

Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

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Executive summary

Implementation of Employment Directive 2000/78/EC

Hungary transposed Directive 2000/78/EC by adopting a comprehensive anti-discrimination code, Act No. 125 of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA), which came into force on 27.01.2004.

ETA defines sexual orientation as one of the numerous protected grounds and defines both direct and indirect discrimination. These definitions are greatly though not fully based on the concepts used by the EU Equality Directives. Harassment, instruction to discriminate and victimisation are also defined and outlawed in the Hungarian system.

ETA covers both employment and all aspects of education, thus in relation to sexual orientation as a protected ground and the field where protection is provided (different aspects of employment and vocational training) Hungarian law is mostly in conformity with the Employment Directive.

However, conformity is not complete, as exceptions provided by ETA in relation to employment by religious organisations are not fully in line with the Directive's provisions, being more lenient, not containing the requirement of a legitimate aim and allowing differentiation not only on the basis of the individual's religion but also on his/her sexual orientation.

There are numerous fora victims of discrimination may turn to in Hungary. At the centre of the system is the Equal Treatment Authority operating since 01.02.2005. This is an administrative organ functioning under the supervision of the Government with the power to act against any discriminatory act irrespective of the ground of discrimination (sex, race, age, sexual orientation, etc.) or the field concerned (employment, education, access to goods, etc.). Beyond the requirements under Article 13 of the Race Equality Directive, the Authority is vested with the right to impose severe sanctions on persons and entities violating the obligation of equal treatment.

Parallel to the operation of the Authority, organs that had played a role in combating discrimination before also continue to act in the field. Labour court procedures continue to be available for victims, and labour inspectorates have also kept their power to act against instances of discrimination. Victims are free to forum shop. The Ombudsmen have also retained their power to investigate cases of discrimination.

A major novelty introduced by the ETA is the possibility of associations and other entities with a legitimate interest in ensuring compliance with the obligation of equal treatment to engage in judicial and administrative proceedings on behalf or in support of complainants. Another important innovation is the standing of representative organisations in *actio popularis* claims. ETA provides that, if the principle of equal treatment is violated or there is an imminent danger thereof, an action against the violation of civil rights or a labour lawsuit may be brought by any representative organisation, provided that the violation of the principle of equal treatment or the direct danger thereof is based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately. A representative organization may – if the above conditions prevail – also choose to complain to the Equal Treatment Authority.

Freedom of movement

Hungarian legislation has transposed relevant community law concerning the right to free movement. Since July 2007, EU citizens, their accompanying or joining family members have had the right to legally stay in Hungary for a maximum period of 90 days without prior notice or administrative measures.

Third country nationals who are married to a Hungarian or EU citizen can enjoy freedom of movement in Hungary since spouses are explicitly mentioned in the relevant legal regulations as family members.

As a consequence of Article 3 of the new Act on Registered Partnerships, a third country national who entered into a registered partnership under the Hungarian Act theoretically falls into the category of 'family member' and should enjoy freedom of movement in Hungary. However, this possibility has not been tested in practice yet.

Entry and residence rights of registered partners are the same for married couples and registered partners, for the purposes of both Act No. 1 of 2007 on the free movement of persons and Act No. 2 of 2007 on the admission and residence of third-country nationals. There have been cases when registered partnerships concluded abroad were registered in Hungary as well.

As a result of the Hungarian regulations, a third country national who has lived together in the same household with a Hungarian or EU citizen can enjoy the freedom of movement in Hungary.

Asylum and subsidiary protection

According to the relevant practice of the Office of Immigration and Nationality in recent years, persecution on account of sexual orientation has been continuously accepted as a ground for qualifying as a refugee or beneficiary of subsidiary protection. Asylum seekers – mostly from Islamic countries such as Algeria and Iran – have successfully argued that their sexual orientation was the reason of their persecution.

Family reunification

The family reunification procedure is governed by Act No. 2 of 2007 on the admission and right of residence of third-country nationals. Any kind of partnerships which have not been registered, including same-sex cohabitations, are automatically excluded from family reunification procedures. Therefore, it is only registered partnerships that are recognised for family reunification purposes.

Freedom of assembly

The Hungarian Constitution and the Act on the Freedom of Assembly ensure the freedom of assembly. Experiences show that the Hungarian LGBT community has been able to practice freedom of assembly as no such demonstrations have been banned or dispersed since the beginning of the 1990s. The LGBT community has been organizing Gay Pride parades since 1995, and until 2007 these events had been sufficiently secured by the police.

On 07.07.2007 participants of the Gay Pride Parade - organised in the framework of the 12th LGBT Cultural and Film Festival - were attacked by extremist groups. The attacks were organised and followed threats and homophobic comments made by a small, non-parliamentary, right wing party. While making homophobic remarks extremists severely injured several participants of the parade after they had left the event.

Violent counter-demonstrators attempted to attack the Gay Pride Marches in 2008 and 2009, but owing to the precautions and organised response of the police they could not injure the participants.

It can be concluded that in 2007 the police did not properly secure the Gay Pride Parade, since despite clear legal obligations it failed to do everything in order to remove the aggressive counter-demonstrators during several hours of the event. In 2008 and 2009, however, the police made adequate precautions to

prevent counter-demonstrators from reaching the participants of the marches and secured the events effectively.

Criminal law, hate speech

Hungarian criminal law only prohibits incitement against a community, i.e. the most extreme form of hate speech. Court practice finds incitement against a community established only if 'stirring up hatred' prompts direct and immediate violent action. General homophobic comments that do not reach this level of severity are not prohibited by Hungarian criminal law.

In the recent years there have been several attempts from the Government to introduce civil and criminal law regulations against hate speech. Since the Constitutional Court annulled the latest modification of the Penal Code, which introduced '*gyalázkodás*' (abuse), a new crime relating to hate speech, and another set of rules are pending before the Court, general homophobic comments that do not reach this level of severity are not prohibited by Hungarian criminal law. Consequently, the Hungarian LGBT community is not protected from hate speech that does not reach the level of incitement.

However, even in the absence of a separate legal provision on hate speech there is a theoretical possibility to challenge such expressions with the means of civil law. An *actio popularis* claim can be initiated in a civil proceeding on account of harassment as provided by the ETA. In such proceedings courts might establish harassment on the basis of homophobic comments; moreover the plaintiff is entitled to request a public interest fine to be imposed on the defendant. So far, however, this possibility has not been tested before courts.

In Hungarian criminal law violence against members of national, ethnic or religious minorities qualifies as a more severe act than general violent crimes such as disorderly conduct or bodily harm. In 2009, Article 174/B of the Penal Code, the relevant section in this regard, was altered so as to protect members of 'certain groups of society', too. Criminal proceedings initiated on the basis of Article 174/B against violent counter-demonstrators in the 2009 Gay Pride March suggest that the LGBT community is regarded as a 'certain group of society' and thus enjoys the protection of that Article.

Transgender issues

The Hungarian legal system expressly deals with the rights of transgender persons in only one legal provision, i.e. the ETA lists gender identity as a ground of discrimination.

A birth certificate entry containing one's gender identity could be one of the grounds of discrimination against transsexual and transgender persons. Thus, modifying a birth certificate entry (e.g. sex and name) is a crucial issue in the process of changing sexes.

Currently, an actual sex changing operation is not required as a prerequisite of modifying name or sex in birth certificates. This practice corresponds to the requirements of the right of self-determination and should be maintained. Nevertheless, it would be desirable that the Ministry of Health issued a professional protocol or legal regulation regarding the necessary documents (forensic expert opinion, medical records) in birth certificate proceedings initiated due to gender reassignment.

The rights of persons who change their names and sexes are infringed in the state health care system and in the field of family law. According to the rules governing services of the compulsory health insurance scheme a person must pay 90 per cent of the costs of a gender reassignment operation, which practically means that transgender persons should cover most of the costs of such operations even if gender reassignment is justified by medical-psychiatric reasons. This is highly problematic since the aim of gender reassignment operations is to alter one's sex so as to correspond to his/her real gender identity.

In 2009 the Ministry of Health started to prepare professional regulations in respect of gender reassignment.

The new Civil Code, which will enter into force on 01.05.2010, regulates situations where a party to a marriage or a registered partnership changes his/her sex. The Act states that in such a case marriage or registered partnership automatically terminates. This idea has been criticised as it would circumscribe the parties' right to self-determination. Notably however, if such former spouses enter into registered partnership with each other within 90 days after the termination of marriage, the period of marriage and same sex partnership is regarded as a perpetual interval in respect of rights that are connected to a certain duration of marriage or registered partnership.

Miscellaneous

In 2008 the Constitutional Court annulled the Act on Registered Partnerships, which aimed at regulating registered partnerships of both heterosexual and same sex couples. However, the decision did not find unconstitutional the notion of same sex registered partnerships. Consequently, the Parliament adopted a new Act on Registered Partnerships for same sex couples, which entered into force on 01.07.2009.

According to the Act, this form of legally accepted partnership generally provides the same rights and obligations as marriages. However, there are several important exceptions, as same sex couples cannot adopt children together, cannot take each others name and do not enjoy the right to artificial insemination. The rule that specifies that same sex couples are not allowed to adopt children together has been criticised as not being reasonable since Hungarian law permits adoption even by single persons.

The new act on registry procedures, which has not entered into force yet, dedicates a full chapter to the detailed rules relating to the creation and registration of same sex partnerships.

It is common practice that before donating blood donors are asked whether they had previously entered into homosexual relationships. It is a questionable protocol since HIV and other diseases that spread through sexual contacts – according to recent scientific research – are connected to risky sexual behaviours and not to ‘risky sexual orientation’. Therefore, it would be more appropriate to inquire about the sexual behaviour of donors (use of condoms, promiscuity etc.) as it is not dependent on sexual orientation.

Best practices

ETA recognises both sexual orientation and gender identity as protected grounds, which clearly goes beyond the standards set by the Employment Directive. Furthermore, the scope of ETA is wider than that of the Employment Directive since beyond employment it also encompasses fields such as education, housing, access to public goods and services, health care and social security.

The Hungarian legal framework regarding gender reassignment has several shortcomings, although the good practice of competent authorities currently does not require an actual sex changing operation as a prerequisite of modifying name or sex in birth certificates. This good practice shows that even in the absence of express legal provisions the relevant procedures can comply with human rights standards. In order to create a clear legal and professional framework for gender reassignment, in 2009 the Ministry of Health and the Ministry of Justice and Law Enforcement started to prepare professional and legal regulations in this respect.

Shortly after the Constitutional Court had annulled the Act on Registered Partnerships, which regulated registered partnerships of both heterosexual and same-sex couples, the Government prepared a new piece of legislation on same-sex registered partnerships, which was adopted by the Parliament. Though not ensuring full equality, the new Act on Registered Partnerships can still be considered as progressive – even according to Hungarian LGBT organisations. The Act makes it possible for same-sex couples to establish before the registrar

of birth certificates a registered partnership. Generally, this form of legally accepted partnership carries the same rights and obligations as marriages. This can be considered as a breakthrough in several important matters concerning the life of members of the LGBT community.

After its failure to protect the participants of the Gay Pride March in 2007 the police was able to fulfil its constitutional obligation and managed to secure the Marches in 2008 and 2009.

A. Implementation of Employment Directive 2000/78/EC

A.1. Main features

Hungary accomplished the task of transposing Directives 2000/43/EC and 2000/78/EC by adopting a comprehensive anti-discrimination code, the Act on Equal Treatment and the Promotion of Equal Opportunities, which came into force on 27.01.2004.¹

The ETA defines sexual orientation as one of the numerous protected grounds (along with gender identity).² The ETA contains the definition for both direct and indirect discrimination. These definitions are greatly though not fully based on the concepts used by the Directives. Harassment, instruction to discriminate and victimisation are also defined and outlawed in the Hungarian system.

Employment and education are both covered by the ETA, so from the point of view of sexual orientation as a protected ground and the sectors where protection is provided (different aspects of employment and vocational training),³ the Hungarian legal framework is in conformity with the Employment Directive.

However, the conformity is not complete; the main gap in transposition being that Article 22 ETA setting out a specific exemption clause for employment is not fully in line with Article 4 of the Employment Directive. Article 22 of the ETA runs as follows:

‘(1) The principle of equal treatment is not violated if

a) the differentiation is proportionate, justified by the characteristics or nature of the job and is based on all relevant and legitimate terms and conditions that may be taken in consideration in the course of recruitment; or

¹ Hungary/2003. évi CXXV. törvény/(28.12.2003). Hereinafter referred to in the body text as ETA.

² Article 8, Hungary/2003. évi CXXV. törvény/(28.12.2003).

³ Article 21, Hungary/2003. évi CXXV. törvény/(28.12.2003) contains a non-exhaustive list of employment-related areas in which direct or indirect discrimination of the employee by the employer shall amount to a breach of the requirement of equal treatment. These include the following: access to employment, with special regard to advertisements and recruitment; conditions for employment; procedures preceding or aimed at the promotion of employment; promotions, pre- or in-service training, working conditions, liability for damages and disciplinary actions; equal pay, dismissals, etc.

b) The differentiation arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.’⁴

Article 22(1)(a) ETA does not clearly specify the need for a ‘legitimate aim’, which is a key element of the Directive’s ‘genuine occupational requirement’ exception. Article 22(1)(b) does not only suffer from this shortcoming, but also lacks the Employment Directive’s important stipulation, namely that a differentiation based on the religious ethos of an organisation may only be related to the religion of the person suffering that differentiation and not any other characteristics (e.g. the sexual orientation) of his/hers.

There are a number of complaint mechanisms that victims of discrimination based on sexual orientation may resort to. The most evident such forum is the *Egyenlő Bánásmód Hatóság* (EBH) [Equal Treatment Authority],⁵ which started its operation in February 2005. The Authority has power to act against any discriminatory act irrespective of the ground of discrimination (sexual orientation, race, age, etc.) or the field concerned (employment, education, access to goods, etc.). Furthermore, the Authority is vested with the right to impose severe sanctions on persons and legal entities violating the ban on discrimination⁶ (for more details, see A.3.). However, other fora that had existed for victims of discrimination have remained to be operational even after the establishment of the Authority.

The most important ones in the field of employment are the labour courts,⁷ which are vested with the task of adjudicating employment-related legal disputes and are relatively independent within the Hungarian judiciary. The most important remedies in labour law are the following:

⁴ EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 200/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007*, p. 43, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf (10.02.2008).

⁵ Hereinafter referred to in the body text as the Authority.

⁶ EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 200/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007*, p. 59, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf (10.02.2008).

⁷ Their scope of authority is described on the basis of the EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 200/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007*, p. 59, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf (10.02.2008).

- the declaration of an agreement as null and void;⁸
- order to continue employment;⁹
- reinstatement and the payment of average earnings for a maximum of twelve months;¹⁰
- employer's full liability for damages, including the payment of lost income, moral damages and justified expenses.¹¹

Under the Act on Labour Supervision¹² *munkaiügyi felügyelőségek* [labour inspectorates] examine compliance with non-discrimination provisions.¹³ Labour Inspectorates are administrative bodies which may resort to a number of sanctions:¹⁴

- call on employers to abide by the rules of labour law;
- oblige employers to terminate the violation;
- propose the imposition of the so-called 'labour law fine';
- conduct a petty offence procedure.¹⁵

First time offenders can be fined between HUF 30,000 (EUR 120) and HUF 8,000,000 (EUR 32,000).¹⁶

Under Government Decree 218/1999 on Petty Offences,¹⁷ an employer who refuses to hire a person owing to – among others – his/her gender, age, race, religion, or any other circumstance that is not relevant from the point of view of the occupation or discriminates between employees on the same basis is liable to be fined up to HUF 100.000 (EUR 400). Such proceedings are conducted by the local notary or the *Országos Munkavédelmi és Munkaiügyi Felügyelőség (OMMF)* [Hungarian Labour Inspectorate]. The same Government Decree¹⁸ also stipulates that a private employment agent who discriminates between job

⁸ Article 8. Hungary/1992. évi XXII. törvény/(04.05.1992) Hereinafter referred to in the body text as the Labour Code.

⁹ Article 100, Hungary/1992. évi XXII. törvény/(04.05.1992).

¹⁰ Article 100, Hungary/1992. évi XXII. törvény/(04.05.1992).

¹¹ Articles 147 and 177, Hungary/1992. évi XXII. törvény/(04.05.1992)

¹² Hungary/1996. évi LXXV. törvény/(18.10.1996). Hereinafter referred in the body text as LSA.

¹³ Article 3, Hungary/1996. évi LXXV. törvény/(18.10.1996).

¹⁴ Their scope of authority is described on the basis of EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007*, p. 60, available at:

http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf (10.02.2008).

¹⁵ Article 6, Hungary/1996. évi LXXV. törvény/(18.10.1996).

¹⁶ Article 7, Hungary/1996. évi LXXV. törvény/(18.10.1996).

¹⁷ Article 93, Hungary/218/1999. (XII.28.) Korm. Rendelet/(28.12.1999).

¹⁸ Article 96, Hungary/218/1999. (XII.28.) Korm. Rendelet/(28.12.1999).

seekers on the basis of their gender, age, race, religion, or any other circumstance that is not relevant from the point of view of the occupation, shall be liable to be fined up to HUF 60,000 (HUF 240).

It is also possible for a victim of discrimination to turn to the Ombudsman (for details, see A.3.).

The relation between the different fora is the following: it is possible for a victim of discrimination to complain to the Equal Treatment Authority, or any other administrative organ before bringing a lawsuit based on the Labour Code¹⁹. If however, one brings a case before a labour court, administrative organs, including the Equal Treatment Authority may not deal with the case, unless it had been filed with them before the court case started. In such instances, the Authority may only proceed with the case once the court case is over, and may only base its decision on the facts established by the court. In the relationship between the proceedings of the different public administrative authorities the key principle is that it is up to the victim to decide which authority he/she wishes to turn to. In order to avoid double proceedings, the Authority shall inform other organs, and other organs shall inform the Authority, about the initiation of a proceeding into a case of discrimination.

A.2. Areas covered

As it was outlined above, the ETA is a comprehensive anti-discrimination code. This means in this respect that discrimination on the ground of sexual orientation is prohibited not only in relation to employment, but to all the fields and sectors covered by the ETA. As to the ETA's material scope, the following can be said: 'The ETA approaches the issue of scope from the personal, instead of the material aspect. It prohibits any discrimination in the public sector, so with regard to this sector the ETA's material scope is in fact broader than that of the equality directives.'²⁰ In the private sector however, only four groups of actors fall under the ETA's scope (regardless of the field concerned):

- those who make a public proposal for contracting (e.g. for renting out an apartment) or call for an open tender;
- those who provide services or sell goods at premises open to customers;

¹⁹ On this topic see: EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007*, p. 61, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf (10.02.2008).

²⁰ This topic is described in EU Network of Independent Legal Experts (2007) *Executive Summary Hungary country report on measures to combat discrimination*, p. 3, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/husum07_en.pdf (10.02.2008).

- self-employed persons, legal entities and organisations without a legal entity receiving state funding in respect of their legal relations established in relation to the usage of the funding;
- employers with respect to employment (interpreted broadly).²¹

When considering this arrangement, we will find that it practically covers all the material fields covered by Directive 2000/43/EC.

A.3. Equality body

The Egyenlő Bánásmód Hatóság (EBH) [Equal Treatment Authority] is the specialised equality body. Established by Article 13 of the ETA the Authority started its operation on 01.02.2005. On 26.12.2004 a Government Decree was adopted on the detailed rules of its procedure.²² As it was outlined above, the Authority is vested with the power and duty to act against any discriminatory act irrespective of the ground of discrimination (sexual orientation, racial or ethnic origin, age, etc.) or the field concerned (employment, education, access to goods, etc.). Beyond the powers required by the Race Equality Directive, the new body is vested with the right to impose severe sanctions on persons and legal entities violating the ban on discrimination.

The Authority is a public administrative body with the overall responsibility to ensure compliance with the principle of equal treatment. It is supervised by the Minister of Social and Labour Affairs. In order to guarantee independence, the ETA declares that 'the Authority shall not be instructed in relation to the exercise of its duties defined in this law.'²³ This means that in theory, despite the Ministerial supervision, the Authority shall enjoy full independence in performing its statutory tasks. A further provision is aiming to protect its independence, which sets forth that the Minister may not change or abolish the Authority's decisions in his/her supervisory role.²⁴

However, according to expert analyses, the Authority's independence is not fully guaranteed due to its restricted budgetary independence and the fact that its President can easily be removed by the Prime Minister.²⁵

²¹ EU Network of Independent Legal Experts (2007) *Executive Summary Hungary country report on measures to combat discrimination*, p. 3, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/husum07_en.pdf (10.02.2008).

²² Hungary/362/2004. (XII.26.) Korm. Határozat/(26.12.2004). Hereinafter referred to in the body text as ETAD.

²³ Article 13 (3), Hungary/2003. évi CXXV. törvény/(28.12.2003).

²⁴ Article 17 (2), Hungary/2003. évi CXXV. törvény/(28.12.2003).

²⁵ EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report/Update 2006 –*

The Authority is assisted by an advisory board (the Equal Treatment Advisory Board²⁶, whose members have extensive experience in the protection of human rights and in enforcing the principle of equal treatment, and are invited by the Prime Minister to join the Advisory Board). With regard to decisions on individual complaints, the Advisory Board's role is restricted to providing legal interpretations assisting the Authority's work.²⁷

The competences of the Authority are set forth by Article 14 of the ETA. The Authority:

- 'shall, based on a complaint or – in cases defined in the ETA – ex officio, conduct an investigation to establish whether the principle of equal treatment has been violated, or based on a complaint conduct an investigation to establish whether employers obliged to adopt an equal opportunities plan have abided by this duty, and deliver a decision on the basis of the investigation;
- may initiate an actio popularis claim with a view to protecting the rights of persons and groups whose rights have been violated;
- review and comment on drafts of legal acts and reports concerning equal treatment;
- make proposals concerning governmental decisions and legislation pertaining to equal treatment;
- regularly inform the public and the Government about the situation concerning the enforcement of equal treatment;
- in the course of performing its duties, co-operate with the social and representation organisations and the relevant state bodies;
- continually provide information to those concerned and provide them with assistance in acting against the violation of equal treatment;
- provide assistance in the preparation of governmental reports to international organisations, especially to the Council of Europe concerning the principle of equal treatment;

Hungary – State Of Affairs Up To 8 January 2007, p. 73-74, available at:
http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf
 (10.02.2008).

²⁶ Hereinafter referred to in the body text as the Advisory Board.

²⁷ On this topic see: EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007*, p. 74, available at:
http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf
 (10.02.2008).

- provide assistance in the preparation of the reports for the Commission of the European Union concerning the harmonisation of directives on equal treatment;
- shall prepare an annual report to the Government on the activity of the Authority and its experiences obtained in the course of the application of ETA.²⁸

As it can be seen from the above list, the Authority is vested with all the tasks included in Article 13 of Directive 2000/43/EC, but ‘in fact, the key element of the Authority’s activity is none of [these] three tasks [...], but investigating into and deciding on individual instances of discrimination. In terms of Article 14 Paragraph (1) Point (a) of the ETA, the Authority has the mandate to conduct independent investigations both ex officio and also based on individual complaints. [...] This is a quasi judicial function, so in this regard the service provided by the Authority goes beyond simple assistance in asserting claims. On the other hand, due to the scarce financial and human resources this function [does] in practice prevent the Authority from actually fulfilling the other tasks [...]’.²⁹

This means that although Article 14 (1) (g) of ETA gives the Authority mandate to provide independent assistance to victims of discrimination the Authority shall ‘continually provide information to those concerned and provide them with assistance in acting against the violation of equal treatment’. This is not done in practice, because the scarce financial and human resources³⁰ prevent the Authority from focusing on any activity other than the investigation and adjudication of complaints from victims of discrimination.

The Ombudsman could also deal with discrimination on the ground of sexual orientation.³¹ Discrimination based on sexual orientation would fall into the

²⁸ Quoted by: EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007*, p. 75, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf (10.02.2008).

²⁹ EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007*, p. 76, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf (10.02.2008).

³⁰ See: EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007*, p. 75, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf (10.02.2008).

³¹ The institution is described on the basis of EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007*, p. 63-64, available at:

scope of authority of the Ombudsman for Civil Rights (one of Hungary's four Ombudsmen, the other three being the Ombudsman for Future Generations, the Ombudsman for the Rights of National and Ethnic Minorities and the Ombudsman for Data Protection).

Under Act LIX of 1993, any victim of acts or omissions of public authorities or public service providers can complain to the Ombudsmen's office, provided that all administrative remedies are exhausted or none exist. The Ombudsmen can also proceed *ex officio*.

Ombudsmen can investigate into any authority, including the armed forces, national security services, and policing organisations. They may request information, a hearing, written explanation, declaration or opinion from the competent official or demand that an inquiry be conducted by a superior. When finding a violation, the Ombudsmen issue recommendations, to which perpetrators must respond within 30 days. Further, Ombudsmen may:

- petition the Constitutional Court;
- initiate that the prosecutor issues a protest;
- propose that a legal provision be amended, repealed or issued. Ombudsmen may initiate disciplinary or criminal proceedings.

The ETA fails to settle potential clashes of authority between the Authority and the Ombudsmen who are also entitled to conduct individual and comprehensive investigations into cases of discrimination. The ETA contains no solution for cases in which the conclusion of and the sanction imposed by the Authority is not in line with the opinion of the Ombudsman. It only restricts itself to exempting the decisions and measures of the Ombudsmen from the Authority's investigation.³² In practice however, a relatively good working relationship has been evolving between the two entities.

A.4. Art 9/2 of the Employment Directive 2000/78/EC

The ETA has brought significant improvement in the possibilities of interested associations in the combat of discrimination. The law introduced the term '*social and interest representation organisation*' (*hereinafter: representative organisations*). Pursuant to Article 3 (f) ETA, such organisations include

http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf
(10.02.2008).

³² Article 15, Hungary/2003. évi CXXV. törvény/(28.12.2003).

- any social organisation or foundation whose objectives set out in its articles of association or statutes include the promotion of equal social opportunities of disadvantaged groups or the protection of human rights;
- in respect of a particular national and ethnic minority, the minority self-government;
- the trade union in respect of matters related to employees' material, social and cultural situation and living and working conditions.³³

Under ETA,³⁴ unless stipulated otherwise by the law, 'any social and interest representation organisation, as well as the Authority may – based on an authorisation by the victim – engage on behalf of the victim in proceedings initiated due to the infringement of the requirement of equal treatment. Furthermore, representative organisations are entitled to exercise the rights of the concerned party in administrative proceedings initiated due to the infringement of the requirement of equal treatment.

Another important novelty introduced by the ETA is the possibility of bringing an *actio popularis* claim. The relevant legal provision provides that if the principle of equal treatment is violated or there is a direct danger thereof, a lawsuit for the infringement of inherent rights or a labour lawsuit may be brought by

- 'a) the Public Prosecutor;
- b) the Authority, or
- c) any social and interest representation organisation,

provided that the violation of the principle of equal treatment or the direct danger thereof was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately.³⁵

Furthermore, a representative organisation may – if the above conditions prevail – also choose to launch a proceeding before the Authority.³⁶

The first and only *actio popularis* case regarding discrimination on the ground of sexual orientation ever emerging under the ETA was the claim brought by

³³ On this issue see: EU Network of Independent Legal Experts (2007) *Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007*, p. 65, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf (10.02.2008)..

³⁴ Article 18, Hungary/2003. évi CXXV. törvény/(28.12.2003).

³⁵ Article 20 (1), Hungary/2003. évi CXXV. törvény/(28.12.2003).

³⁶ Article 20 (2), Hungary/2003. évi CXXV. törvény/(28.12.2003).

the organisation *Háttér Társaság a Melegekért* (*Háttér Társaság*) [Háttér Support Society for Gays and Lesbians (Háttér Society)] against a denominational university, which declared that homosexual persons may not be students of the faculty of theology.³⁷

Háttér Society is one of the two major gay and lesbian rights groups that provide legal assistance to victims of discrimination based on sexual orientation. The other major civil society organisation is *Habeas Corpus Munkacsoport* [Habeas Corpus Working Group].

These novel legal authorisations of civil society organisations can under certain circumstances be very beneficial for victims of discrimination based on sexual orientation. For instance, in cases of discriminatory practices (i.e. when the violation concerns gays and lesbians as a group as well and not only as particular individuals), it has become possible to take effective legal action without any individual being forced to ‘come out’ and possibly face further discrimination or victimisation stemming from his/her decision to assert his/her rights.

A.5. Statistics and case law.

Statistics. The *Országos Igazságszolgáltatási Tanács* (OIT) [National Justice Council (NJC)], the supreme organ of judicial administration, informed the Senior Expert that data collection conducted on the basis of the National Statistics Program (*Országos Statisztikai Adatgyűjtési Program*) does not extend to statistics that show the number of court cases regarding discrimination on the ground of sexual orientation.³⁸ The *Országos Munkavédelmi és Munkaügyi Felügyelőség* (OMMF) [Hungarian Labour Inspectorate] also informed the Senior Expert that it does not have data concerning cases of discrimination on the ground of sexual orientation.³⁹ According to the *Nemzeti Fogyasztóvédelmi Hatóság* (NFH) [National Consumer Protection Authority] there have not been any complaints in respect of discrimination on the ground of sexual orientation in the indicated period.⁴⁰ The *Egyenlő Bánásmód Hatóság* (EBH) [Equal Treatment Authority] presented some statistics in respect of discrimination on the ground of sexual orientation.⁴¹

Case law. In Hungary the conceptual standpoints (*elvi állásfoglalás*) and actual decisions (*eseti döntés*) of the Supreme Court can be accessed by the public. There are several providers that publish in electronic and paper format these

³⁷ See the case *Háttér Társaság a Melegekért* [Háttér Support Group for Gays and Lesbians] v. *Károli Gáspár Református Egyetem* [Gáspár Károli Calvinist University] in Annex I.

³⁸ Letter of 04.02.2008. Information was confirmed by telephone interview on 22.02.2010.

³⁹ Letter of 05.03.2008. Information was confirmed by telephone interview on 22.02.2010.

⁴⁰ Letter of 22.02.2008. Information was confirmed by telephone interview on 22.02.2010.

⁴¹ Letter of 18.02.2008. See Annex II.

data bases.⁴² Since 01.07.2007 the National Justice Council has been obliged to maintain an online data base, which contains certain types of court judgments.⁴³ However, the data base was criticised for having too restrictive a scope, for failing to function satisfactorily in practice and for failing to comply with the fundamental principles of the freedom of information.⁴⁴ A search in the on-line data base did not yield any relevant results.

⁴² For example publishing company Complex has a Döntvénytár [Complex Decision Archive] that contains the above decisions.

⁴³ The database is available at: <http://www.birosag.hu/engine.aspx?page=anonim> (22.02.2010).

⁴⁴ Eötvös Károly Intézet (2009) Az igazságszolgáltatás nyilvánossága különös tekintettel a bírósági határozatok nyilvánosságára, p.40, available at: http://ekint.org/ekint_files/File/tanulmanyok/bhgy/birosagok_nyilvanossaga_20090909_vegleges.pdf (18.02.2010).

B. Freedom of Movement

B.1. EU citizen LGBT partners of EU citizens

The recently adopted Act 1 of 2007 on the right to free movement, residence and entry of EU and EEA Member States' citizens⁴⁵ (hereinafter: EU citizens) governs the rules related to the freedom of movement in Hungary.

According to Article 1 (1) FMA the right of free movement and residence is provided to all EU Member State citizens, their accompanying or joining family members in compliance with the rights equally granted by the Treaty on the European Union.

Thus, EU citizen LGBT partners of Hungarian or EU citizens have a self-standing right to free movement.

According to Article 1 (1) FMA the right to free movement and residence is provided to the accompanying or joining family members of EU and Hungarian citizens.

According to the FMA the term 'family member' covers

- '1) the spouse of a Hungarian or EU citizen;
- 2) their dependent descendant or descendant under 21 years of age;
- 3) their dependent ancestors; etc.'⁴⁶

Thus, third country nationals who are married to a Hungarian or EU citizen can enjoy freedom of movement in Hungary.

Article 1 (1) FMA raises problems regarding the principle of equal treatment given that only spouses are recognised as family members, but members of a partnership- be it registered or unregistered - are not listed in the Act as spouses.

However, Article 3 of the new Act on Registered Partnerships⁴⁷ stipulates that members of a same-sex registered partnership have the same rights as spouses, with the exceptions contained in that Act. Since freedom of movement issues

⁴⁵ Hungary/2007. évi I. törvény/(05.01.2007). Hereinafter referred to in the body text as FMA (Free Movement Act).

⁴⁶ Article 2, Hungary/2007. évi I. törvény/(05.01.2007).

⁴⁷ Hungary/2009. évi XXIX. törvény (17.12.2010).

are not mentioned as exceptions, in theory the term 'family member' should include registered same-sex partners. There is no relevant practice in this regard, yet..

Therefore, a third country national who entered into a registered partnership under the Hungarian Act on Registered Partnerships theoretically falls into the category of 'family member' and should enjoy freedom of movement in Hungary.

Entry and residence rights of registered partners are the same for married couples and registered partners, for the purposes of both Act No. 1 of 2007 on the free movement of persons and Act No. 2 of 2007 on the admission and residence of third-country nationals. There have been cases when registered partnerships concluded abroad were registered in Hungary as well.

Although members of an unregistered partnership are not recognised as family members, certain cohabiting partners have a possibility to enjoy freedom of movement, since according to FMA, partners of Hungarian or EU citizens who have lived together for at least one year are provided with the right to free movement and residence. The relevant Article states that:

'The Republic of Hungary – as provided by this Act – secures the right of free movement and residence to

(...)

d) a person who accompanies an EEA or Hungarian citizen,

d.a) who has been the dependent of a Hungarian citizen or the person who has lived in the same household with a Hungarian citizen for at least one year or who has been personally treated by the Hungarian citizen because of serious medical reasons;

d.b) who has been the dependent of an EU or EEA citizen or the person who - in their country of residence - has lived together in the same household with an EU or EEA citizen for at least one year or who has been personally treated by the EU or EEA citizen because of serious medical reasons

and whose entry and residence in Hungary is authorised as a family member.⁴⁸

⁴⁸ Article 1 (1) db), Hungary/2007. évi I. törvény/(05.01.2007).

Therefore, a third country national who has lived together in the same household with a Hungarian or EU citizen can enjoy the freedom of movement in Hungary.

B.2. Statistics and case law

Statistics. According to the *Állampolgársági és Bevándorlási Hivatal* (BÁH) [Office of Immigration and Nationality (OIN)], the authority dealing with foreigners entering or residing in Hungary, relevant Hungarian laws forbid keeping statistical data referring to sexual orientation; therefore there is no statistics that demonstrate the impact/social reality of relevant legislation for LGBT persons.⁴⁹

Case law. A search in *Complex Döntvénytár* [Complex Decision Archive) on 18.02.2008 did not result in any relevant case law. Complex Decision Archive contains the conceptual standpoints (*elvi állásfoglalás*) and actual decisions (*eseti döntés*) of the Supreme Court. A search in the on-line court judgments data base yielded no relevant results. The OIN does not have an accessible case law database.

⁴⁹ Letter of 20.02.2008. Information was confirmed by telephone interview on 22.02.2010.

C. Asylum and subsidiary protection

C.1. Persecution of LGBT persons as ground for asylum

According to the relevant practice of the *Bevándorlási és Állampolgársági Hivatal (BÁH)* [Office of Immigration and Nationality (OIN)] in the recent years, persecution because of sexual orientation has been continuously accepted as a ground for qualifying as a refugee or beneficiary of subsidiary protection. Asylum seekers – mostly from Islamic countries such as Algeria and Iran – successfully argued that their sexual orientation was the reason of their persecution as a member of a particular social group.

Considering the fact that Hungarian society is characterised by a quite negative attitude, where LGBT people still face discrimination and stigmatisation in Hungary, the practice of the OIN can be regarded as a positive step forward. However, in some recent cases between 2004 and 2009, the OIN requested psychiatric expert opinions upon the asylum seekers' sexual orientation. There is no specific legal regulation that would require obtaining such expert opinions. Moreover, the practice of the OIN is not consistent in this regard since such expert opinions are not requested in every relevant case. *Magyar Helsinki Bizottság (MHB)* [Hungarian Helsinki Committee] argued that requesting such medical expert opinion is problematic, because it presupposes that LGBT status is a medical condition and denies the right to self-determination. Also, it makes asylum procedures significantly longer and more expensive. There are no documented court decisions in which the tenability of such expert opinion would have been raised. Also, there are no documented cases in which the OIN would have refused granting asylum status reasoning that if the applicant had been 'discreet' in the home country there would have been no persecution.⁵⁰

There have been no reports on applying 'phallometric testing' in Hungary.

OIN is only obliged to reason its resolutions when it refuses to grant asylum, therefore it is impossible to assess the considerations relating to granting asylum status. Also, it cannot be established in how many cases the clients referred to their sexual orientation as ground of persecution.

⁵⁰ Personal interview with representative of the Hungarian Committee on 23.02.2010.

C.2. Family members in the context of asylum

Act No. 80 of 2007 on asylum⁵¹ which came into force on 01.01.2008, does not recognise LGBT persons' officially registered partnership as family relationship. According to Article 2:

'(j): family member is: a foreigner's

j.a) spouse,

j.b) minor child (including adopted and foster child),

j.c) parent(s) if the person seeking recognition is a minor;'

If an asylum seeker is granted refugee status his/her family members are automatically recognised as refugees according to AA; although this provision only applies to heterosexual couples. Therefore it can be concluded that provisions defining family members are contrary to Article 2 (h) of 2004/83/EC imposing that unmarried partners in a stable relationship should also be recognised as family members if the Member State's legislation or practice treats unmarried couples in a way comparable to married couples under its law related to aliens.

Members of a same-sex couple are not considered as family members who are - in the case of a heterosexual family - automatically recognised as refugees under AA. This provision of AA is obviously discriminatory regarding LGBT persons; therefore it can be concluded that asylum legislation only accepts married spouses who are - by definition of the Act on Marriage and Family – heterosexual.

C.3. Statistics and case law

Statistics. The *Bevándorlási és Állampolgársági Hivatal (BÁH)* [Office of Immigration and Nationality (OIN)] informed the Senior Expert that it does not have statistics that contain the sexual orientation of its clients. According to the information received from OIN, asylum seekers who indicate their sexual orientation as a ground of persecution are registered as 'belonging to a certain

⁵¹ Hungary/2007. évi LXXX. törvény (29.062007). Hereinafter referred to in the body text as AA.

social group'.⁵² Therefore, sexual orientation later cannot be identified as a ground of persecution.

Case law. A search in *Complex Döntvénytár* [Complex Decision Archive) on 18.02.2008 did not result in any relevant case law. Complex Decision Archive contains the conceptual standpoints (*elvi állásfoglalás*) and actual decisions (*eseti döntés*) of the Supreme Court. A search in the on-line court judgments database yielded no results. The OIN does not have an accessible case law database.

The Hungarian Helsinki Committee, a Hungarian NGO that assists asylum seekers in Hungary, is aware of a couple of relevant cases.⁵³

⁵² Letter of 20.02.2008. Information was confirmed by telephone interview on 22.02.2010.

⁵³ See Annex I.

D. Family reunification

Hungarian legislation has not incorporated the provisions set out in Recital 5, Article 4 (3) and Article 5 (2) of Council Directive 2003/86/EC on the right to family reunification. Section 2 of the Asylum Act defines family membership - same-sex unions are not recognised in family reunification procedures. Therefore it can be stated that Hungary has not exploited the possibility ensured by the Directive.

The family reunification procedure is governed by Act No. 2 of 2007 on the admission and right of residence of third-country nationals⁵⁴ (hereinafter: ARA).

Article 2 (d) ARA stipulates that ‘family member’ shall mean:

- ‘(d.a) the spouse of a third-country national;
- (d.b) the minor child (including adopted children) of a third-country national and his/her spouse;
- (d.c) the minor child, including adopted and foster children, of a third-country national where this third-country national has parental custody and the children are dependent on him/her;
- (d.d) the minor child, including adopted and foster children, of the spouse of a third-country national where the spouse has parental custody and the children are dependent on him/her;’.

We can therefore conclude that any kind of partnerships which have not been registered, including same-sex cohabitations, are automatically excluded from family reunification procedures. Therefore, it is only registered partnerships that are recognised for family reunification purposes.

D.1. Statistics and case law

Statistics The *Bevándorlási és Állampolgársági Hivatal (BÁH)* [Office of Immigration and Nationality (OIN)] informed the Senior Expert that it does not have statistics that contain the sexual orientation of its clients.⁵⁵

⁵⁴ Hungary/2007. évi II. törvény / (05.01.2007). Hereinafter referred to in the body text as ARA.

⁵⁵ Letter of 20.02.2008. Information was confirmed by telephone interview on 22.02.2010.

Case law. A search in *Complex Döntvénytár* [Complex Decision Archive) on 18.02.2008 did not result in any relevant case law. Complex Decision Archive contains the conceptual standpoints (*elvi állásfoglalás*) and actual decisions (*eseti döntés*) of the Supreme Court. A search in the on-line database of court judgments yielded no relevant results. The OIN does not have an accessible case law database.

E. Freedom of assembly

The Hungarian legal system recognises the freedom of assembly. The Constitution provides that 'the Republic of Hungary acknowledges the freedom of peaceful assembly and ensures its free exercise.'⁵⁶

The Act on the Freedom of Assembly⁵⁷ specifies the legal rules originating from the general clause of the Constitution. FAA states that the freedom of assembly is a fundamental civil liberty that belongs to anybody and reiterates that the Republic of Hungary acknowledges it and ensures its free exercise.⁵⁸ In the framework of the freedom of assembly peaceful meetings, demonstrations or processions can be organised, in which the participants could freely express their opinion. Furthermore, participants are entitled to impart their opinion to those who are concerned. However, the exercise of the freedom of assembly must not constitute any crime or call for a crime and must not infringe the rights or freedoms of others.⁵⁹

Under FAA the exercise of the freedom of assembly is subject to a prior notification to the police, which is entitled to prohibit the assembly only in cases provided by law. These are the following:

- If the event would endanger the undisturbed operation of democratic institutions or courts;
- If public transport may not be organised elsewhere.⁶⁰

If any of these dangers are present, the police – within 48 hours after receiving the notification - is entitled to prohibit the organisation of the event at the indicated time or in the indicated place.⁶¹ This decision can be challenged in a speedy court procedure.⁶²

The organiser has the primary task of securing order during events. However, the police, if requested, cooperates in securing public order and removes any persons intending to violate peacefulness.⁶³

The police is entitled to break up the event in the following circumstances:

⁵⁶ Article 62 (1) of Hungary/1949. évi XX. törvény (20.08.1949).

⁵⁷ Hungary/1989. évi 3. törvény (24.01.1989). Hereinafter referred to in the body text as FAA.

⁵⁸ Article 1, Hungary/1989. évi 3. törvény (24.01.1989).

⁵⁹ Article 2, Hungary/1989. évi 3. törvény (24.01.1989).

⁶⁰ Article 8 (1), Hungary/1989. évi 3. törvény (24.01.1989).

⁶¹ Article 8 (1), Hungary/1989. évi 3. törvény (24.01.1989).

⁶² Article 9, Hungary/1989. évi 3. törvény (24.01.1989).

⁶³ Article 11, Hungary/1989. évi 3. törvény (24.01.1989).

- If the event constitutes a crime or call for a crime or violates the rights or freedoms of others;
- If participants appear in the event with weapons or with any other tools capable of causing harm to others;
- If the event had not been notified to the police;
- If the event is not conducted as notified in advance (e.g. if another route is used).⁶⁴

In the Hungarian legal system the police has a very limited discretion to ban demonstrations. In most cases it is possible to hold two fundamentally antagonistic events at the same time and virtually the same place since it is impossible to foresee whether a demonstration would 'endanger the undisturbed operation of democratic institutions or courts'.⁶⁵ Furthermore, the police cannot examine the risk of any other crimes being committed at demonstrations. However, if the police notices that a demonstration is violating the rights or freedoms of others it must immediately take action to maintain order at the events and if necessary disperse the unlawful demonstration.⁶⁶

Since 1989 the Hungarian LGBT community has been able to freely exercise freedom of assembly and their demonstrations have not been banned. Since 1995 the LGBT community has been annually organising the Lesbian Gay Bisexual Transgender Film and Cultural Festival (hereinafter: LGBT Cultural Festival). The police had been able to secure the safety of these events until 2007. Prior to 2007 persons who demonstrated against gay pride festivals used to express their disapproval as spectators in a rather unorganised way. Their homophobic remarks had been disturbing but never exceeded the level of verbalism and no physical atrocities had ever been reported.

However, in 2007 organisers of the 12th LGBT Cultural Festival reported that they encountered difficulties in negotiating with the police about the route of the Gay Pride March. According to the police these difficulties were due to the tense political and public reactions (the LGBT community received threats from extremist political groups). Nevertheless, there were no legal objections to organise the event.

On 07.07.2007, after previous threats and with the verbal support of a non-parliamentary, small right wing party, extremist groups attacked the participants of the 12th LGBT Cultural Festival. The attackers were organised, threw bottles and stones at the marchers and made homophobic comments⁶⁷ while following

⁶⁴ Article 14, Hungary/1989. évi 3. törvény (24.01.1989).

⁶⁵ See Article 8 (1), Hungary/1989. évi 3. törvény (24.01.1989), explained in paragraph 79.

⁶⁶ Article 14, Hungary/1989. évi 3. törvény (24.01.1989).

⁶⁷ Amongst the comments were 'fags and Jews to the Danube' and 'soap factory', which referred to the activities of the Nazis during the II World War in Budapest, or 'dirty fags'. Also, the attackers demonstrated the Nazi arm waving.

the march for several kilometres.⁶⁸ Furthermore, organisers reported that these groups severely injured eleven participants after they had left the event.

The organisers of the homophobic demonstration had also notified their event to the police, which did not raise any legal objections.

According to media reports eight people of the anti-gay demonstration were arrested by the police in connection with the attacks.⁶⁹ However, some opinion leaders pointed to the fact that the representatives of the Ministry of Justice and Law Enforcement (the Minister and the Secretary of Law Enforcement Issues) did not condemn with necessary emphasis the violent action and blurred the responsibility of the participants of the Gay Pride March and that of the extremist demonstrators.

In the years of 2008 and 2009, organised extremist groups also tried to attack the Gay Pride March. In both years the police isolated the march from the attackers with a double fence and forbade entering into neighbouring streets. In this way it secured the physical integrity of participants, however the complete isolation of the march prevented supporters of the event to join or leave it freely as participants had to join the march at the starting point and had to leave it at the end spot. In 2008 the police had to evacuate peaceful demonstrators at the end spot as extremist groups were severely threatening them.

Police reports showed that after the 2008 Gay Pride March 57 protesters were arrested and 12 officers were injured.⁷⁰ In 2009 41 protesters were arrested. Criminal proceedings were initiated against seven attackers on the basis of violence against a member of a certain social group⁷¹.

There have been no bans of LGBT demonstrations so far and until 2007 the police had secured these events properly. However, in July 2007 the police was not able to protect the participants of the Gay Pride March from the physical attacks of extremists appearing at an anti-gay demonstration.

In the author's view, in order to fulfil the requirements of FAA, the police in 2007 ought to have recognised the aggression of extremists appearing at the anti-gay demonstration and called upon them to discontinue the unlawful activities. Furthermore, the police ought to have dispersed the anti-gay demonstration if the aggression had not been ended.

⁶⁸ The events are described by interviews of participants in: Patent Egyesület [Patent Society] (2008) *Rideg bánásmód [Rigid Treatment]*, available at: http://patent.org.hu/LMBT_emberi_jogok_2002-2007.pdf, (20.02.2008).

⁶⁹ See for example: <http://nol.hu/cikk/453102/> (21.02.2008)

⁷⁰ http://www.police.hu/ideiglenesek/2008juli5/BRF-20080706_70.html (18.02.2010).

⁷¹ http://www.police.hu/friss/BRF_20090906_11.html (18.02.2010).

However, there were no official proceedings conducted in respect of the responsibility of the police and there were no legal or non-legal consequences of the police's conduct in July 2007. The Minister of Justice and Law Enforcement declared in an interview that according to his opinion the police 'knew what to do and secured the demonstration with appropriate force'.⁷² Such an opinion could explain the lack of any official investigations in this matter.

On 09.07.2007 LGBT organisations issued a statement, in which they condemned the violent acts committed in the Gay Pride March and called upon the Minister of Justice and Law Enforcement to investigate why the police had failed to protect the peaceful demonstrators.⁷³ The organisations received no response to the statement.

Furthermore, Háttér Society issued a public call, in which it sought victims and eye witnesses to the violence in the Gay Pride March. According to the head of the organisation, nobody wanted to be involved in a possible legal proceeding, so Háttér Society could not document the incidents properly and could not initiate any proceedings *viz.* the police or the attackers.⁷⁴

It can be concluded that after the incidents in 2007 the police was able to fulfil its constitutional obligation and managed to secure with adequate preparations and responses the Gay Pride Marches in 2008 and 2009.

E.1. Statistics and case law

Statistics. The *Országos Rendőr-főkapitányság* [National Police Department] informed the Senior Expert that it did not compile statistics relating to the number of demonstrations in favour of or against tolerance of LGBT people for the period of 2000-2007.⁷⁵

Case law. A search in *Complex Döntvénytár* [Complex Decision Archive) on 18.02.2008 did not result in any relevant case law. Complex Decision Archive contains the conceptual standpoints (*elvi állásfoglalás*) and actual decisions (*eseti döntés*) of the Supreme Court. A search in the on-line data base of court judgments did not yield any relevant results. *Eötvös Károly Intézet* (EKINT) [Károly Eotvos Institute] researched and criticised the database, asserting that its practical functioning was not sufficient and did not comply with the

⁷² http://www.klubradio.hu/data/files/takacs_albert_melegek.mp3 (06.04.2008).

⁷³ <http://pride.hu/article.php?sid=2405> (06.04.2008). The statement was signed by seven organisations: *Szivárvány Misszió Alapítvány* [Rainbow Mission Foundation], *Atlasz SE* [Atlas Sports Club], *Háttér Társaság a Melegekért (Háttér Társaság)* [Háttér Support Society for Gays and Lesbians (Háttér Society)], *Labrisz Egyesület* [Labris Society], *Lambda Budapest*, *Patent Egyesület* [Patent Society], *Pride.hu*.

⁷⁴ Telephone interview on 07.04.2008.

⁷⁵ Letter of 04.02.2008. Information was confirmed by telephone interview on 22.02.2010.

requirements of the freedom of information. The EKINT study expressly mentioned that the researchers were not able to find court judgments in cases initiated against the counter-demonstrators at the 2008 Gay Pride March.⁷⁶

⁷⁶ Eötvös Károly Intézet (2009) Az igazságszolgáltatás nyilvánossága különös tekintettel a bírósági határozatok nyilvánosságára, p.26, available at: http://ekint.org/ekint_files/File/tanulmanyok/bhgy/birosagok_nyilvanossaga_20090909_vegleges.pdf (18.02.2010).

F. Criminal law, hate speech

F.1. Hate speech

The Hungarian legal system does not contain a general prohibition of hate speech. It only prohibits incitement against a community, the most extreme form of hate speech. Article 269 of the Penal Code⁷⁷ provides that:

‘A person who in front of a wider public, stirs up hatred against

a) the Hungarian nation or

b) a national, ethnic, racial, religious group or certain groups of the society

is guilty of a crime and is liable to imprisonment up to three years.’

In view of the author this piece of legislation in theory protects the LGBT community as a ‘certain group of the society’, since other aspects of Hungarian law consider persons of different sexual orientation a homogeneous group of society.⁷⁸ However there have not been any documented indictments or judgments issued under this Article of the Penal Code in relation to the LGBT community.

Human rights organisation *Társaság a Szabadságjogokért* (TASZ) [Hungarian Civil Liberties Union] requested the police to investigate incitement against a community and violating the freedom of assembly following events that occurred before and during the 2008 Gay Pride March.⁷⁹ First, the police terminated the proceedings arguing that the incidents reported did not constitute a crime. However, after the complaint of TASZ the Budapest Prosecutor's Office ordered the police to continue the proceedings, arguing that the facts of the case had not been sufficiently established.⁸⁰

Hungarian judicial practice is coherent in dealing with Article 269 cases; courts find incitement against a community established only if ‘stirring up hatred’ prompts direct and immediate violent action. Thus, the LGBT community is not

⁷⁷ Hungary/1978. évi IV. törvény (31.12.1978).

⁷⁸ LGBT persons constitute vulnerable groups in Hungarian anti-discrimination law since the Equal Treatment Act contains gender identity and sexual orientation as prohibited grounds of discrimination.

⁷⁹ <http://tasz.hu/gyulekezesi-jog/megszuntettek-nyomozast-meleg-meltosag-meneten-tortent-tamadasokkal-kapcsolatban-tasz> (18.02.2010).

⁸⁰ <http://tasz.hu/gyulekezesi-jog/folytatodik-nyomozas> (18.02.2010).

protected under criminal law from general homophobic comments that do not reach this level of severity.⁸¹

The practice of the ordinary courts is supported by the relevant decisions of the Hungarian Constitutional Court.⁸²

In September 2007 the Ministry of Justice and Law Enforcement submitted to the Parliament a bill entitled ‘Protection against hate speech’. The Bill proposed to give civil courts the power to impose sanctions that were otherwise available in cases of violation of personal rights.⁸³ The Bill defined hate speech as follows:

‘(1) Personal rights are violated particularly when hate speech is directed against racial origin, national or ethnic minority membership, religious or other belief, sexual orientation, gender identity or other important features of personality and are concerning a minority community, which owns these features.

(2) The perpetrator cannot allege that his/her conduct was not directly and recognisably aimed at the party or parties specified above in section (1)’⁸⁴

However, the Hungarian President declined to sign the Bill and remitted it to the Constitutional Court for ‘prior constitutional control’, i.e. asking the Court to examine the Bill’s compliance with the Constitution. The President argued that the Bill contained several provisions that appeared unconstitutional. He expressed his fears that on the basis of one expression concerned individuals could flood the courts with petitions, notwithstanding the possibility of NGOs to initiate claims as well. The President argued that:

‘The possibility of several thousands of civil court proceedings and the amount of related compensations would circumscribe freedom of expression more than any other criminal law sanction.’

According to his submission this phenomenon would also deter other non-offending expressions that are necessary in a democratic society and thus hamper the functioning of a free public debate.

⁸¹ Similarly, racist comments that do not directly and immediately incite to hatred against racial minorities are also not banned by the legal system and there are very few criminal proceedings initiated in this regard.

⁸² Hungary/30/1992. AB határozat(26.15.1992) and Hungary/12/1999. AB határozat (21.05.1999).

⁸³ In Hungarian law there are objective (establishing the infringement, refraining from the infringement, and ordering an apology) and subjective sanctions (compensation) attaching to the violation of personal rights.

⁸⁴ Article 1 of Bill T/3719.

Furthermore, in its submission the President stated that the Bill would violate the principle of non-discrimination as members of the majority population were not provided legal protection, although their personal features were just as valuable as those of minority communities.

The expression ‘minority community’ was also found problematic by the President since it did not offer an answer to who constituted a minority. A grammatical approach would consider a minority a group that is in numerical minority compared to the whole of the society, whereas an approach that more corresponds to the aims of the bill would take into account a minority group in a smaller context such as a town or region. The President believed that this feature of the Bill would be contrary to the rule of law.

Finally, according to the submission of the President the right of any legal aid (representative) organisation to public interest litigation is also unconstitutional since it contravenes the right of self-determination.

On 30.06.2008 the Constitutional Court annulled the Act on the basis of reasons identical to those presented by the President.⁸⁵

Moreover, on 18.02.2008 Parliament adopted ‘abuse’, a new form of crime relating to hate speech. The provision inserts a new Article into the Penal Code. The relevant Article provides that

‘(1) A person who in front of a wider public uses or spreads an expression, which, in connection with the Hungarian nation or certain groups of society, particularly national, ethnic, racial or religious groups, is capable of infringing the honour or violating the human dignity of members of those groups is guilty of a misdemeanour and is liable to imprisonment up to two years.

(2) A person who in front of a wider public demonstrates a gesture – especially if it resembles or refers to an absolutist regime or idea - which is capable of infringing the honour or violating the human dignity of members of the Hungarian nation or certain groups of society, particularly national, ethnic, racial or religious groups is liable as provided in section (1).

(3) A person cannot be held liable if, in connection with the public activity of a political party or societal group conducting political activities,

- a) uses or spreads an expression, which is capable of infringing the honour or violating the human dignity of that group of the society,
- b) demonstrates a gesture provided in section (2).⁸⁶

⁸⁵ Hungary/Alkotmánybíróság/96/2008 (VII.3.) (30.06.2008).

⁸⁶ Article 181/A of the Penal Code.

The Article did not enter into force however, as the President declined to sign this piece of legislation too and submitted it to the Constitutional Court for 'prior constitutional control'. On 30.06.2008 the Constitutional Court annulled the Article arguing that it would have imposed undue limitations on the freedom of expression.

On 10.11.2008 the Parliament adopted the Act on 'Securing legal means protecting from certain severe conducts violating human dignity'.⁸⁷ The Act aims to create a possibility for members of certain groups to combat hate speech against the group he/she belongs to. According to the Act, the personal rights of members are violated if someone publicly carries out a conduct that is offending, humiliating or frightening - either in its aim or in its effect – towards groups identified by national or ethnic origin, religious belief or sexual orientation. The defendant could be freed from sanctions if he/she is able to show that his/her conduct was not severe enough to violate the personal rights of members of protected groups. The Act stipulates that public conduct involves dissemination through media, or other mass communication means, replication and electronic communication channels. Civil suits can be initiated within 30 days after the unlawful conduct by a member of the protected group and ordinary civil law sanctions can be requested from the court. The Act explicitly covers sexual orientation but does not mention gender identity or gender reassignment.

The President of Hungary however submitted the adopted Act before its promulgation to a 'prior constitutional control' to the Constitutional Court.⁸⁸ According to the President, the Act establishes an irrefutable presumption that an offending conduct targeted towards a group reaches out (*átsugárzik*) to the members of that group. He stated that '[a]ccording to the Act it is not possible to refute this presumption since the defendant cannot challenge either the existence of a connection between the plaintiff and the protected group or the nature, intensity and depth of that connection. The justification of the defendant can only regard the severity of the unlawful conduct. However, without examining the above circumstances the gravity of the conduct cannot be assessed.' The Constitutional Court has not yet delivered a decision in the case, therefore the Act has not yet entered into force.

In theory these provisions could provide protection from hate speech that does not reach the severity of incitement against the LGBT community as a certain group of society. In 2004 there had also been an attempt made at introducing criminal law sanctions against hate speech, i.e. amending Article 269 of the Criminal Code. The amendment introduced new definitions which intended to

⁸⁷ <http://www.parlament.hu/irom38/06219/06219.pdf> (18.02.2010).

⁸⁸ The submission is available at: http://www.keh.hu/admin/data/file/2769_20081126abinditvany_gyuloletbeszed_2008_nov_ci_merrel.pdf (18.02.2010).

decrease the threshold of incitement.⁸⁹ However, that amendment had in its entirety been annulled by the Constitutional Court, which found that the new definitions would have circumscribed the freedom of expression. Bearing in mind that the legislative attempts described above have all been annulled by the Constitutional Court, it is highly questionable whether or not the Court would approve the new rules. Therefore, at this stage analysing the legal provision would be premature.

However, even in the absence of an additional legal provision on hate speech there is a possibility to challenge such expressions with the means of civil law. An *actio popularis* claim⁹⁰ can be initiated in a civil proceeding or before the Equal Treatment Authority on the ground of harassment as provided by the Equal Treatment Act.⁹¹ In such proceedings harassment might be established on the basis of homophobic comments as they could be capable to create an humiliating or hostile environment. So far this possibility has been tested only in cases of hate speech in respect of the Roma community.⁹²

F.2. Homophobic violence

After the attack of the participants of the 12th Lesbian Gay Bisexual Transgender Film and Cultural Festival⁹³ on 07.07.2007 in a joint statement eleven NGOs condemned the attacks and requested the Government to initiate the reviewing of Article 174/B of the Penal Code regulating violence against a member of a national, ethnic or religious minority so as to include violence against the LGBT community. They argued that the Article should cover violent acts committed because of someone's sexual orientation, gender identity or belonging to another social group. The Government did not react to the statement.

Until 01.02.2009 Article 174/B concerned only members of national, ethnic or religious minorities.⁹⁴ Since this *sui generis* crime more rigorously sanctions

⁸⁹ More on this issue see paragraphs 91-94.

⁹⁰ On *actio popularis* claims see paragraph 54.

⁹¹ Article 10 (1) Hungary/2003. évi CXXV. törvény/(28.12.2003), ETA, stipulates that harassment includes conducts of sexual or other nature related to protected grounds (e.g. sex, ethnic origin, sexual orientation) with the purpose or effect of violating human dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment.

⁹² Both cases are from Equal Treatment Authority: 1. Hungary/Egyenlő Bánásmód Hatóság/EBH/187/1/2010 (19.01.2010), available at: http://helsinki.hu/dokumentum/EBH_határozat.pdf (22.02.2010), 2. Hungary/Egyenlő Bánásmód Hatóság/ EBH/1475/2009 (30.09.2009).

⁹³ On this issue see paragraph 85.

⁹⁴ Article 174/B of the Penal Code provides that (1) A person who injures or compels someone with force or threats to do or to abide something is guilty of a crime and is liable for imprisonment up to five years. (2) The punishment is imprisonment for a term of two to eight years if the crime is committed: (a) with the use of weapons; (b) with any other tools capable

violent acts motivated by racial or religious hatred it was argued that it could offer a more efficient protection for members of the LGBT community as well, if the above changes were made. The NGOs stated that without such regulation perpetrators of homophobic violence thus could only be held liable for less serious conducts such as disorderly conduct or causing bodily harm. The criminal proceedings initiated after the attack on the 12th Lesbian Gay Bisexual Transgender Film and Cultural Festival illustrated this practice as perpetrators were accused of disorderly conduct.⁹⁵

Partly owing to the attacks against the Gay Pride Marches the Parliament adopted the amendment of the Penal Code's Article 174/B regulating violence against a member of a national, ethnic or religious minority. From 01.02.2009 Article 174/B refers to the crime 'violence against a member of a community'. The Article provides that such crime occurs when an individual 'injures or with threats or violence forces another to do something, to refrain from doing something or to endure something on the basis of his/her real or perceived belonging to a national, ethnic, racial, religious group or certain groups of the population'. The main novelty of the new text of Article 174/B is the term 'certain groups of the population', which in theory could refer to the LGBT community. The Fralex experts are not aware of any initiatives by the police to record homophobic incidents under the new Art. 174/B.

The new provision of the Penal Code was invoked when seven attackers of the 2009 Gay Pride March were charged with violence against a member of a community. However, the practical application of Article 174/B is still inconsistent as police charged three men who beat a lady wearing the T-shirt of the March with disturbing the peace, a crime which is punishable with lighter sanctions.⁹⁶

F.3. Statistics and case law

Statistics. The *Igazságszolgáltatási Tanács* [National Justice Council] informed the Senior Expert that it did not have statistics in respect of incitement against a community that show the number of court cases or convictions regarding homophobic hate speech. Similarly, there are no statistics at the National Justice Council that show the number of court decisions in which homophobic motivation was used as an aggregating factor in sentencing.⁹⁷ *Legfőbb Ügyészség (LÜ)* [Office of the Prosecutor General] informed the Senior Expert

to hurt others; (c) to cause substantial harm in interests; (d) with the mortifying of the victim;(e) in a group; (f) in an organized way'.

⁹⁵ See: http://www.hirszerzo.hu/cikk.tojassal_mentek_neki_a_melegeknek_-_vadat_emeltek_a_rendzavarok_ellen.49659.html (23.02.2008)

⁹⁶ <http://tasz.hu/gyulekezesi-jog/nem-garazdasag-kozosseg-tagja-elleni-eroszak-rendorseghez-fordul-tasz-megvert-no-ugy> (23.02.2010).

⁹⁷ Letter of 04.02.2008. Information was confirmed by telephone interview on 23.02.2010.

that the sexual orientation of perpetrators or victims is not registered in official statistics in Hungary.⁹⁸

Case law. A search in *Complex Döntvénytár* [Complex Decision Archive) on 18.02.2008 did not result in any relevant case law. Complex Decision Archive contains the conceptual standpoints (*elvi állásfoglalás*) and actual decisions (*eseti döntés*) of the Supreme Court. A search in the on-line data base of court judgments did not yield any relevant results.

⁹⁸ Letter of 01.02.2008. Information was confirmed by telephone interview on 23.02.2010.

G. Transgender issues

The Hungarian legal system expressly deals with the rights of transgender persons in only one legal provision. The Act on Equal Treatment⁹⁹ includes gender identity as one of the grounds of discrimination.¹⁰⁰ In this way transgender persons constitute a separate vulnerable group in Hungarian anti-discrimination law.

A birth certificate entry that shows gender identity could be one of the grounds of transsexual and transgender persons' differentiation. Thus, modifying a birth certificate entry is a crucial issue in the process of changing sexes.

According to practical experiences transgender persons who intend to modify their secondary sex characteristics could encounter difficulties in initiating the necessary legal and medical procedures. This is due to the fact that there are no specific procedural rules in this regard. This phenomenon, however, is – at least - partly compensated by the applicability of the general norms of administrative proceedings and the positive practice of competent authorities (see below).

The decree governing the rules concerning birth certificates and name changing¹⁰¹ refers to changing sexes. The birth certificate contains, amongst other information, the child's sex.¹⁰² According to BCD the registrar of birth certificates amends or corrects a closed entry in the birth certificate if

- it does not correspond to the relevant rules,
- it contains false or defective data or
- name changing was requested.¹⁰³

Furthermore, BCD prescribes that if the sex of the child is altered the relevant birth certificate entry has to be corrected.¹⁰⁴

Thus, if someone intends to alter his/her name due to sex changing the relevant birth certificate entries can be amended on the basis of Articles 14-c) and 32-d) BCD and this information is then included in the state registry.

As regards the procedural rules of registering sex changing the Birth Certificate Decree does not prescribe specific rules. The Act regulating the procedural rules of administrative authority proceedings states however that this piece of

⁹⁹ Hungary/2003. évi CXXV. Törvény/(28.12.2003).

¹⁰⁰ Article 8-n), Hungary/2003. évi CXXV. Törvény/(28.12.2003.).

¹⁰¹ Hungary/1982. évi 72. tvr./(14.08.1982). Hereinafter referred to in the body text as the Birth Certificate Decree or BCD).

¹⁰² Article 32 c), Hungary/1982. évi 72. tvr./(14.08.1982).

¹⁰³ Article 14, Hungary/1982. évi 72. tvr./(14.08.1982).

¹⁰⁴ Article 32-d), Hungary/1982. évi 72. tvr./(14.08.1982).

legislation is applicable in authority registry proceedings¹⁰⁵. Since the birth certificate procedure is such a proceeding the general rules of administrative proceedings can be applied in cases of gender reassignment.

There is not any legal provision that regulates what evidences can be accepted in support of sex changing. According to the fundamental principle of administrative proceedings authorities are free to judge the value of evidence and enjoy a certain discretion in this regard.

Practical experiences show that the actual process is conducted as follows:¹⁰⁶ The request to changing one's name and sex should be submitted to the Birth Certificate Department of Central Data Processing, Registry and Election Office's Authority and Supervision Department¹⁰⁷ operating under the Ministry of Interior. The request should be accompanied by an expert opinion from a forensic psychologist or psychiatrist and a medical record from a urologist or gynaecologist. On the basis of these documents a professional opinion is prepared. The opinion is evaluated by the Ministry of Health as a quasi professional authority and it adopts a resolution on whether or not the request is well founded. The Office sends the resolution to the registrar of birth certificates who amends the birth certificate.

Currently, an actual sex changing operation is not required as a prerequisite of modifying name or sex in birth certificates.¹⁰⁸

Thus, the practice of the Hungarian authorities can be considered progressive and corresponds to the right of self-determination. This good practice shows that even in the absence of expressive legal provisions the relevant procedures can comply with human rights standards. At the same time it would be important that the competent Ministry of Health issued a professional protocol or legal regulation regarding the necessary documents (expert's opinion, medical records) in birth certificate proceedings initiated because of gender reassignment.

The rights of persons who legally changed their names and sexes are violated in the health care system and in the field of family law. It is a justifiable demand that the medical-biological correction of their gender identity is supported after their names and sexes are officially changed.

The Act regulating the services of the compulsory health insurance scheme states that the insured is entitled to an operation that aims to change his/her

¹⁰⁵ Article 12-(1) Hungary/2004. évi CXL. törvény/(28.12.2004).

¹⁰⁶ J. Takács (ed.) (2005) *A lélek műtétei* [Operations of the Soul], Budapest: Új Mandátum Könyvkiadó, p. 51.

¹⁰⁷ Hereinafter referred to in the body text as the Office.

¹⁰⁸ J. Takács (ed.) (2005) *A lélek műtétei* [Operations of the Soul], Budapest: Új Mandátum Könyvkiadó, pp. 52, 178-180.

primary sex characteristics and which is partially financed by the social health insurance scheme.¹⁰⁹

However, the governmental decree determining the fees of various medical interventions provides that the patient has to cover 90 % of the fee in case of an operation that aims to change one's primary sex characteristics.¹¹⁰ This is a highly questionable approach since sex changing operations are directed to alter one's sex so as to correspond to his/her real gender identity. Financial burdens can hamper this process to a great extent. It would be justified to fully cover the expenses of such operations. One prerequisite of financing could be the registration of name and sex changing in the birth certificate.

A further interesting question is what happens if a spouse is changing his/her sex since according to Hungarian law only persons of different sexes can live in marriage. The current Code of Family Law¹¹¹ does not recognise gender reassignment as a reason of terminating marriage.¹¹² However, the new Civil Code, which has not entered into force, explicitly mentions this reason of terminating marriages.¹¹³ However, if parties of the marriage enter into registered partnership with each other within 90 days after the termination of marriage, the period of marriage and same sex partnership is regarded as a perpetual interval in respect of rights that are connected to a certain duration of marriage or registered partnership. It is unclear how parents' rights would change after termination of a marriage for this reason.

Háttér Társaság a Melegekért (Háttér Társaság) [Háttér Support Society for Gays and Lesbians (Háttér Society)], a leading Hungarian LGBT NGO, expressed its concerns towards the Government in connection with the above future rules. It suggested that

'a transgender person and his/her spouse should have the right to declare whether they want to continue living together. If they do not, then the marriage terminates and the spouses can initiate a separate court procedure in order to settle the various financial issues, child supervision rights and other questions. If the spouses want to continue living together the marriage would alter to a registered partnership and the starting date of marriage would qualify as the starting date of the partnership. In this way, it could be

¹⁰⁹ Article 23-k) of Hungary/1997. évi LXXXIII. törvény/(25.07.1997) (This rule does not apply to operations that aim to create primary sex characteristics because of their absence owing to a growth abnormality).

¹¹⁰ Article 6 of Appendix I Hungary/284/1997. (IX. 23.) Korm.rendelet/(23.12.1997).

¹¹¹ Hungary/1952. évi IV. törvény/(06.06.1952). Hereinafter referred to in the body text as the Code of Family Law.

¹¹² According to Article 17-1 (Hungary/1952. évi IV. törvény/(06.06.1952), Code of Family Law a marriage terminates if: a) either of the spouses dies or b) a court terminates it.

¹¹³ Article 3: 21 of the draft of the new Civil Code, (hereinafter referred to as the Draft). Available at: http://irm.gov.hu/download/ptk-normaszoveg-tervezet_20071029.pdf/ptk-normaszoveg-tervezet_20071029.pdf, (13.02.2008).

avoided that the spouses do not receive certain benefits that are dependent of the length of mutual cohabitation (i.e widower's pension).'¹¹⁴

Háttér Society also expressed its concerns in connection with the legal rule that intends to automatically terminate registered partnerships in case of gender reassignment. According to the organisation such a rule contradicts the right of self-determination and is not reasonable since parties of registered partnerships can be of different sexes.

In 2009 the *Egészségügyi Minisztérium* [Ministry of Health Care] started drafting detailed professional protocols concerning gender reassignment.¹¹⁵ An expert of the NGO Háttér Társaság a Melegekért [Háttér Support Society for Gays and Lesbians] is involved in the preparation of professional and legal protocols. The NGO supports the ongoing practice namely that operations should not be a prerequisite for the legal consequences of gender reassignment.

G.1. Statistics and case law

Statistics. The *Igazságügyi és Rendészeti Minisztérium (IRM)* [Ministry of Justice and Law Enforcement] provided the Senior Expert with statistics; however these statistics only show how many persons had their name and sex changed in birth certificates.¹¹⁶ There are not any other statistics available in this regard.

Case law. A search in *Complex Döntvénytár* [Complex Decision Archive] on 18.02.2008 did not result in any relevant case law. Complex Decision Archive contains the conceptual standpoints (*elvi állásfoglalás*) and actual decisions (*eseti döntés*) of the Supreme Court. A search in the on-line court decision data base yielded no relevant results.

¹¹⁴ Háttér Society provided the Senior Expert with his statement to the Government on 21.02.2008.

¹¹⁵ Electronic letter dated 18.02.2010.

¹¹⁶ Letter of 13.02.2008.

H. Miscellaneous

H.1. Registered partnership

On 17.12.2007, following heated political debate the Parliament enacted the legal regulations concerning registered partnerships.¹¹⁷ The attack on the Gay Pride Parade in July 2007¹¹⁸ and the coming out of the State Secretary of Human Resources at the Office of the Prime Minister, brought issues relating to LGBT rights to the centre of political attention. These events and the unpopularity of the governing parties contributed to adopting the Act despite strict resistance demonstrated by the political elite earlier.¹¹⁹ The Act on Registered Partnerships would have entered into force on 01.01.2009.

Before adopting the Act, *Szabad Demokraták Szövetsége (SZDSZ)* [Alliance of Free Democrats], the small liberal party then in the governing coalition, submitted a bill on 24.09.2007 that aimed at securing equal rights of LGBT persons with respect to marriages. However, the bill was not supported by the Parliamentary Commission on Human Rights, Minority and Religious Affairs.¹²⁰

Meanwhile, on 22.09.2007 the Equal Treatment Authority's Advisory Board issued a proposal for legislation in this respect¹²¹. The Advisory Board supported the marriage of LGBT partners thus promoting equal treatment in relation to the right to marry. The Board

‘recommend[ed] to open up the institution of marriage to lesbian, gay, bisexual and transgender persons as well. Consequently, it recommends the Government of the Hungarian Republic to draft and submit a bill to the Parliament that makes it possible for persons of the same sex to enter into marriage under the same conditions as those applying to persons of different sex.’¹²²

The Act on Registered Partnerships was challenged by several organisations before the Constitutional Court. The submissions' main argument was that the

¹¹⁷ Hungary/2007. évi CLXXXIV. Törvény/(29.12.2007). Hereinafter referred to in the body text as RPA.

¹¹⁸ For details see paragraph 85.

¹¹⁹ http://www.egyenlobanasmod.hu/index.php?g=hirek/TTaf_070927jj.htm (23.02.2008).

¹²⁰ http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=38&p_izon=3832 (23.02.2008).

¹²¹ EBHTT/10007/2007. számú jogalkotási javaslat [draft proposal to Parliament].

¹²² EBHTT/10007/2007. számú jogalkotási javaslat [draft proposal to Parliament].

Act violated the protection of marriage and family as provided for by Article 15 of the Constitution. On 17.12.2008 the Constitutional Court annulled the Act.¹²³

However, the Court underlined that creating the possibility of a registered partnership for same sex partners is not unconstitutional. What the Court found unconstitutional in the Act was the registered partnership for heterosexual couples. The Court argued that Article 15 of the Constitution includes the obligation of the state not only to protect existing marriages but to create a legal environment, which encourages its citizens to choose marriage from the available forms of cohabitation. The Court stated that the existence of two institutions, different only in their names and not in their legal content, could eviscerate the constitutional protection and would cause legal uncertainty. According to the Court, therefore, the full spectrum of rights and obligations connecting to marriage cannot be made available for persons who would have the possibility to enter into marriage but chose otherwise. The Court concluded that such decision would 'constitutionally devalue' the institution of marriage, decrease its social and institutional importance and hence would not be constitutionally acceptable.

As regards same sex registered partnerships the Court found no constitutional barriers, given that for LGBT persons the institution of marriage is not available and an institution that involves rights similar to those in marriage is not only constitutional in respect of same sex couples but can be derived from the Constitution.

On 20.04.2009 the Parliament adopted the revised Registered Partnership Act (The New RPA).¹²⁴ Principally, the New RPA contains the same regulations as had the former Registered Partnership Act for same sex couples. The Act entered into force on 01.07.2009. The New RPA was also challenged before the Constitutional Court by several organisations. On 23.03.2010 the Constitutional Court in its decision declared that the Act is constitutional.¹²⁵

Though not ensuring full equality, the Act on Registered Partnerships can still be considered as progressive – even according to Hungarian LGBT organisations. *Háttér Társaság a Melegekért (Háttér Társaság)* [Háttér Support Society for Gays and Lesbians (Háttér Society)] and nine other NGOs published a joint statement, in which they welcomed the new legal rules but at the same time noticed that a full respect of human rights would require that full equality is granted in relation to the right to marry.¹²⁶

The Act on Registered Partnerships makes it possible for same-sex couples to establish before the registrar of birth certificates a registered partnership.

¹²³ Hungary/Alkotmánybíróság/154/2008 (XII. 17) (17.12.2008).

¹²⁴ Hungary/2009. évi 29. törvény (20.04.2009).

¹²⁵ Hungary/Alkotmánybíróság/533/B/2009 (23.03.2010).

¹²⁶ www.hatter.hu (23.02.2008).

Generally, this form of legally accepted partnership is connected with the same rights and obligations as marriages. However, there are several important exceptions: registered partners 1. may not adopt children together; 2. do not enjoy the right to artificial insemination; 3. may not adopt each others' names (a separate administrative decision is needed to change their names); 4. in certain instances, may acquire easier separation, than married couples.¹²⁷

RPA is a significant development, which can be considered as a breakthrough in view of the previous legal rules and political attitude. However, since it does not realise the LGBT persons' right to marry, it can still be criticised from a human rights standpoint.

Furthermore, there is no reasonable explanation to exclude same sex partners from adopting children since Hungarian law permits adoption by single persons besides adoption by married couples.¹²⁸ This means that although there is no legal objection for one registered partner to adopt a child, such adoption would always deprive children from being officially cared for by both of their parents, and partners from being recognised as primary carers. This is obviously against children's best interests.

The new Act on the registry procedure, which has not entered into force yet, dedicates a full chapter to the detailed rules concerning the creation of registered partnerships.¹²⁹ It describes the tasks of the registrar, the regulations concerning the notification about the will of establishing a registered partnership or the venue of the event.

H.2. Blood donation

It is an everyday practice of the National Blood Supply Society that before donating blood the donors are asked whether they had previous homosexual relationships. The Ombudsman of Data Protection was asked to issue an opinion in relation to this practice.

The Ombudsman for Civil Rights, acting as Ombudsman of Data Protection, established that the question regarding homosexual relationships

¹²⁷ A notary is entitled to terminate registered partnerships while marriages can only be terminated by courts.

¹²⁸ See Article 46 Hungary/1952. évi IV. Törvény/(06.06.1952).

¹²⁹ Hungary/2010. évi 1. törvény (14.12.2009).

‘... is not inappropriate with a view to data protection, however [the Ombudsman] is firmly against the registering of data concerning homosexual relationships.’¹³⁰

The Ombudsman argued that the question is necessary because of medical reasons. In order to single out diseases that spread through sexual contact (e.g. HIV) doctors should be aware of this information since homosexual contacts are considered as ‘risky sexual behaviour’ in the case of blood donation. The category of ‘risky sexual behaviour’ concerns persons - including prostitutes and men entering into homosexual relationships - subjected to a higher risk of diseases that spread through sexual contact.

The Ombudsman noticed that the latency of HIV is around 1-3 months, which means that the virus cannot be detected in the blood during this period. The problem is that blood from donors is used after a much shorter time. In this way excluding gays from blood donation, is not an inappropriate practice from the viewpoint of data protection.

However, the opinion of the Ombudsman raises severe doubts since HIV – according to the latest scientific findings – is connected to risky sexual behaviour and not to *risky sexual orientation*. Although the question was examined from a data protection angle, the opinion of the Ombudsman could be taken as supporting the belief that HIV only threatens gay persons. Therefore, it would be more appropriate to inquire about the sexual behaviour of donors (use of condoms, promiscuity, etc.) as it is not dependent on sexual orientation.

H.3. Other

In Hungary there are no laws or known legislative plans similar or comparable to institutional homophobia surfaced in Lithuania.

¹³⁰ The statement of the ombudsman is quoted at: <http://www.origo.hu/itthon/20080123-ombudsman-jogszeru-a-homoszexualitasra-rakerdezni-veradaskor.html> (26.02.2008).

I. Good practice

ETA recognises both sexual orientation and gender identity as protected grounds, which clearly goes beyond the standards set by the Employment Directive.¹³¹ Furthermore, the scope of ETA is wider than that of the Employment Directive since beyond employment it also encompasses fields such as education, housing, access to public goods and services, health care and social security.¹³²

The Hungarian legal framework regarding sex changing has several shortcomings, although the good practice of competent authorities currently does not require an actual sex changing operation as a prerequisite of modifying name or sex in birth certificates. This good practice shows that even in the absence of express legal provisions the relevant procedures can comply with human rights standards.¹³³

Shortly after the Constitutional Court had annulled the Act on Registered Partnerships, which regulated registered partnerships of both heterosexual and same sex couples, the Government prepared a new piece of legislation on same sex registered partnerships, which was also adopted by the Parliament.

Though not ensuring full equality, the Act on Registered Partnerships can still be considered as progressive – even according to Hungarian LGBT organisations. The Act makes it possible for same-sex couples to establish before the registrar of birth certificates a registered partnership. Generally, this form of legally accepted partnership carries the same rights and obligations as marriages. This can be considered as a breakthrough in several important matters concerning the life of members of the LGBT community.¹³⁴

¹³¹ See paragraph 36 of this study.

¹³² See paragraphs 47-48 of this study.

¹³³ See paragraphs 141-158 of this study.

¹³⁴ See paragraphs 161-172 of this study.

Annexes

Annex 1 – Presentation of case law

Asylum and Subsidiary Protection

Case title	Algerian asylum seeker (case No.: 106-1-25433/9/04-M)
Decision date	21.06.2004
Reference details	Bevándorlási és Állampolgársági Hivatal (BAH) – [Office of Immigration and Nationality (OIN)]
Key facts of the case	The Algerian applicant worked as a model and hairdresser in his country of origin. He only had friends amongst his colleagues. According to his statements because of his lifestyle his sexual orientation was obviously identifiable. Once the villa where a fashion show took place was burned down as a threat against homosexuals. His best friends were shot later, he also received serious threats so the applicant realised he had to leave his country. Due to his lifestyle it was evident that he did not have the possibility to avoid serious punishment according to the Algerian criminal code, which penalises homosexuality.

Main reasoning/argumentation	Due to the fact that Algerian criminal code penalises homosexuality and that the applicant has been seriously threatened his asylum claim had to be considered well founded under 1951 Geneva Convention.
Key issues (concepts, interpretations) clarified by the case	In this case the authority accepted the reasoning that someone who works as a model, whose profession is hardly tolerated in Islamic countries, cannot renounce his sexual orientation.
Results (sanctions) and key consequences or implications of the case	The applicant was recognised as refugee on 21.06.2004.

Case title	Algerian asylum seeker (case No.: 106-1-9320/40/07-M)
Decision date	2007
Reference details	Bevándorlási és Állampolgársági Hivatal (BÁH) – [Office of Immigration and Nationality (OIN)]
Key facts of the case	The Algerian applicant revealed his concealed sexual orientation to one of his colleagues who was thought to be a friend. However, this friend presumably had close connections to an extremist Islamic terrorist group Salafiste (the activity of which has been increasing in the region), and informed them about this. He received serious threats after that from this terrorist group, and tried to avoid them by moving to another city. Despite his efforts, the group found him again, and caught him in the street, and threatened to kill him if he does not renounce his sexual orientation. The local criminal code penalises homosexuality, and though the state authorities do not persecute such persons directly if they are able to keep this characteristic hidden, no protection might have been expected from them either in such case, so

	he chose to leave the country.
Main reasoning/argumentation	Due to the fact that Algerian criminal code penalises homosexuality and that the applicant has been seriously threatened his asylum claim had to be considered well founded under 1951 Geneva Convention.
Key issues (concepts, interpretations) clarified by the case	Sexual orientation qualifies as ground of persecution in asylum matters.
Results (sanctions) and key consequences or implications of the case	The applicant was granted refugee status in 2007.

Case title	Iranian asylum seeker (case No.: 106-5-362/32/2006-M)
Decision date	12.04.2006
Reference details	Bevándorlási és Állampolgársági Hivatal (BÁH) – [Office of Immigration and Nationality (OIN)]
Key facts of the case (max. 500 chars)	The 18 years old Iranian client claimed asylum on the basis of persecution for reasons of membership of a particular social group. He had homosexual relationships in his country of origin and once his sister-in-law saw them together and called the police. Simultaneously the client was an activist of a Christian association.

Main reasoning/argumentation	Due to his homosexuality he had to face discrimination, harassment and even potential death penalty in his country of origin. According to the latest country of origin information, homosexual orientation can be considered as the ground of persecution as a member of a particular social group. Also apostasy is severely punished by Iranian law, therefore these circumstances had to be taken into consideration in favour of the applicant.
Key issues (concepts, interpretations) clarified by the case	Psychiatric examination of homosexuality lead to controversial results, two experts stated that the applicant showed 'signs' of homosexual orientation while the third expert concluded that his sexual evolution was rather heterosexual. This example proved that sexual orientation cannot be subject of medical evaluation and treated as psychiatric diseases.
Results (sanctions) and key consequences or implications of the case	The client was recognised as refugee on 12.04.2006.

Criminal law, hate speech

Case title	National Radio and Television Commission case (case No.: 2005/2009 (XII.16.) ORTT határozat)
Decision date	16.12.2009
Reference details	<i>Országos Rádió és Televízió Testület (ORTT)</i> – [National Radio and Television Commission]
Key facts of the case (max. 500 chars)	On 18.07.2009 in the television show <i>Képtelenségek</i> (Absurdities) on radical EchoTv the host and the guests of the program made statements concerning the LGBT community in Hungary. The guests in

	<p>relation to LGBT rights talked about 'decaying, destroying the society'. They referred to the participants of the Gay Pride March as people with the 'most disgusting and distasteful' attitude. LGBT persons were called 'destructive parasites' and were compared to cancerous cells that are automatically rejected from the body.</p> <p>A statement from the Chief of National Police in relation to the Hungarian Guard, an extremist movement, was broadcasted in the framework of the program. The statement was intentionally misinterpreted and was brought into connection with the Gay Pride March.</p> <p>A further statement of one guest was capable of making the impression that 'the civilization of gays' and the 'civilization of white Christians' cannot exist together and one of the two should disappear.</p>
Main reasoning/argumentation	The Commission in its decision concluded that the statements in the television show were capable of stirring up hatred against gays and violated their human rights. Thus, they violated Article 3(2) of the Radio and Television Act. The Commission stated that the said article does not mean that in television and radio programs there wouldn't be place for debate or criticism. The aim of that article is to prevent that the television and the radio become an 'amplifier' of those who call for discrimination.
Key issues (concepts, interpretations) clarified by the case	The case helps to clarify what kind of statements amount to hate speech in television and radio broadcasting.
Results (sanctions) and key consequences or implications of the case	The television company had to interrupt its broadcasting for 90 minutes and had to screen a message during that time containing the main finding of the Commission's decision.

Miscellaneous cases

Case title	Háttér Társaság a Melegekért [Háttér Support Society for Gays and Lesbians] v. Károli Gáspár Református Egyetem [Gáspár Károli Calvinist University]
Decision date	08.06.2005
Reference details	Legfelsőbb Bíróság [Supreme Court] acting as extraordinary review court
Key facts of the case	After dismissing a theology student who had confessed his homosexuality to one of his professors, the Faculty Council of the Theological Faculty of the defendant published a general declaration on 10.10.2003, claiming that the church may not approve the education, recruitment and employment of pastors and teachers of religion who conduct a homosexual way of life. The plaintiff brought an <i>actio popularis</i> claim against the university requesting the court to declare that the defendant's published opinion violated the right of homosexuals as a social group to equal treatment, to withdraw its declaration as well as to pay punitive damages. Both the first and second instance courts rejected the claim of the plaintiff.
Main reasoning/argumentation	The Court accepted the claimant's argument that even the proving of an abstract disadvantage may be sufficient for the establishment of discrimination and the shifting of the burden of proof. However, it took the stance that the denominational university is exempted from the obligation to abide by the requirement of equal treatment by virtue of the general exempting rule of the ETA [Article 7 (2)], according to which an action based on a protected characteristic 'shall not be taken to violate the requirement of equal treatment if it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation'.

Key issues (concepts, interpretations) clarified by the case	Requirements of the shifting of the burden of proof and those of objective justification of discrimination in the case of denominational universities were clarified.
Results (sanctions) and key consequences or implications of the case	No sanctions were imposed on the defendant. The decision expresses that in the case of a denominational university, it may objectively be considered to be reasonable to exclude homosexuals from theological education, taking in consideration the fact that later on they may become pastors (although this is not inevitable, as students with a degree in theology do not automatically become pastors).

Case title	Háttér Társaság a Melegekért [Háttér Support Society for Gays and Lesbians] v. Pepsi Sziget Kft. [Pepsi Island Ltd.]
Decision date	2002
Reference details	Budapest II. és III. Kerületi Bíróság [2 nd and 3 rd District Court Budapest]
Key facts of the case	The plaintiff intended to participate in Pepsi Island, a cultural/musical event in Budapest in the framework of which it would have provided HIV/AIDS prevention services as well as awareness raising of LGBT rights. After successful negotiations the defendant organiser denied the request referring to an agreement that it concluded with the mayor and the leaders of the police in the relevant district. The agreement stated that the parties did not want any kind of events related to homosexuals appearing in Pepsi Island. The plaintiff asked the court to declare that the agreement is null.
Main reasoning/argumentation	The court entertained the claim of the plaintiff and declared the agreement null reasoning that it violated that anti-discrimination clause of the Constitution (Article 70/A) as it discriminated against gays and lesbians. However, the court refused to impose a public interest fine on the defendant.

Key issues (concepts, interpretations) clarified by the case	This case is the first and only documented case which established discrimination on the ground of sexual orientation. The judgment was delivered before the entering into force of the Equal Treatment Act thus the court had to refer to the relevant Article of the Constitution.
Results (sanctions) and key consequences or implications of the case	The court established discrimination on the ground of sexual orientation, but did not impose any sanction.

Case title	Equal Treatment Authority case (Case No.: 102/2009.)
Decision date	March 2009
Reference details	<i>Egyenlő Bánásmód Hatóság</i> (EBH) [Equal Treatment Authority]
Key facts of the case	The case concerned a person who intended to enrol in a dance school but was refused owing to the fact that he was a gay rights activist who also appeared in the media. The head of the school who rejected his enrolment referred to homosexuality as an aberration and told him that his activities would damage the reputation of the school.
Main reasoning/argumentation	The Authority stated that the defendant dance school failed to put forward any reasonable justification that would stand as a plausible explanation for the harm suffered by the applicant. Therefore, it established discrimination based on sexual orientation.
Key issues (concepts, interpretations) clarified by the case	What constitutes objective justification in a discrimination case.

Results (sanctions) and key consequences or implications of the case	It's the first and so far the only case in which the Equal Treatment Authority established discrimination on the ground of sexual orientation. Sanctions: The Authority ordered to publish its decision on its website for 6 months. Furthermore, it imposed a fine of HUF 200,000 (approx. EUR 740) on the defendant.
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Annex 2 – Statistics

Implementation of Employment Directive 2000/78/EC

Statistics provided by the *Egyenlő Bánásmód Hatóság* (EBH) [Equal Treatment Authority] on the basis of the Senior Expert's request can be assessed as follows:

	2005	2006	2007	2008	2009
Total complaints of discrimination on the ground of sexual orientation	2	2	2	5	9
Total finding of discrimination not confirmed	2	2	2	0 ¹³⁵	2
Total finding of discrimination confirmed	0	0	0	0 ¹³⁶	3

Transgender Issues

The *Igazságügyi és Rendészeti Minisztérium* (IRM) [Ministry of Justice and Law Enforcement] provided the Senior Expert with the following statistics; however these figures only show how many persons had their name and sex changed in birth certificates.¹³⁷

¹³⁵ According to the information provided by the Equal Treatment Authority on 19.02.2010, no decisions were issued in the complaints of 2008 as the complainants either remained anonymous or requested only information.

¹³⁶ See footnote 134.

¹³⁷ According to the information provided by the Ministry of Justice and Law Enforcement (IRM) on 26 February 2010, the number of requests concerning sex and name changes was 12

	Number of sex and name changes in birth certificates
2000	0
2001	0
2002	1
2003	19
2004	16
2005	20
2006	17
2007	9

in 2008 and 28 in 2009. Also, the IRM in its letter stated that the Ministry is not obliged by law to keep any statistics on matters relating to sex changing.