are related to social exclusion by applying ill-chosen measures. Although, morally speaking, the goal of court verdicts is fully justified, the courts are unable to handle the consequences that run beyond the scope of the conflict concerned (because they have not been created for such purposes).

RESÜMEE

Diskriminierungsverbot und Privatrecht

ATTILA MENYHÁRD

Das Diskriminierungsverbot dient dem Lösen eines gesellschaftlichen Problems, das vom Privatrecht, das auf das Marktmodell aufbaut, nur begrenzt gehandhabt werden kann. Das Diskriminierungsverbot kann im Kreis des Vertragsrechts nur auf die Monopolsituationen und öffentlichen Angebote beschränkt mit der Natur des Privatrechts in Einklang gebracht werden. Ein weiterer Anhaltspunkt bei der Anwendung des Diskriminierungsverbotes im Privatrecht kann sein, wenn die Rechtsanwendung innerhalb des Rahmens des gesellschaftlichen Zieles des Diskriminierungsverbotes – also der Verhinderung der sozialen Ausgrenzung – bleibt, und wenn sie im Falle des Zur-Geltung-Kommens von Marktverhältnissen infolge der Verweigerung eines Vertragsabschlusses keine Rechtsverletzung feststellt. Im Kreis der Sanktionierung des Verbotes der Benachteiligung (der Verletzung der Anforderung der Gleichbehandlung) als Rechtsverletzung der Persönlichkeit kann die Verletzung der Menschenwürde als entsprechender Anhaltspunkt dienen; dies kann unabhängig von der Tatsache des Vertragsabschlusses untersucht werden. Die privatrechtliche Rechtsanwendung ist nicht dazu geeignet, die Kosten des Diskriminierungsverbotes auf entsprechende Weise zu etablieren und zu leiten, deshalb entfallen die Kosten der Geltendmachung des Diskriminierungsverbotes auf die einzelnen Marktprotagonisten, oder womöglich gerade auf die zu schützenden Gesellschaftsgruppen. In einem Teil der Fälle, die mit dem Diskriminierungsverbot in Zusammenhang stehen, versuchen die Gerichte die sozialen Probleme bezüglich der sozialen Ausgrenzung mit dazu ungeeigneten Mitteln zu lösen. Zwar sind dabei das Ziel und die Entscheidungen in der überwiegenden Mehrzahl der Fälle moralisch voll und ganz begründet, so sind jedoch die Gerichte zur Handhabung der Folgen, die über das Verhältnis der Parteien zueinander hinausweisen, nicht im Stande (da sie dazu nicht im Stande sein können).